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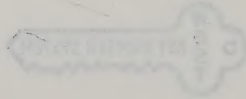
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### PRESIDING JUDGE

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### ASSOCIATE JUSTICES

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B. REX SCHAUER - - - - - Los Angeles

## DEPARTMENT TWO

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### ASSOCIATE JUSTICES

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HOMER R. SPENCE - - - - - San Francisco

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LOREN F. WHITE - - - Deputy Clerk - - - - - San Francisco

HARRY M. GARDISER - - Deputy Clerk - - - - - San Francisco

A. R. FAIRWELL - - - Deputy Clerk - - - - - San Francisco

A. F. BRADOVICH - - - Deputy Clerk - - - - - Sacramento

HENRY P. CRABTREE - - Deputy Clerk - - - - - Los Angeles

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PAUL VALLÉE - - - - - Los Angeles

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##### JUDGES

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##### JUDGES

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##### CLERK

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##### JUDGES

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FRED N. HOWSER - - - - - Los Angeles

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# CALIFORNIA REPORTER

## 217 PACIFIC REPORTER

### SECOND SERIES

35 Cal.2d 175

**PEOPLE v. KNOWLES et al.**

Cr. 4992.

Supreme Court of California, in Bank.

April 21, 1950.

Rehearing Denied May 18, 1950.

David Knowles was convicted in Superior Court, Los Angeles County, Harold B. Landreth, J., of armed robbery and kidnapping for a purpose of robbery and he appealed from judgment of conviction and from order denying his motion for a new trial. The Supreme Court, Traynor, J., held that whether appellant was sufficiently identified as guilty person was for trier of facts under evidence, and that appellant could not be convicted of both armed robbery and kidnapping.

Order denying motion for new trial affirmed and judgments of conviction for kidnapping for purpose of robbery affirmed, and judgments of conviction for armed robbery reversed.

Edmonds and Carter, JJ., and Gibson, C. J., dissented.

Prior opinion, 204 P.2d 344.

#### 1. Kidnapping ⇨6

##### Robbery ⇨26

In prosecution for armed robbery and kidnapping for purpose of robbery, whether defendant was sufficiently identified as guilty person was for trier of facts under the evidence. Pen.Code, §§ 209, 211.

#### 2. Constitutional law ⇨70(3)

Courts cannot nullify a statute merely because statute may be unwise.

#### 3. Kidnapping ⇨1

Under statute penalizing one who seizes, confines, holds or detains another to commit extortion or robbery, one who for 15 or 20 minutes guarded witnesses who

had been forced into back room 25 feet away at point of gun and who struck victim over head, and threatened to strike another during time stealing of property occurred in store, was guilty of kidnapping. Pen. Code, § 209.

#### 4. Criminal law ⇨5

Subject to the constitutional prohibition against cruel and unusual punishment, the legislature may define and punish offenses as it sees fit.

#### 5. Criminal law ⇨5

The legislature could define kidnapping to include the detention of a victim during the commission of armed robbery and could prescribe discretionary death penalty as punishment for violation of statute. Pen. Code, § 209.

#### 6. Statutes ⇨181(1)

The will of the legislature must be determined from statutes and intentions at odds with intentions articulated in statutes cannot be ascribed to legislature.

#### 7. Statutes ⇨184, 214, 216, 217, 325, 365

In determining the purpose legislature sought to express by statute, the court first turns to the words themselves, and may also properly rely on extrinsic aids, history of statute, legislative debates, committee reports, and statements to the voters on initiative and referendum measures.

#### 8. Statutes ⇨190

If statutory words are clear, court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.

#### 9. Statutes ⇨190

In interpreting a statute court can not seek hidden meanings not suggested by statute or by available extrinsic aids.

**10. Criminal law** ⇨200(1)

Where two offenses committed by same act are such that commission of one is necessarily included in commission of the other, defendant can be punished only for the commission of one. Pen.Code, § 654.

**11. Criminal law** ⇨200(1)

Where course of criminal conduct causes commission of more than one offense, each of which can be committed without committing any other, applicability of statute providing that act or omission which is made punishable in different ways by different provisions of Penal Code may be punished under either provision, but not under more than one, depends upon whether a separate or distinct act can be established as basis of each conviction, or whether single act has been so committed that more than one statute has been violated. Pen. Code, § 654.

**12. Criminal law** ⇨200(1)

A defendant who for 15 or 20 minutes guarded witnesses who had been forced into back room 25 feet away at point of gun, and who struck victim over the head, and threatened to strike another during time stealing of property from store occurred, could not be subjected to punishment for both kidnapping and robbery. Pen.Code §§ 209, 211, 654.

**13. Criminal law** ⇨1186(7)

Where defendant was improperly convicted of both armed robbery and kidnapping although defendant had committed only a single indivisible act, conviction for the more serious offense of kidnapping only would be affirmed and conviction for armed robbery would be reversed. Pen. Code, §§ 209, 211, 654.

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Rosalind G. Bates and Aileen M. MacLymont, Los Angeles, for appellant.

Fred N. Howser, Attorney General, and Henry A. Dietz, Deputy Attorney General, for respondent.

TRAYNOR, Justice.

Defendant and Caryl Chessman were jointly charged by information with two

counts of armed robbery, two counts of kidnapping for the purpose of robbery, and one count of grand theft. Defendant waived a jury and was tried separately. The trial court found him guilty on both counts of robbery and both counts of kidnapping, but not guilty on the count of grand theft. It determined that one kidnapping involved bodily harm to the victim and sentenced appellant to life imprisonment without possibility of parole. The sentences on the other offenses were to run concurrently. Defendant appeals from the judgment of conviction and the order denying his motion for a new trial, contending that the evidence is insufficient to establish his guilt and that armed robbery is not punishable as kidnapping under Penal Code section 209.

On January 23, 1948, at about 6:30 p. m., defendant and Chessman entered a clothing store in Redondo Beach. There was no one in the store except the owner Melvin Waisler and Joe Lesher, a clerk. Defendant asked to look at overcoats and Lesher showed him several while Chessman sat nearby and Waisler walked around the store. The accused stood in a well-lighted area, and Waisler and Lesher testified that they were able to get a good look at them. Shortly thereafter, defendant and Chessman displayed guns, saying "this is a stick-up, put up your hands." They compelled Waisler and Lesher to enter a stockroom in the rear of the store and face the wall, and then took their wallets. Defendant held them at gunpoint in the stockroom while Chessman took some clothes and attempted to open the cash register. He returned to the stockroom, forced Lesher to come back and open the register for him, and took money therefrom, after which he returned Lesher to the stockroom. Defendant struck Waisler on the head with the barrel of his gun, and then left with Chessman. Waisler and Lesher ran to the front of the store in time to see defendant and Chessman escaping in a gray 1946 Ford coupe. They then notified the police.

About an hour later, two police officers in a radio car observed the gray Ford proceeding in a northerly direction on Vermont Avenue in Los Angeles, about half



a block south of Hollywood Boulevard. They pursued the Ford and saw Chessman, who was driving, turn into a service station, circle it and drive out. The Ford proceeded south at high speed for about a mile, and when Chessman then attempted a U-turn the officers drove their car into the side of the Ford. Both men ran from the car but were quickly caught. The officers found the stolen clothing and a .45 automatic in the rear of the Ford. Chessman had about \$150 on his person and defendant \$8.

To establish an alibi, defendant produced Miss Ann Stanfield who testified that he visited her at her residence in Hollywood at about 6:00 p. m. on the evening of the robbery and that he remained there for about fifteen or twenty minutes. If her testimony were true, appellant could not have been in Redondo Beach, 23 miles distant, at the time of the robbery. Defendant testified that he met Chessman by appointment at the corner of Vermont Avenue and Sunset Boulevard at about 7:00 p. m. on the evening of the robbery. He testified that there was a man in the car at the time introduced to him by Chessman as Joe, and that Joe rode with them when the police pursuit began, but got out of the car at the service station and ran into the rest room while Chessman and appellant drove off. Chessman corroborated defendant's story.

The foregoing testimony was contradicted in every material detail by witnesses for the prosecution. Waisler and Leshar positively identified defendant as a participant in the robbery. The officers testified that they had the car in plain view at all times, that there were only two occupants, and that they saw none leave it at the station. The direct conflict in the evidence was resolved by the trial court in favor of the people.

[1] Defendant contends that Waisler's and Leshar's identification of him does not establish his guilt beyond a reasonable doubt, because the identification was not by means of a standard police line-up, and because they made the identification after being informed by the police that the rob-

bers had been caught and after they saw defendant's picture in the newspapers upon his arrest in company with Chessman, "a famous bandit." It is for the trier of facts to weigh the evidence relating to identification and to resolve the conflicts therein. His acceptance of an identification not inherently improbable must be upheld if there is substantial evidence to support it, even though the contradictory evidence, if believed, would have induced a contrary result. *People v. Waller*, 14 Cal. 2d 693, 700, 96 P.2d 344; *People v. Braun*, 14 Cal.2d 1, 5, 92 P.2d 402; *People v. Farrington*, 213 Cal. 459, 463, 2 P. 2d 814; *People v. Ash*, 88 Cal.App.2d 819, 825, 199 P.2d 711; *People v. Alexander*, 78 Cal.App.2d 954, 957, 178 P.2d 813; *People v. Tanner*, 77 Cal.App.2d 181, 186, 175 P.2d 26; *People v. Deal*, 42 Cal.App.2d 33, 36, 108 P.2d 103. Substantial evidence of defendant's guilt leaves his first contention without merit.

Defendant also contends that the crime of which he was convicted is only armed robbery, and that Penal Code section 209 cannot properly be construed as applicable to that crime. In his view the statute applies only to orthodox kidnapping for ransom or robbery not to the detention of the victim during the commission of armed robbery. This interpretation of section 209 finds no support in its language or legislative history; it could not be sanctioned without a pro tanto repeal by judicial fiat.

[2] Defendant concedes that the language of the statute does not in its ordinary sense support his interpretation. Under that language one accused of armed robbery who has inflicted bodily harm on the victim can be charged with a capital offense. Reasonable men may regard the statute as unduly harsh and therefore unwise; if they do they should address their doubts to the Legislature. It is not for the courts to nullify a statute merely because it may be unwise. "We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it." *Cardozo J., in Anderson v. Wilson*,

289 U.S. 20, 27, 53 S.Ct. 417, 420, 77 L. Ed. 1004.

Before its amendment in 1933, Penal Code section 209 provided that "Every person who maliciously, forcibly, or fraudulently takes or entices away any person with intent to restrain such person and thereby to commit extortion or *robbery*, or exact from the relatives or friends of such person any money or valuable thing" (Italics added) shall be punished by imprisonment for life or for a minimum of ten years. The 1933 amendment made the punishment, where the victim suffered bodily harm, death or life imprisonment without possibility of parole. At the same time, however, the Legislature redefined the offense to encompass "Every person who *seizes, confines*, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever *with intent to hold or detain, or who holds or detains*, such individual for ransom, reward or to commit extortion or robbery \* \* \*." (Italics added.) The addition by amendment of the italicized words is a deliberate abandonment of the requirement of movement of the victim that characterized the offense of kidnapping proscribed by section 209 before the amendment. By that amendment the Legislature "changed the offense theretofore described in section 209 from one which required the asportation of the victim to one in which the act of seizing for ransom, reward, or to commit extortion or robbery became a felony." *People v. Raucho*, 8 Cal.App.2d 655, 663, 47 P.2d 1108, 1112.

[3] The trial court found on substantial evidence that defendant restrained Waisler and Leshner in the stockroom for about fifteen or twenty minutes and inflicted bodily harm on Waisler during the detention, while his confederate Chessman rifled the cash register. That conduct is clearly covered by the words of section 209 given their plain meaning. Webster's New International Dictionary, Unabridged Edition (1943) defines "seize" as "To take possession of by force," and "confine" as "To restrain within limits; to limit; \* \* \* to shut up; imprison; to put or keep in

restraint \* \* \* to keep from going out." Clearly a person is taken possession of by force when he is compelled to enter a room at the point of a gun, as in this case. He is also restrained within limits, shut up, and kept from going out when he is forced to remain in that room for fifteen or twenty minutes. That he is held and detained thereby and that such detention was the purpose of the seizure and confinement is readily apparent. There can be no doubt therefore that defendant and Chessman *seized and confined* the two victims with intent to hold and detain them or that they *held and detained* "such individual[s]" (the victims seized and confined) to commit robbery.

Defendant concedes that asportation of the victim is not an essential element of section 209, but he contends that the Legislature intended that the statute apply only to acts of seizure and confinement incident to a "traditional act of kidnapping." The Legislature, however, has broadened the statutory prohibition to include not only the seizure and confinement of an individual in a traditional act of kidnapping (for ransom or reward), but also the seizure and confinement of an individual for the purpose of robbery, a purpose foreign to "traditional kidnapping" as defined by defendant. It is therefore idle to suggest that conduct aptly described by the statute is not punishable thereunder. *People v. Raucho*, supra, 8 Cal.App.2d 655, 663, 47 P.2d 1108.

[4-6] There is no question that the Legislature has the power to define kidnapping broadly enough to include the offense here committed and to prescribe the punishment specified in section 209. Subject to the constitutional prohibition of cruel and unusual punishment, the Legislature may define and punish offenses as it sees fit. *People v. Lavine*, 115 Cal.App. 289, 297, 1 P.2d 496, appeal dismissed, *Lavine v. People of State of California*, 286 U.S. 528, 52 S.Ct. 500, 76 L.Ed. 1270. It may define and punish as kidnapping an offense that other states regard only as armed robbery. Section 209 establishes that definition as the law of California. *People v.*



Tanner, 3 Cal.2d 279, 296, 44 P.2d 324. The statutory definition of the proscribed offenses is not rendered uncertain or ambiguous because some of the prohibited acts are not ordinarily regarded as kidnapping. When the Legislature has made such acts punishable as kidnapping, this court should not impute to the statute a meaning not rationally supported by its wording. "The judgment of the court if I interpret the reasoning aright does not rest upon a ruling that Congress would have gone beyond its power if the purpose that it professed was the purpose truly cherished. The judgment of the court rests upon the ruling that another purpose not professed, may be read beneath the surface, and by the purpose so imputed the statute is destroyed. Thus the process of psychoanalysis has spread to unaccustomed fields. There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body." Cardozo, J., dissenting in *United States v. Constantine*, 296 U.S. 287, 298-299, 56 S.Ct. 223, 228, 80 L.Ed. 233; *Smith v. Union Oil Co. of California*, 166 Cal. 217, 224, 135 P. 966; *City of Eureka v. Diaz*, 89 Cal. 467, 469-470, 26 P. 961; *Callahan v. City and County of San Francisco*, 68 Cal.App.2d 286, 290, 156 P.2d 479. The will of the Legislature must be determined from the statutes; intentions cannot be ascribed to it at odds with the intentions articulated in the statutes. Section 209 clearly prohibits and punishes the offense committed by defendant; there is no basis for supposing that the Legislature did not mean what it said.

[7] An insistence upon judicial regard for the words of a statute does not imply that they are like words in a dictionary, to be read with no ranging of the mind. They are no longer at rest in their alphabetical bins. Released, combined in phrases that imperfectly communicate the thoughts of one man to another, they challenge men to give them more than passive reading, to consider well their context, to ponder what may be their consequences. Speculation cuts brush with the pertinent question: what purpose did the Legislature seek to express as it strung those words into a statute? The court turns first

to the words themselves for the answer. It may also properly rely on extrinsic aids, the history of the statute, the legislative debates, committee reports, statements to the voters on initiative and referendum measures. Primarily, however, the words, in arrangement that superimposes the purpose of the Legislature upon their dictionary meaning, stand in immobilized sentry, reminders that whether their arrangement was wisdom or folly, it was wittingly undertaken and not to be disregarded.

[8, 9] "While courts are no longer confined to the language [of the statute], they are still confined by it. Violence must not be done to the words chosen by the legislature." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *Columbia Law Rev.* 527, 543. A standard of conduct prescribed by a statute would hardly command acceptance if the statute were given an interpretation contrary to the interpretation ordinary men subject to the statute would give it. "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Addison v. Holly Hill Fruit Products Co.*, 322 U.S. 607, 618, 64 S.Ct. 1215, 1221, 88 L.Ed. 1488, 153 A.L.R. 1007; see also *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816. If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. *Matson Nav. Co. v. United States*, 284 U.S. 352, 356, 52 S.Ct. 162, 76 L.Ed. 336; *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 62-64, 57 S.Ct. 77, 81 L.Ed. 38; *United States v. Johnson*, 221 U.S. 488, 496, 31 S.Ct. 627, 55 L.Ed. 823; *In re Miller*, 31 Cal.2d 191, 198-199, 187 P.2d 722; *Caminetti v. Pacific Mut. Life Ins. Co. of California*, 22 Cal.2d 344, 353-354, 139 P.2d 908; *Seaboard Acceptance Corp. v. Shay*, 214 Cal. 361, 369, 5 P.2d 882; *People v. Stanley*, 193 Cal. 428, 431, 225 P. 1; *Mulville v. City of San Diego*, 183 Cal. 734, 739, 192 P. 702; *Gordon v. City of Los Angeles*, 63

Cal.App.2d 812, 816, 147 P.2d 961; *People v. One 1941 Buick* 8, 63 Cal.App.2d 661, 667, 147 P.2d 401; *People v. Pacific Guano Co.*, 55 Cal.App.2d 845, 848-849, 132 P.2d 254; see also *De Sloovere*, *The Equity and Reason of a Statute*, 21 Cornell Law Quar. 591, 605, *Contextual Interpretation of Statutes*, 5 Fordham Law Rev. 219, 221, 230; *Extrinsic Aids in the Interpretation of Statutes*, 88 Univ. of Penn. Law Rev. 527, 531, 538; *Cox*, *Learned Hand and the Interpretation of Statutes*, 60 Harv. Law Rev. 370, 374-375; *Jones*, *Statutory Doubts and Legislative Intention*, 40 Columbia Law Rev. 957, 964, 974, and *Extrinsic Aids in the Interpretation of Federal Statutes*, 25 Wash. U.L.Q. 2, 8, 9. Certainly the court is not at liberty to seek hidden meanings not suggested by the statute or by the available extrinsic aids. In *re Miller*, 31 Cal.2d 191, 198-199, 187 P.2d 722, and cases cited therein.

Defendant's interpretation of the statute rests entirely upon speculation. It finds no support in the statutory language or its contextual implications or in the legislative history of the statute. He relies upon the wave of public indignation at the widespread kidnapping for ransom during the early nineteen-thirties as a motivation for the statute. He takes no account of the equally rampant and terrorizing armed robbery that compelled the attention of state legislatures at the same time. There is no reason to suppose that the latter evil was not in the minds of the authors of the statute, particularly in view of the retention of the "to commit \* \* \* robbery" provision. The contention that only orthodox kidnapping for ransom was contemplated by the statute is hardly tenable in view of the broad scope of the federal Lindbergh Law that served as a model for the revision of section 209. The federal statute did not limit its prohibition to kidnapping for the purpose of ransom or reward. It, Act of May 18, 1934, c. 301, 48 Stat. 781, 18 U.S.C. § 408a [1948 Revised Criminal Code, 18 U.S.C.A. § 1201], provides a discretionary death penalty for the transportation in interstate commerce of a person "held for ransom or reward or otherwise." (Italics added.) The holding of an officer

to prevent the arrest of his captor, although admittedly not within the concept of orthodox kidnapping for ransom or pecuniary benefit, was held punishable under the statute. *Gooch v. United States*, 297 U.S. 124, 126, 56 S.Ct. 395, 80 L.Ed. 522.

Since 1901, the Legislature has included robbery as one of the purposes of kidnapping prohibited under section 209. There is no indication that in making the penalty therefor more severe and the concept of the crime so broad that movement of the victim was no longer required, the Legislature intended to apply these provisions only to kidnapping for ransom or reward. "Familiar legal expressions in their familiar legal sense", *Henry v. United States*, 251 U.S. 393, 395, 40 S.Ct. 185, 186, 64 L.Ed. 322, used by the Legislature indicates the contrary, that the broad coverage was intended.

Given the unequivocal language of the statute, there is no merit to defendant's contention that the Legislature did not intend to change the substantive nature of the existing crime. Certainly that contention finds no support in any of the cases decided under the statute. In *People v. Tanner*, 3 Cal.2d 279, 44 P.2d 324, the defendants forced the victim to go from his driveway to his house at gun point and there questioned him about the location of money that they had heard was on the premises. On appeal from their conviction under section 209, they contended that their offense was only armed robbery and that the Legislature did not intend to punish it under a kidnapping statute. The court affirmed the conviction, holding that the Legislature is empowered to define criminal offenses as it sees fit and that the statute clearly indicates an intention to punish standstill kidnapping under its provisions. It is suggested that under the statute there must be movement of the victim, under a preconceived plan for protracted detention to obtain property that would not be available in the course of ordinary armed robbery. Defendant seeks to read into the statute a condition that the victim be moved a substantial distance. The statute itself is a refutation of that contention. Movement of the victim is only one of several methods by which the statutory



offense may be committed. The statute provides that "Every person who seizes, confines \* \* \* or who holds or detains [any] individual \* \* \* to commit extortion or robbery \* \* \* is guilty of a felony." It is contended that the statute cannot properly be read with the omissions indicated, for all that is then left is "cautious legal verbiage" of no significance. The statute, however, sets forth the conditions as alternative ones, and only one need be present. Thus, under a statute providing that the victim be seized or abducted, a defendant who has seized a victim cannot claim exemption from the statute because he has not also abducted him.

There is no condition in the statute that kidnapping be premeditated as part of a robbery or that robbery be premeditated as part of a kidnapping. In *People v. Brown*, 29 Cal.2d 555, 558-559, 176 P.2d 929, this court rejected an attempt to read into the statute a condition that the robbery be premeditated, where the defendant abducted a woman to commit rape. After raping her he took her wrist watch. A finding that the victim suffered bodily harm was supported both by the forcible rape and by the fact that the defendant subsequently struck her. The judgment imposing the death penalty was affirmed on the ground that the taking of the wrist watch made the abduction kidnapping to commit robbery, even if the original objective were rape and the intent to rob was only an afterthought. See also *People v. Kristy*, 4 Cal.2d 504, 50 P.2d 798; *People v. Holt*, 93 A.C.A. 603, 606, 209 P.2d 94; *People v. Melendrez*, 25 Cal.App.2d 490, 77 P.2d 870; *People v. Johnston*, 140 Cal.App. 729, 35 P.2d 1074.

*Chatwin v. United States*, 326 U.S. 455, 66 S.Ct. 233, 90 L.Ed. 198, affords no support for appellant's contention. In that case, a conviction under the Federal Kidnapping Act of a member of a plural marriage sect for the interstate transportation of his 15-year old "celestial spouse" was reversed on the ground that the record

failed to show that the girl was held against her will as required by the Act. "But the broadness of the statutory language does not permit us to tear the words out of their context, using the magic of lexicography to apply them to unattractive or immoral situations *lacking the involuntariness of seizure and detention which is the very essence of the crime of kidnapping. Thus, if this essential element is missing, the act of participating in illicit relations or contributing to the delinquency of a minor or entering into a celestial marriage, followed by interstate transportation, does not constitute a crime under the Federal Kidnapping Act.*" *Chatwin v. United States*, 326 U.S. 455, 464, 66 S.Ct. 233, 237, 90 L.Ed. 198. Italics added. There is no intimation that had the restraint been forcible, the transportation would not have been within the broad meaning of the "or otherwise" clause of the federal act. Similarly, in a case like the present one, where the seizure and restraint are clearly forcible and the purpose of the seizure is robbery, the offense is kidnapping within the meaning of section 209.

[10] Defendant's convictions for violation of Penal Code section 209 (kidnapping) and Penal Code section 211 (robbery) both rest upon the commission of a single act: the taking of personal property in the possession of Waisler and Lesher from their persons and in their immediate possession by force and fear\*, namely, by seizing and confining them under force of arms. The seizure and confinement were an inseparable part of the robbery. Penal Code section 654 provides: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other." If the two offenses committed by the same act are such that the commission of one is necessarily included in the com-

\* Penal Code section 211: "Robbery is the felonious taking of personal property in the possession of another, from his

person or immediate presence, and against his will, accomplished by means of force or fear."

mission of the other, the defendant can be punished only for the commission of one. *People v. Greer*, 30 Cal.2d 589, 596, 184 P.2d 512, 516: "Where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense." The use of a minor to transport narcotics, Health and Safety Code, § 11714, necessarily contributes to the delinquency of that minor, Welfare & Institutions Code, § 702. Section 654 requires that the defendant be punished only for one of those offenses. *People v. Krupa*, 64 Cal.App.2d 592, 598, 149 P.2d 416. Similarly the commission of statutory rape necessarily contributes to the delinquency of the minor victim and a defendant cannot be punished for violation of both statutes on the basis of the one act. *People v. Greer*, 30 Cal.2d 589, 596, 184 P.2d 512.

[11] But the applicability of section 654 is not limited to necessarily included offenses. If a course of criminal conduct causes the commission of more than one offense, each of which can be committed without committing any other, the applicability of section 654 will depend upon whether a separate and distinct act can be established as the basis of each conviction, or whether a single act has been so committed that more than one statute has been violated. If only a single act is charged as the basis of the multiple convictions, only one conviction can be affirmed, notwithstanding that the offenses are not necessarily included offenses. It is the singleness of the act and not of the offense that is determinative. A statute providing for the punishment of any person operating a "still" or having a "still" in his possession, Stats. 1927, c. 277, p. 497, states two distinct offenses: operation and possession. If, however, the only act of possession is that necessarily incident to the operation, only one conviction can be affirmed. *People v. Clemett*, 208 Cal. 142, 146, 280 P. 681. An unsuccessful attempt at murder by use of a bomb may form the basis for convictions of attempted murder, assault with intent to kill, or malicious use of explosives. Insofar as only a single act is charged as the

basis of the convictions, however, the defendant can be punished only once. *People v. Kynette*, 15 Cal.2d 731, 762, 104 P.2d 794. The possession of narcotics is an offense distinct from the transportation thereof, but there can be only one conviction when a single act of transportation is proved and the only act of possession is that incident to the transportation. *Schroeder v. United States*, 2 Cir., 7 F.2d 60, 65. In *People v. Greer*, 30 Cal.2d 589, 600, 184 P.2d 512, the defendant was charged with the violation of Penal Code section 261(1) and Penal Code section 288. Both charges were based upon a single act of sexual intercourse with a girl under 14. It is possible to violate either statute without violating the other, and this court there stated that if the commission of separable and distinct acts were charged, although they might have been committed at relatively the same time, the convictions of both offenses would be upheld. If, as in that case, however, the violation of both statutes is predicated on the commission of a single act of sexual intercourse, Penal Code section 654 requires that the defendant be punished under only one statute.

The distinction recognized in *People v. Greer*, supra, has permitted the affirmance of multiple convictions in cases in which separate and divisible acts have been proved as the basis of each conviction, even though those acts were closely connected in time and were part of the same criminal venture. In *People v. Slobodion*, 31 Cal.2d 555, 561-563, 191 P.2d 1, this court sustained convictions under Penal Code sections 288 and 288a based upon a course of conduct with a young girl where the commission of a separate act as the basis of each offense was proved. See also, *People v. Pickens*, 61 Cal.App. 405, 407, 214 P. 1027; *People v. Ciulla*, 44 Cal.App. 725, 187 P. 49. In *People v. Ciulla*, supra, the court sustained convictions for kidnapping under Penal Code section 207 and forcible rape, both offenses having been committed upon the same girl, for the reason that the acts charged were separate and divisible and were connected only by the fact that they were part of a single criminal venture.

[12] Since defendant's convictions were predicated upon the commission of a single act, he cannot be subjected to punishment for both offenses under the rule of *People v. Greer*, supra. Defendant committed no act of seizure or confinement other than that necessarily incident to the commission of robbery. Waisler and Leshner were restrained only while the actual taking of personal property was being accomplished. No separate act not essential to the commission of the robbery was charged or proved. For that reason, there is no inconsistency between this case and those in which this court has affirmed multiple convictions of kidnapping and robbery. In each of those cases, the acts that formed the basis of the kidnapping conviction were separate from those that involved the actual taking of property. In *People v. Brown*, 29 Cal.2d 555, 176 P.2d 929, the defendant forced his victim to drive a considerable distance to the outskirts of the city where they stopped and he raped her. While she was dressing, he took her wristwatch. The abduction or carrying away upon which the kidnapping conviction was based was separable from the robbery and not essential to its commission. In *People v. Dorman*, 28 Cal.2d 846, 172 P.2d 686, the defendants drove their victim about for several hours without attempting robbery, then murdered him and only thereafter took his money. Again, the act of kidnapping was separable from the commission of robbery. See also, *People v. Pickens*, 61 Cal. App. 405, 407, 214 P. 1027. In *People v. Kristy*, 4 Cal.2d 504, 50 P.2d 798, the defendants robbed their victims and then kidnapped them to accomplish their escape from prison. In *People v. Pearson*, 41 Cal. App.2d 614, 107 P.2d 463, habeas corpus denied. In *re Pearson*, 30 Cal.2d 871, 186 P. 2d 401, the defendant robbed X and thereafter forced Y and Z to drive him away in an attempt to escape. He was convicted of the robbery of X and the kidnapping of Y and Z. In *People v. Tanner*, 3 Cal.2d 279, 44 P.2d 324, the defendants first took the valuables that formed the basis of the robbery conviction and thereafter confined their victims and tortured them in an un-

successful attempt to secure information as to the location of other property.

[13] Unlike the defendants in the foregoing cases, Knowles committed no act of kidnapping that was not coincident with the taking of personal property. There was no seizure or confinement that could be separated from the actual robbery as a separate and distinct act. Since he committed only a single, indivisible act, Penal Code section 654 requires that he be punished only once therefor. In view of the fact that the Legislature prescribed greater punishment for the violation of section 209 it must be deemed to have considered that the more serious offense, and the convictions thereunder must be the ones affirmed. *People v. Kehoe*, 33 Cal.2d 711, 716, 204 P. 2d 321; *People v. Chapman*, 81 Cal.App.2d 857, 866, 185 P.2d 424; *People v. Degnen*, 70 Cal.App. 567, 578, 234 P. 129; *Durrett v. United States*, 5 Cir., 107 F.2d 438, 439; *Hewitt v. United States*, 8 Cir., 110 F.2d 1, 10-11; *People v. Goggin and Murphy*, 281 N.Y. 611, 22 N.E.2d 174, affirming 256 App.Div. 995, 10 N.Y.S.2d 586, 587; *People v. Heacox*, 231 App.Div. 617, 247 N.Y.S. 464, 466.

The order denying the motion for a new trial is affirmed. The judgments of conviction of kidnapping for the purpose of robbery are affirmed, and the judgments of conviction of armed robbery are reversed.

SHENK, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

By the present decision, "the detention of a victim during the commission of armed robbery" constitutes kidnapping, and although "[d]efendant committed no act of seizure or confinement other than that necessarily incident to the commission of robbery", he may be prosecuted either for robbery or for kidnapping at the election of the district attorney. As I read section 209 of the Penal Code, it neither compels nor warrants this construction, and it is a startling innovation in criminal law that an



act which constitutes robbery is also kidnaping.

Under the law now stated, the crime of kidnaping may merge into the crime of robbery. In its practical operation, where one is convicted of robbery only he may be imprisoned for a period of from five years to life. If he is convicted only of kidnaping, under certain circumstances he may be confined for life, with the possibility of being released upon parole. But if he is guilty not only of kidnaping but also of robbery, since under section 654 of the Penal Code he cannot be punished for both crimes, his term of imprisonment may be only for the period prescribed for one of them.

Thus one who also robs will receive no greater punishment than the criminal who does nothing more than kidnap a person. This is a clear invitation to the kidnaper. He has nothing to lose if he also takes property from his victim's person or immediate presence by means of force or fear (Penal Code, sec. 211). Under the present decision, if prosecuted for both kidnaping and robbery, punishment can be imposed only for kidnaping. Otherwise stated, instead of being subject to imprisonment upon two sentences, each of which may be for life with the possibility of parole and, in practical effect terms of confinement for years, he can only be given one such sentence, with consequent reduction in the time to be served in prison. The fact that Knowles will be subject to imprisonment for life without the possibility of parole under one of the sentences for kidnaping does not warrant a construction of the applicable statutes to allow a substantial decrease in the amount of punishment in those cases where the victim was kidnaped and robbed but suffered no physical harm.

Under the rule now stated, section 209 of the Penal Code may be applied in connection with section 1159. By the latter statutes, "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged \* \* \*." As an act of robbery now will also constitute a kidnaping, the jury may find one charged with

robbery guilty of kidnaping. As a result, one who ordinarily would be subjected to a sentence for a minimum term of one year may be executed. From now on, many charges of attempted robbery, and every one of robbery, inevitably will be prosecutions for a crime which may be punishable by death.

Unquestionably, the Legislature has the power to make either attempted robbery or robbery a capital offense. But in my opinion, considering both the language and historical background of section 209, it has not done so. A cardinal rule of statutory interpretation is that where "*\* \* \** a statute is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity and the other consisting of sound sense and wise policy, the former should be rejected and the latter adopted." *People v. Ventura Refining Co.*, 204 Cal. 286, 292, 268 P. 347, 350, 283 P. 60; *San Joaquin & Kings River Canal & Irrigation Co. v. Stevenson*, 164 Cal. 221, 128 P. 924.

As amended in 1933, section 209 provides: "Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever *with intent to hold or detain, or who holds or detains*, such individual for ransom, reward or to commit extortion or robbery \* \* \*" is punishable for kidnaping. [*Italics added.*] The proper construction of the statute largely turns upon the meaning of the italicized words. The prevailing opinion also stresses the words "seizes" and "confines", although each of them is consistent with the traditional concept of kidnaping, and unlike those italicized does not pertain to conduct invariably present in robbery.

As defined in Webster's New International Dictionary, Unabridged Edition (1943), the word "seize" means: "*Transitive.* \* \* \* 2. b To take possession of by force; \* \* \* 4. To lay hold of suddenly or forcibly; \* \* \* 5. To take prisoner; \* \* \* *Intransitive.* \* \* \* 3. To make a snatch or clutch." Synonyms for "seize" are listed as "Catch, grip; apprehend, arrest, take, capture." The same authority defines the word "confine"



as “\* \* \* *transitive*. \* \* \* 2. To restrain within limits; to limit; \* \* \* to shut up; imprison; to put or keep in restraint \* \* \*.” Synonyms listed are “Restrain, immure, circumscribe, compass; incarcerate, cage.”

The definitions and synonyms demonstrate that the words “seizes” and “confines” are consistent with conduct which, until the present decision, has been understood to amount to kidnaping. Although proof of asportation is not necessary to sustain a conviction, nevertheless much more is required than the mere “detention” almost invariably present in attempted robbery or robbery. Words like “take prisoner,” “arrest,” “imprison,” and “incarcerate” suggest the more purposeful aspect of the control exercised by the wrongdoer over the victim’s person which is present in kidnaping.

As to the controversial words of section 209 designated by italics, the first clause of the statute defines the specific intent necessary to establish the crime of kidnaping. Rather than the requirement prior to 1933 that the acts be done “maliciously, forcibly, or fraudulently,” the amended statute declares that the acts need only be done “\* \* \* with intent to hold or detain.” None of the acts listed in the first clause is that of holding or detaining. The conduct described as constituting kidnaping is the act of seizing, confining, inveigling, enticing, decoying, abducting, concealing, kidnaping or carrying away any individual *with intent to hold or detain him*. [Italics added.] Had the Legislature intended the detention of the victim, in and of itself, to constitute kidnaping, that conduct would have been stated as the criminal act denounced, rather than being used to describe the necessary intent.

The first clause, therefore, defines as a crime any one of a series of specified acts done to “\* \* \* any individual \* \* \*” with the specific intent to hold or detain him. Following this clause is the disjunctive word, “or.” This word introduces an alternative definition of kidnaping. One “\* \* \* who holds or detains, *such in-*

*dividual* for ransom, reward or to commit extortion or robbery \* \* \*” [Italics added] is also guilty of kidnaping. The phrase “\* \* \* who holds or detains” is qualified by the words “\* \* \* such individual.” The words “such individual” must refer to the antecedent noun, “individual,” in the preceding clause. And the word “individual” in the first clause is qualified as one whom a person “\* \* \* seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away \* \* \*.”

Applying these plain grammatical principles, it follows that the only type of holding or detaining which may constitute kidnaping under section 209 is the holding or detaining of an individual who has previously been kidnaped in the well understood sense. It is clear that the words “holding” and “detaining” are used in the code section to extend the definition of kidnaping to one who acts as the guard or keeper of the kidnaped victim. The inclusion of the words “\* \* \* who aids or abets \* \* \*” reflects a superabundance of caution on the part of the Legislature, and also demonstrates an intent to make even one who aids the keeper guilty of kidnaping.

For these reasons, the language used by the Legislature makes it clear that mere detention is not sufficient to constitute kidnaping, excepting where the detention follows a traditional act of kidnaping. Grammatically, the construction which the court has placed upon the statute is not supported by its language. And even if there were sound grammatical authority for the conclusion reached, the individual words of a statute should not be subjected to semantic dissection; the severed members are cold and lifeless without the spirit of the law.

The historical background and development of section 209 also lead to the conclusion that simple detention during an act of robbery does not constitute kidnaping. In analyzing the evolution of the legislation, it is essential to distinguish between the two statutory crimes of kidnaping which exist in California and in most modern jurisdictions. The first, and more

historically orthodox form of the offense, is defined in section 207 of the Penal Code. It is, with certain modifications which harmonize its terms with modern political development, the continuation of the crime of kidnaping as it has existed since before the Christian era. See Lardone, Kidnaping in Roman Law, 1 U.Det.L.J. 163-171. At common law, as under the earlier Jewish law, kidnaping was "the forcible abduction or stealing away of a man, woman or child from \* \* \* [his] own country, and sending \* \* \* [him] into another." 4 Bl.Comm. [Christian Ed.] 221. This is substantially the crime defined by section 207 as it was enacted in 1872 and has since remained without material change. Amended Stats.1905, p. 653, to add "carries him into another \* \* \* county, *or into another part of the same county.*"

The second crime of kidnaping is of comparatively recent origin. Perhaps no modern crime is as deeply and inescapably attached to its historical basis as is kidnaping for pecuniary purposes, and any adequate analysis of the offense necessarily must be based upon thorough understanding and appreciation of that background.

Apparently kidnaping for ransom was unknown at common law. One of the first reported instances of the crime in this country occurred in 1874. Ross, The Kidnapped Child [1876], cited and discussed in 12 N.Y.U.L.Q.Rev. 646, 649-50. The next kidnaping for the purpose of ransom which attracted great attention was in 1900 when Edward Cudahy was abducted and \$25,000 demanded for his release. Spreading Evil—The Autobiography of Pat Crowe [1927], cited and discussed in 12 N.Y.U.L.Q.Rev. 646, 650-51. In the following year, one of the first of the kidnaping for ransom statutes to be enacted in the United States was adopted in Illinois, which from the outset, made kidnaping "for the purpose of extorting ransom" a capital offense. Stats.Ill. 1901, p. 145, sec. 1. Other jurisdictions enacted similar statutes, but the penalty prescribed was generally no more than life imprisonment, although uniformly well in excess of the penalty under the pre-exist-

ing crime of "common-law" kidnaping, such as that defined in section 207 of the Penal Code.

In 1901 the California Legislature enacted section 209 of the Penal Code, which read: "Every person who maliciously, forcibly, or fraudulently takes or entices away any person with intent to restrain such person and thereby to commit extortion or robbery, or exact from the relatives or friends of such person any money or valuable thing, is guilty of a felony, and shall be punished therefor by imprisonment in the state's prison for life, or any number of years not less than ten." Stats.1901, ch. 83, p. 98. This section differed from the majority of kidnaping for ransom or extortion statutes by enumerating robbery as an additional purpose of the unlawful act. Inasmuch as extortion, as then defined, was "the obtaining of property from another, with his consent" Pen.Code § 518, enacted 1872, quite evidently the Legislature determined that robbery should be specified as a purpose in order to include the taking of a thing of value from the person of the victim, against his will. *People v. Fisher*, 30 Cal.App. 135, 157 P. 7 (promissory note and deeds to property); *People v. Salter*, 59 Cal.App.2d 59, 137 P.2d 840 (combination to office safe).

Although in the years after the first World War a number of isolated kidnappings for ransom occurred, "it was not until the latter part of 1931 that the public began to be aware of the fact that kidnappings were becoming more numerous, and that the hit-or-miss methods of the lone criminal had given away to the carefully planned activity of the professional." *Fisher & McGuire, Kidnapping and the So-Called Lindberg Law*, 12 N.Y.U.L.Q.Rev. 646, 652 (citing Sullivan, *The Snatch Racket*, 1931). "Kidnaping appeared to have acquired some of the characteristics of a profitable and skilled profession." *Finley, The Lindberg Law*, 28 Georgetown L.R. 908, 909. The Lindberg kidnaping awakened the American people to the fact that a revolting crime was being generally committed and unless the menace was met fearlessly and

with determination, "the very sanction of the criminal law was threatened." Fisher & McGuire, Kidnapping, *supra*.

The Federal Kidnaping Act, the so-called Lindberg Law, 18 U.S.C.A. § 1201, June 22, 1932, ch. 271, § 1, 47 Stat. 326, was "drawn in 1932 against a background of organized violence. 75 Cong.Rec. 13282-13304. Kidnaping by that time had become an epidemic in the United States. Ruthless criminal bands utilized every known legal and scientific means to achieve their aims and to protect themselves. Victims were selected from among the wealthy with great care and study. Details of the seizures and detentions were fully and meticulously worked out in advance. Ransom was the usual motive." *Chatwin v. United States*, 1946, 326 U.S. 455, 462-463, 66 S.Ct. 233, 236, 90 L.Ed. 198.

It was in this nation-wide atmosphere of public alarm that, in 1933, the California Legislature amended section 209 of the Penal Code to make kidnaping for ransom, reward, extortion or robbery a capital crime. During the years 1933 to 1935, similar statutes were enacted in almost all of the other states, or the punishment specified by existing statutes defining kidnaping was increased. The effectiveness of this uniform action by the various states, and

particularly by the Federal government, is clearly demonstrated by the statistics which show a decrease in kidnaping and a larger percentage of convictions for the commission of this crime. See Bomar, *The Lindberg Law*, 1 Law & Contemp.Prob. 435; Fisher & McGuire, Kidnapping, *supra*.

California is almost unique in its specification of robbery as one of the purposes for kidnaping. Other than Nevada and Arizona, where the statute is modeled upon the California code section, Nev.Comp. Laws 1931-41, Supp. vol. 2, § 10612.01; Ariz.Code Anno. [1939] vol. 3, § 43-3202, only two states in the United States specify robbery as a purpose for kidnaping. Ark. Stats.1947 Anno. vol. 4, § 41-2302; Wyo. Comp.Stats.1945 Ann. vol. 1, § 9-214. The vast majority of American jurisdictions list "ransom" or "extortion" as the dominant purpose.<sup>1</sup> Five states, however, follow the New York pattern of having a single crime of kidnaping, the only purpose specified being to hold or detain,<sup>2</sup> although in New York, Delaware and Maryland the offense, thus broadly defined, may carry a death penalty.

Thus, although the state laws enacted during the Lindberg era vary greatly in specific phraseology, the great body of them define the crime as kidnaping for ransom

1. 18 U.S.C.A. § 1201; Colo.Stats.Ann. [1935] ch. 48, § 77(4); Gen.Stats.Conn. [1949 Rev.] vol. 3, § 8372; Dist.Col. Code [1940], § 22-2101; Fla.Stats.Ann. vol. 22, § 805.02; Georgia Code [1933], § 26-1603; Smith-Hurd Ill.Ann.Stats., ch. 38, § 386; Gen.Stats.Kan.Ann. [1935], ch. 21, Art. 4, § 449; Ky.Rev. Stats.1948, § 435.140; Annotated Laws of Mass. vol. 9, ch. 265, § 26; Mich. Stats.Ann. vol. 25, § 28.581, Comp.Laws 1948, § 750.349; Mo.R.S.A. vol. 13, § 4414; Rev.Code Mont. [1935] Ann. vol. 5, § 10970.1; Rev.Stats. of Nebr. [1943] vol. 2, ch. 28, § 417; N.Mex.Stats.1941 Ann., vol. 3, § 41-2503; Gen.Stats.N.C. 1943, vol. 1, § 14-39; 10 Page's Ohio Gen.Code Ann. § 12427; Okl.Stats.Ann. [1937] title 21, § 745; Ore.Comp.Laws Ann. vol. 3, § 23-435; Purdon's Pa.Stats. Ann., title 18, § 4723; Gen.Laws R.I. [1938], ch. 606, § 21; Code of S.C. vol. 1, § 1122; S.D.Code [1939] vol. 1, § 13.2701; Williams Tenn.Code, vol. 7, § 10795; Vernon's Texas Pen.Code, vol.

2. Art. 1177a; Utah Code Ann. [1943], vol. 5, § 103-33-1(b) (1); Virginia Code 1936 Ann. § 4407; Vermont Stats. [1947], § 8259; Remington's Rev.Stats. Wash. vol. 4, § 2410-1; W.Virg.Code [1943] Ann., § 5929(3); Wisc.Stats. [1943] § 340.56; Rev.Stats.Maine, vol. 2, ch. 117, § 14; also Code of Ala. [1940], Tit. 14, § 7; Burns Ind.Stats.Ann. vol. 4, [1942 Rep.] 10-2903; Code of Iowa [1946], vol. 2, § 706.3, I.C.A.; La.Code of Crim.L. & Proc. [1943], Art. 740-44; N.J.S.A. 2:143-1.

2. 39 McKinney's Consol.Laws of N.Y.Penal Law pt. 2, § 1250; Rev.Laws of N. H. [1942], p. 1827; Minn.Stats.Ann. vol. 40, § 619.34; Rev.Code Del. [1935], § 5174; Ann.Code Md. [1939] vol. 1, Art. 27, § 385. Possibly Washington should also be listed here as a result of judicial construction of their statute. *State v. Andre*, 195 Wash. 221, 80 P.2d 553; *State v. Berry*, 200 Wash. 495, 93 P.2d 782, noted and criticized in 38 Columb. L.R. 1287; 19 Ore.L.R. 301.



or extortion in the American gangland tradition of the early 1930s. The two exceptions to the general rule are found (1) in the New York act which, in effect, makes "common law" kidnaping, such as is defined in section 207 of our Penal Code, a capital offense; and (2) in the California statute, which includes robbery as one of the purposes of the crime.

If simple detention during robbery is kidnaping, the scope and coverage of the California and New York statutes go far beyond any normal conceptions of kidnaping for ransom. The very severity of the punishment,<sup>3</sup> and the revolting nature of the crimes which were the driving force behind such modern statutes, make it obvious that detention incidental to robbery is not kidnaping. These kidnaping for ransom statutes are "to be construed in the light of [their] contemporary historical background" *Finch v. State*, 116 Fla. 437, 442, 156 So. 489, 491; and "the act must be so construed to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed. 1 Kent's Com. 462; *Commonwealth v. Kimball*, 24 Pick. 366, 370, 24 Mass. 366, 370; *United States v. Fisher*, 2 Cranch 358, 400, 2 L.Ed. 304." *State v. Clark*, 29 N.J.L. 95.

The courts which construed the exceedingly broad language of the New York statute were among the first to recognize the reasonable limitations which must be placed upon the language used in such legislation. Thus, in *People v. Kuntzsch*, Co.Ct., 64 N.Y.S.2d 116, which was a case involving an abduction for union membership purposes during a strike, the court dismissed an indictment for kidnaping, saying: "A literal reading of the statute makes a wilful seizure with intent to confine, against the will of the person seized, a kidnaping. Such a literal construction can be carried to absurd extremes. \* \* \* The Court in construing the Statute should

keep in mind the penalty imposed for violation of the statute. The crime is most serious." 64 N.Y.S.2d at pages 118-119; see also, *Black on Interpretation of Laws*, 2nd Ed. § 46, p. 129.

The federal courts have also shown a recent tendency to retreat from their former broad construction of the intent required under the Lindberg Law. That act specifies, "for ransom or reward or otherwise." In *Gooch v. United States*, 1936, 297 U.S. 124, 56 S.Ct. 395, 396, 80 L.Ed. 522, the "or otherwise" clause was given a broad construction to cover non-monetary benefits. However, recently, in *Chatwin v. United States*, 1946, 326 U.S. 455, 66 S.Ct. 233, 90 L.Ed. 198, the court considered the conviction of an advocate of polygamous "celestial marriages," who was charged with taking a small girl from Utah into Mexico, going through a marriage ceremony with her and then returning to Arizona where they resided as man and wife. The prosecution was under the "or otherwise" clause of the Lindberg Law. In reversing the conviction, it was said: "The stipulated facts of this case reveal a situation quite different from the general problem to which the framers of the Federal Kidnaping Act addressed themselves. \* \* \* Comprehensive language was used to cover every possible variety of kidnaping followed by interstate transportation \* \* \* [but] were we to sanction a careless concept of the crime of kidnaping or were we to disregard the background and setting of the Act the boundaries of potential liability would be lost in infinity. \* \* \* The absurdity of such a result, with its attendant likelihood of unfair punishment and blackmail, is sufficient by itself to foreclose that construction." 326 U.S. at pages 462-465, 66 S.Ct. at page 236. In reaching its conclusions concerning the particular crime for which Knowles should be punished, the court attempts to dismiss the *Chatwin* case by saying there " \* \* \* is no intimation that had the restraint been

3. In California, although first degree murder is punishable by death or life imprisonment, Pen.Code, § 190, kidnaping for purposes of extortion or robbery may

be punished by death or life imprisonment *without possibility of parole*, if the victim suffers bodily harm. Pen.Code, § 209.



forcible, the transportation would not have been within the broad meaning of the 'or otherwise' clause of the federal act." This, however, does not give proper weight to the broad policy stated by the Supreme Court of the United States in refusing to " \* \* \* sanction a careless concept of the crime of kidnapping \* \* \*."

Applying the rule of the Chatwin case, the facts shown in the prosecution of Knowles reveal a situation quite different from the general conduct against which the framers of the statute directed legislation. Clearly, he was a participant in an armed robbery, but only by a strained construction of section 209 may his acts be said to constitute kidnapping for the purpose of robbery. The record includes no evidence showing any plan to control the victims' whereabouts as a method of extorting money from them or their friends. The dominant act was the robbery. It could have been accomplished without requiring the victims to go into the storeroom. That movement was merely incidental to the robbery; it was a movement during the robbery, but *it was not a considered and essential prelude to the robbery*. Unquestionably, the crime Knowles committed was not kidnapping for the purpose of robbery in the sense that the Legislature intended by the enactment and amendment of section 209 of the Penal Code.

This conclusion logically follows the rationale of the cases decided when the statute enacted in 1901 was in effect. In *People v. Fisher*, 1916, 30 Cal.App. 135, 157 P. 7, the court prefaced its statement of facts by noting that the record "reads as though it were a tale of medieval brigandage." The defendants seized the victim on the highway and forced him to write a note to his secretary explaining his absence. They then drove him from Merced to Stockton, where he escaped and they were captured. Wire-tapping equipment, unsigned deeds to all of the victim's real property and a number of blank promissory notes were found in the automobile. This was a clear case of kidnapping for the purpose of robbery, that is, the property was to be obtained from a victim's person without his consent. More-

over, viewing the transaction in its entirety, it was an orthodox kidnapping.

The other cases which were prosecuted under the 1901 act were decided upon similar facts. In *People v. Lombard*, 1933, 131 Cal.App. 525, 21 P.2d 955, a conviction of attempt to commit kidnapping for purposes of ransom was sustained upon facts which showed the usual kidnap plan: a hideaway prepared, ransom notes and other preparations for extorting money. And *People v. Wagner*, 1933, 133 Cal.App. 775, 24 P. 2d 927, according to one of the defendants in the case, was "just a case of one racket playing on another." The court there said that "the object of kidnapping which is made an offense by the statute is not primarily the seizure and restraint of the victim, but the mulcting him or his relatives or friends of money or other property through coercion." 133 Cal. at page 780, 24 P.2d at page 928.

The first decision in which this court considered the effect of the 1933 amendment to section 209 of the Penal Code is *People v. Tanner*, 1935, 3 Cal.2d 279, 44 P.2d 324. The defendants believed that the victim had a large amount of cash hidden in his house. He was accosted in his car just outside his garage and was forced to re-enter the house. For over an hour he was questioned, threatened, and finally tortured as the defendants attempted to find out where the "real money" was hidden. Finally, they became convinced that their information was incorrect and there was no large sum of money in the house. Although the asportation was slight, it was clearly connected with a prearranged plan which called for protracted holding and coercion to obtain from the victim property which would not have been available in the course of an ordinary armed robbery. This was the type of criminal conduct which the Legislature sought to prevent by making a capital crime of kidnapping "for the purpose of robbery."

At least four other prosecutions under the 1933 amendment may be placed within the same category. In one of them, there was a prison break in which the warden

and other officials were detained for the purpose of obtaining money and clothing and to assure safe exit from the prison. The seizure and transportation was as much for the purpose of robbery as for purpose of obtaining human shields for the escape. It was all part of an organized plan to seize the victims and secure the escape.<sup>4</sup> *People v. Kristy*, 4 Cal.2d 504, 50 P.2d 798. *People v. Grimes*, 35 Cal.App.2d 319, 95 P.2d 486, presents an excellent example of orthodox kidnapping for ransom. A farmer's wife was taken from her home after a demand was made for \$25,000 under threat that otherwise she would never be seen again. *People v. Salter*, 59 Cal.App.2d 59, 137 P.2d 840, concerned a situation similar to that shown in *People v. Tanner*, supra. The defendants seized the victim in his driveway and thereafter held him, both in his house and in a car driven about town, while they attempted to obtain from him the combination to his office safe. And the prosecution in *People v. Anderson*, 87 Cal.App.2d 857, 197 P.2d 839, was based upon the kidnapping for robbery of a used car dealer who was taken on a feigned demonstration ride. All of these decisions, upon their facts, affirmed judgments of conviction for seizing and carrying away a person for a purpose which could not be accomplished at the place where he was attacked.

To ascertain the legislative intent in the amendment of section 209, reference properly may be made to Senate Bill No. 1226 and Assembly Bill No. 334 which were enacted in 1933. These bills, identical in text, were entitled "An act to amend section 209 of the Penal Code, relating to the punishment of kidnapping." After the Legislature passed the Assembly bill, a report on it was made to the Governor by the Legislative Counsel, who is charged with the duty of advising him, as well as the legislators, upon pending bills and other matters, Government Code, §§ 10230-10245; Rule 34 of the Joint Rules of the Senate and Assembly, California

Legislature, 1949. The report analyzed the proposed amendment as follows: "This bill enlarges the definition of kidnapping. It makes the doing of the designated act or acts an offense by deleting the existing requirement that the seizure or carrying away must be done maliciously, forcibly or fraudulently, and includes within the definition one who aids or abets."

"The existing penalty for kidnapping, upon conviction, is imprisonment in the state prison for from 10 years to life. This bill specifies \* \* \* [greatly increased] penalties."

The Legislative Counsel's opinion went to the governor while the bills were being considered by him. "The executive is, by the constitution, a component part of the law-making power. In approving a law, he is \* \* \* supposed to act \* \* \* as a part of the legislative branch of the government." *Fowler v. Peirce*, 2 Cal. 165, 172. And the enactment of legislation requires the concurrent action not only of the two houses of the Legislature, but of the governor. See: *Davies v. City of Los Angeles*, 86 Cal. 37, 50, 24 P. 771. "While engaged in considering bills \* \* \* presented to him for approval or disapproval, he is acting in a legislative capacity, and not as an executive." *Lukens v. Nye*, 156 Cal. 498, 501, 105 P. 593, 594, 20 Ann.Cas. 158, 36 L.R.A., N.S., 244. See also *Wright v. United States*, 302 U.S. 583, 58 S.Ct. 395, 82 L.Ed. 439; *Edwards v. United States*, 286 U.S. 482, 52 S.Ct. 627, 76 L.Ed. 1239. Presumably, in considering the two bills, the governor relied upon, or at least considered, the opinion of the Legislative Counsel. As the legislation was presented to him by his advisor, the only purpose of the amendment of section 209 was to omit the requirement that the acts specified by the statute then in effect be done maliciously and to change the penalties for kidnapping.

Since the amendment in 1933, the decisions of this court have consistently recog-

4. The 1939 amendment to the extortion statute which added the language "the obtaining of an official act of a public officer, induced by a wrongful use of force or fear," Pen.Code § 518, Am.Stats.

1939, p. 2017, would appear to more aptly bring such prison break kidnappings under the heading of "for the purpose of extortion."

nized the distinct characteristics of kidnaping and robbery. Before the present case, whenever the conviction of one found guilty of both kidnaping and robbery arising out of the same chain of events was upheld, the judgment as to each crime has been affirmed. By these decisions, impliedly at least, it has been held that one can commit robbery without also being guilty of kidnaping; until now the court has not held that the same act may constitute both kidnaping and robbery. The decisions are to the contrary. In *re* Pearson, 30 Cal.2d 871, 186 P.2d 401 [kidnaping for the purpose of committing robbery and attempted robbery of one Afornin; see *People v. Pearson*, 41 Cal.App.2d 614, 617, 107 P.2d 463, for details]; *People v. Brown*, 29 Cal.2d 555, 176 P.2d 929 [kidnaping for the purpose of robbery and robbery of one Mrs. Jacobs]; *People v. Dorman*, 28 Cal.2d 846, 172 P.2d 686 [kidnaping for the purpose of robbery and robbery of one Bigelow]; *People v. Britton*, 6 Cal.2d 8, 56 P.2d 493 [one charge of kidnaping for the purpose of robbery and two charges of robbery]; *People v. Kristy*, 4 Cal.2d 504, 50 P.2d 798 [four counts of kidnaping for the purpose of robbery and four counts of robbery]; *People v. Tanner*, 3 Cal.2d 279, 44 P.2d 324 [two counts of kidnaping and two counts of robbery of one Bodkin and his wife].

In *People v. Dorman*, *supra*, the defendant was convicted upon one count for murder, one count for kidnaping for the purpose of robbery, and three counts for robbery. In affirming the judgment, Justice Shenk discussed “\* \* \* the undisputed acts of transporting Bigelow to an isolated spot, and \* \* \* robbing him” [28 Cal.2d 846, 172 P.2d 690] as sufficient evidence to support each of the convictions.

A later case is *People v. Brown*, *supra*, in which Justice Traynor spoke for the court in affirming convictions for two counts of robbery and one of kidnaping for the purpose of robbery, where the victim suffered bodily harm. The most recent decision is *In re Pearson*, *supra*, in which a petition for a writ of habeas corpus was denied one imprisoned following convictions for kidnaping and attempted robbery based upon

the same facts. At page 878 of the opinion in 30 Cal.2d, 186 P.2d at page 405, Justice Schauer stated as to the conviction for kidnaping, “Petitioner is legally imprisoned for life without possibility of parole under a judgment \* \* \* verdict which so fixes his punishment.”

By the present decision, the court *sub silentio* has overruled the cases cited. And if since 1933 an act of robbery has also constituted kidnaping, the defendants in those cases were entitled to the same relief now given Knowles.

The majority opinion attempts to distinguish the prior decisions upon the ground that, in each of them, “\* \* \* the acts that formed the basis of the kidnaping conviction were separate from those that involved the actual taking of property. \* \* \*” If this be true, the present case apparently is the first one in reported California legal history where there were inseparable acts of robbery and kidnaping. Furthermore, assuming that the records upon which convictions for robbery and kidnaping for the purpose of robbery were affirmed by this court showed separable acts constituting these crimes, the decisions in those cases are entirely inconsistent with the conclusions now reached. It cannot be said with any certainty whether the triers of fact placed the judgments of conviction upon evidence of the incidental detention necessary to relieve the victims of their property, or upon testimony concerning the defendants’ conduct not directly connected with the robberies. As now stated, every robbery is a kidnaping because of such incidental detention and one is unable to say which act the jury relied upon as the basis for its verdict of guilty of kidnaping. If in the prior cases the juries determined that there was detention incidental to robbery and based the convictions for the kidnappings upon that evidence, then, as here, the judgment of conviction for robbery should have been reversed. This is true because, under the new formula, either the evidence as to detention incidental to robbery or that concerning an independent act unrelated to robbery would support the judgment of conviction for



kidnaping. And applying section 654 of the Penal Code as used in the majority opinion, where, as in the present case, the conviction for robbery and for kidnaping for the purpose of robbery are based upon the robbery alone, the conviction of the lesser crime should have been set aside.

To summarize my conclusions, the grammatical construction and language of the statute, the legislative history and development of section 209, the legislative intent as derived from the history and circumstances surrounding the enactment of the 1933 amendment clearly show that one can commit robbery without also being guilty of kidnaping. Considering particularly the facts shown by the present record, I see no basis whatever for holding that one who moves his victim within the immediate zone of the crime merely to facilitate the robbery, or detains him briefly in order to obtain property from him is guilty of kidnaping.

Otherwise stated, if there be detention alone, it must follow a traditional act of kidnaping in order to render the one detaining guilty of that crime. It is true that section 209 does not in every case require asportation, although that is an element usually present in kidnaping. But the seizure, confinement, inveigling, enticing, decoying, abducting, concealing, kidnaping or carrying away must be done, as the words themselves demonstrate, to control the victim's whereabouts for the purpose of robbery or extortion. If the defendant's control of the location of the victim's person is purely transitory or incidental, as in the ordinary robbery, the crime is not kidnaping.

I would reverse the judgments of conviction for kidnaping, and affirm the judgments of conviction for robbery.

GIBSON, C. J., concurs.

CARTER, Justice (dissenting).

I am in full accord with the views expressed in the dissenting opinion of Mr. Justice Edmonds, but feel that something further should be said in regard to the holding in the majority opinion. It is there

held that a robbery is also a violation of section 209 of the Penal Code, called "kidnapping." The prosecuting attorney is given the sole and arbitrary power to determine whether a person shall suffer life imprisonment without possibility of parole or even death on the one hand, or, in the case of robbery in the second degree, as little as one year's imprisonment. It all depends on the charge he chooses, at his whim or caprice, to make against the accused. If he charges both robbery and kidnapping and the defendant is convicted of both crimes, he must suffer the greater punishment provided for kidnapping, or, if he wishes, he may charge kidnapping alone and likewise obtain the extreme penalty. However, he may charge robbery alone, and, in case of a conviction, lesser punishment would follow. All these things could occur on the identical set of facts which establish only robbery as will later appear. It is not to be supposed that the Legislature intended to place any such drastic and arbitrary power in the hands of the district attorney. On the contrary, it is clear that it did not intend to embrace the crime of robbery in section 209 of the Penal Code. Every robbery, whether first or second degree, necessarily involves some detention or holding of the victim if we give those words a narrow and restricted meaning. The Legislature has carefully defined robbery and fixed its punishment, deeming that punishment adequate. If it had intended to depart from those provisions, it would have done so directly by amending the robbery statute. It would not have attempted to achieve that result by amending section 209, the kidnap statute. The case falls squarely within *In re Shull*, 23 Cal.2d 745, 146 P.2d 417, 419, where this court held that a statute imposing an additional five-year term of imprisonment where a felony was committed with a deadly weapon was not intended to apply to the felony of assault with a deadly weapon, for the elements in both instances were the same and the punishment for the latter was clearly defined. It is there said: "It is not unreasonable to suppose that the Legislature believed that for felonies in which the use of a gun was not one of the



**FINNEY v. LOCKHART.**

No. L. A. 21189.

Supreme Court of California, in Bank.

April 19, 1950.

Robert William Finney brought action against James Lockhart and others to recover damages for inducing persons not to purchase dog food from plaintiff. A judgment for plaintiff against named defendant was entered by the Superior Court, Los Angeles County, Clarence L. Kincaid, J., and the named defendant alone appealed. The Supreme Court, Shenk, J., held that verdict awarding \$1.00 general and \$2,000 exemplary damages could not be set aside on ground of excessiveness of award of exemplary damages on appeal on judgment roll alone.

Judgment affirmed.

Prior opinion, 208 P.2d 25.

**1. Libel and slander ☞33, 125**

In action for damages for defamation per se, the law presumes general damages, and it is unnecessary to segregate exact or any proportion between actual and exemplary damages. Civ.Code, § 3294.

**2. Conspiracy ☞20**

The fact that jury in action to recover damages for inducing persons not to purchase dog food from plaintiff awarded only nominal damages in the compensatory class did not necessarily imply finding that no more actual damages were sustained, Civ. Code, § 3294.

**3. Appeal and error ☞1004(1)**

Reviewing court's power to declare an award of damages excessive exists only when from facts the amount appears at first blush to suggest passion or prejudice on part of jury, and there is no distinction when review is of an award of exemplary rather than actual damages. Civ.Code, § 3294.

**4. Appeal and error ☞1004(3)**

After award of damages has been approved by trial court the reviewing court will hesitate to declare amount excessive unless upon consideration of entire record including the evidence it must be said that

essential factors, such as rape, larceny, and the like, an added penalty should be imposed by reason of the fact that the defendant being armed with such a weapon would probably be more dangerous because of the probability of death or physical injury being inflicted by the weapon. Hence, such a condition would be reasonable grounds for increasing the penalty where felonies are involved which do not include as a necessary element being armed with a pistol. The Legislature has by other acts imposed an increased punishment where the only additional factor, being armed with a deadly weapon, is present. The only difference between a simple assault and one with a deadly weapon is the latter factor. The commission of a simple assault is declared a misdemeanor, and the punishment therefor is a fine of not over \$500 or imprisonment in the county jail for six months, or by both. Pen.Code, secs. 240, 241. When there is added to the assault the use of a deadly weapon the punishment is increased to imprisonment in the state prison not exceeding ten years or in the county jail not exceeding one year or a fine not exceeding \$5,000 or by both fine and imprisonment, Pen.Code, sec. 245, and if section 1168(2) (a) or 3024(a) is applicable and the weapons therein mentioned are used, the *minimum* term is fixed at five years where the perpetrator is not one previously convicted of a felony. Briefly, the Legislature has fixed the punishment for an assault where a deadly weapon is used, a particular crime, and it is not to be supposed that for the same offense without any additional factor existing the added punishment should be imposed. In felonies where a deadly weapon is not a factor in the offense, the additional punishment is imposed by section 3 of the Deadly Weapons Act, because of the additional factor of a deadly weapon being involved."

Applying the foregoing rule to the case at bar, it seems obvious to me that by the amendment to section 209 of the Penal Code the Legislature did not intend to make the punishment for kidnapping applicable to robbery, but such is the holding of the majority in this case.

Rehearing denied; GIBSON, C. J., and EDMONDS and CARTER, JJ., dissenting.

award was the result of passion or prejudice.

#### 5. Damages $\S$ 94

The rule that exemplary damages should bear a reasonable relation to actual damages is only for purpose of guarding against excess, and there is no fixed ratio by which to determine proper proportion between the two classes of damages. Civ. Code,  $\S$  3294.

#### 6. Appeal and error $\S$ 932(2), 1004(3)

Verdict awarding \$1 general and \$2,000 exemplary damages in action to recover damages for inducing persons not to purchase dog food from plaintiff could not be set aside on ground of excessiveness of award of exemplary damages on appeal on judgment roll alone, since it must be assumed that evidence was substantial in support of amount of the verdict and that award was not given under influence of passion or prejudice. Civ. Code,  $\S$  3294.

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Howlett & Elson and Eugene M. Elson,  
Los Angeles, for appellant.

Richard K. Gandy and Robert G. Cockins,  
Santa Monica, for respondent.

SHENK, Justice.

This is an appeal by the defendant from a judgment entered on a verdict awarding \$1.00 general and \$2,000 exemplary damages. The question presented is the asserted excessiveness of the award of exemplary damages. The appeal is taken on the judgment roll. To obtain a review of the claim of excess by this method the defendant concedes that the factual allegations in the complaint are true. Originally other defendants were joined, but the action as to them was dismissed on their motion for nonsuit after the plaintiff rested. The trial continued and the case was submitted to the jury as against the defendant Lockhart alone. The alleged facts will be stated briefly to indicate the nature of the action as against him.

The plaintiff conducted a retail pet food merchandising business known as Boulevard Dog Food Store in the city of Santa

Monica, Los Angeles county. He had a good reputation and a large patronage. The defendant operated the Canine Butcher Shop in the same county as a competitor of the plaintiff. For the purpose of injuring and destroying the plaintiff's business and his good reputation as a merchant, the defendant illegally and maliciously initiated and carried on a campaign through the use of artifice, intimidation, intrigue and defamation to cause purchasers of dog food in the vicinity to believe and understand that the plaintiff sold meat from slaughtered sick and diseased horses, that the meat sold by him was unfit for canine consumption, and that he was unworthy of patronage. The defendant's utterances to customers and the public were by both printed circulars and word of mouth. Specific instances and examples of the published utterances were alleged. The complaint contains allegations of malice and ill-will of the defendant, the falsity of his published statements, and facts as to the claimed damages to the plaintiff's business, reputation and feelings. The plaintiff sought both compensatory and exemplary damages. The defendant moved for a new trial on the ground among others of excessive exemplary damages appearing to have been given under the influence of passion and prejudice. The motion was denied.

Section 3294 of the Civil Code permits the recovery of exemplary damages in actions for breach of an obligation not arising from contract where the defendant has been guilty of oppression, fraud, or malice. Such damages are in addition to the actual damages and are given for the sake of example and by way of punishing the defendant.

It is not questioned that this is a proper case for the recovery of exemplary in addition to general damages. The code provision does not specify the proportion which the exemplary must maintain to the general damages. It is the defendant's contention that the decisional law of the state is that exemplary damages must bear a reasonable proportion to the actual damages awarded. He states that a review of the cases where the amount of exemplary damages has been declared excessive and a reduction ordered,

indicates an approved proportion of not in excess of five to one. He urges that this court should declare the award of exemplary damages in the ratio of 2000 to 1 to be excessive; that the amount of exemplary damages should be reduced to the sum of \$5.00, or that the judgment should be reversed and the cause remanded for a new trial on the issue of exemplary damages alone with a direction that they should bear some reasonable proportion to the amount of actual damages awarded.

The difficulty with the defendant's position is that it oversimplifies the question. There is no applicable rule which would justify the result sought, at least in the absence of an opportunity afforded to the appellate court to review the entire record including the evidence, the rulings on the admission and rejection of evidence, and the instructions to the jury.

[1,2] The plaintiff was not entitled to exemplary damages as of right. The award was in the discretion of the jury upon finding compensatory damages, where evidence of malice was also present. The verdict implied a finding that the plaintiff sustained actual damages. The award of exemplary damages confirmed the plaintiff's allegations of malice. In an action for damages for defamation per se, which is the essence of this action, the law presumes general damages, and it has been declared unnecessary to segregate the exact or any proportion between the two classes of damages. *Clark v. McClurg*, 215 Cal. 279, 9 P.2d 505, 81 A.L.R. 908; *McConathy v. Deck*, 34 Colo. 461, 83 P. 135; *State ex rel. St. Joseph Belt R. Co. v. Shain*, 341 Mo. 733, 108 S.W. 2d 351, \$1.00 nominal damages, \$4,000 exemplary damages; *Edwards v. Nulsen*, 347 Mo. 1077, 152 S.W.2d 28, \$1.00 nominal damages, \$25,000 exemplary damages, sustained; cf. *Mother Cobb's Chicken Turnovers, Inc. v. Fox*, 10 Cal.2d 203, 73 P.2d 1185, and *Haydel v. Morton*, 8 Cal.App.2d 730, 48 P.2d 709, where in one case the court and in the other the jury found that no actual damages were suffered; *Sedgwick, Damages*, 9th Ed., p. 697 et seq., 708-709; *McCormick, Damages*, sec. 83, note p. 432, citing *Clark v. McClurg*, supra, 215

Cal. 279, 9 P.2d 505, 81 A.L.R. 908. The fact that the jury awarded only nominal damages in the compensatory class does not necessarily imply a finding that no more actual damage was sustained.

[3,4] The reviewing court's power to declare an award of damages excessive exists only when from the facts the amount appears at first blush to suggest passion or prejudice on the part of the jury. There is no distinction when the review is of an award of exemplary rather than actual damages. *Varcoe v. Lee*, 180 Cal. 338, 341, 181 P. 223; *Scott v. Times-Mirror Co.*, 181 Cal. 345, 366-367, 184 P. 672, 12 A.L.R. 1007; *Livesey v. Stock*, 208 Cal. 315, 322, 281 P. 70; 15 Am.Jur. p. 738, sec. 297. These and other cases indicate that it is the province of the jury, and the trial court on the motion for a new trial, to say whether punitive damages should be awarded. The presumptions are in favor of the correctness of the verdict and judgment. After an award has been approved by the trial court the reviewing court will hesitate to declare the amount excessive unless upon consideration of the entire record including the evidence it must be said that the award was the result of passion or prejudice. See *Brewer v. Second Baptist Church of Los Angeles*, 32 Cal. 2d 791, 801, 197 P.2d 713; *Pickwick Stages, Northern Division v. Board of Trustees of City of El Paso DeRobles*, 54 Cal.App. 730, 215 P. 558; *Singleton v. Singleton*, 68 Cal. App.2d 681, 704, 157 P.2d 886.

[5,6] The rule that the exemplary should bear a reasonable relation to the actual damages is only for the purpose of guarding against excess. *Brewer v. Second Baptist Church of Los Angeles*, supra, 32 Cal.2d at page 802, 197 P.2d 713, citing *Wilkinson v. Singh*, 93 Cal.App. 337, 269 P. 705, and *Plotnik v. Rosenberg*, 55 Cal.App. 408, 203 P. 438; see also *Farvour v. Geltis*, 91 Cal.App.2d 603, 205 P.2d 424; *Booth v. People's Finance & Thrift Co. of Modesto*, 124 Cal.App. 131, 144, 12 P.2d 50. But these cases also state that there is no fixed ratio by which to determine the proper proportion between the two classes of damages. The presence of the influential factors on the amount of the damages cannot



be disclosed except by the record of the trial proceedings including the evidence. The problem cannot be resolved by an inspection of the judgment roll alone. Therefore the basis for the determination of the question is not in the record. On the present appeal it must be assumed that the evidence was substantial in support of the amount of the verdict and that the award was not given under the influence of passion or prejudice.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



35 Cal.2d 155

**ENGLISH v. CITY OF LONG BEACH.**

**L. A. 21257.**

Supreme Court of California, in Bank.

April 17, 1950.

Action by Henry W. English against the City of Long Beach in which plaintiff sought a writ of mandate annulling civil service board's order finding him physically unable to perform duties of police patrolman and sustaining his dismissal, and to compel his reinstatement. The Superior Court, Los Angeles County, Thomas J. Cunningham, J., entered judgment setting aside board's order and directing that patrolman be reinstated and the city appealed. The Supreme Court, Gibson, C. J., held that action of civil service board in taking evidence outside hearing and outside presence of patrolman or his attorney and in considering and relying upon such evidence in arriving at its decision, was a denial of a fair hearing.

Judgment reversed and trial court instructed to enter judgment directing civil service board to set aside its order sustaining petitioner's dismissal and to afford him a full and fair hearing.

For prior opinion of District Court of Appeal, see 209 P.2d 403.

**1. Municipal corporations** Ⓒ218(8), 220(6)

Under civil service board rule requiring employee to pass physical examination before resuming work after absence of six months or more, and providing that failure to pass examination would constitute grounds for suspension or dismissal, failure to pass examination does not automatically disqualify an employee and he is entitled to be compensated until written charges have been served and filed against him, upon which charges he is entitled to a hearing before civil service board.

**2. Municipal corporations** Ⓒ185(8)

Where police patrolman failed to pass required physical examination upon return from absence exceeding six months and was served with dismissal notice therefor and hearing was held before civil service board at which patrolman was represented by counsel and at which both parties called witnesses, fact that members of board took evidence outside hearing and outside presence of patrolman or his attorney and considered and relied upon information thus received in arriving at its decision, was a denial of a fair hearing.

**3. Administrative law and procedure** Ⓒ477

Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present and the fact that there may be substantial and properly introduced evidence which supports the board's ruling is immaterial.

**4. Administrative law and procedure** Ⓒ812

**Mandamus** Ⓒ176

Where trial court found that discharged police patrolman had been deprived of fair hearing because civil service board in reaching its decision relied upon evidence taken outside hearing, its judgment granting writ of mandate compelling reinstatement of patrolman, instead of remanding cause to civil service board for proper proceedings, was improper, since board was not precluded from holding another hearing. Code Civ.Proc. § 1094.5(e).

## 5. Administrative law and procedure ☞681

## Mandamus ☞16(1)

Where trial court found that discharged police patrolman had been deprived of fair hearing, and patrolman obtained court order directing that appeal of city should not operate as stay of execution of judgment granting writ of mandate, the city's inability or failure to resist application for that order was not such a voluntary compliance with the writ as to render issues moot. Code Civ.Proc. § 1110 b.

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Irving M. Smith, City Attorney, Clifford E. Hayes and Dewey L. Strickler, Deputy City Attorneys, Long Beach, for appellants.

Kenneth Sperry, Long Beach, for respondent.

GIBSON, Chief Justice.

The civil service board of Long Beach approved the action of the city manager in dismissing the petitioner, Henry W. English, from his position as patrolman in the police department. English sought a writ of mandate annulling the board's order and compelling his reinstatement. The trial court concluded that a board rule requiring petitioner to take and pass a physical examination was invalid, and that petitioner was deprived of a fair hearing because the board in reaching its decision relied upon evidence taken outside the hearing. The judgment required the board to set aside its order sustaining the dismissal and directed that petitioner be reinstated as of August 3, 1945. This appeal followed.

Between December 24, 1944, and July 15, 1945, English was absent from duty on sick leave, vacation and leave of absence. When he reported back for duty he was informed that he would not be permitted to return until he had taken and passed a physical examination as required by civil service rules and regulations. The rules provide that an employee who has been absent for six months or more shall be required to take and pass a physical examination to be given by a board of physicians before being entitled to return to active duty, and that failure to pass such examination shall constitute grounds for suspension or dismissal.

English submitted to an examination, the report of which was adverse to him. On August 3, 1945, the city manager filed with the civil service board and served on English a written notice of dismissal based on charges that he had failed to pass the required examination and that he had a physical ailment or defect which incapacitated him for the proper performance of the duties of his position.

On September 12, 1945, a hearing was held before the civil service board on the charges filed. English was present and represented by counsel, both parties called witnesses who testified concerning his physical condition and its relation to the performance of his duties. The matter was twice continued, once at the request of English and the other time by the board on its own motion. Members of the board took evidence outside the hearing and outside the presence of English or his attorney. Some of them talked to one of the examining doctors, and one member questioned his personal physician concerning the relation of English's asserted disability to the performance of the duties of his position. The information thus received was imparted to other board members, and was considered and relied upon by them in arriving at their decision.

On January 23, 1946, the board found that English was physically unable to perform the duties of patrolman and sustained his dismissal as of August 3, 1945.

[1] The validity of the board's rule which requires an employee to take and pass a physical examination before resuming work after an extended absence and which provides that failure to pass the examination shall constitute grounds for his suspension or dismissal was established in *English v. City of Long Beach*, 77 Cal. App.2d 894, 176 P.2d 940. It was there held that failure to pass the examination does not automatically disqualify an employee, and that the employee is entitled to be compensated until written charges against him have been served and filed, upon which charges he is entitled to a hearing before the civil service board. Thus the rule does not leave the determination of whether or not an employee shall

be suspended or dismissed to the uncontrolled discretion of the examining physicians. They act as a group of experts, and their findings and conclusions form merely part of the evidence to be considered by the board in determining whether the employee shall be suspended or dismissed.

[2, 3] The principal question is whether English was deprived of a fair trial. The Long Beach city charter and the rules and regulations of the civil service board require that a discharged employee be accorded a hearing. *English v. City of Long Beach*, 77 Cal.App.2d 894, 176 P.2d 940; cf. *La Prade v. Department of Water & Power*, 27 Cal.2d 47, 162 P.2d 13. In conducting the hearing, the board acts as a local administrative tribunal, and it has power to make final adjudications of fact in connection with matters properly submitted to it. The action of such an administrative board exercising adjudicatory functions when based upon information of which the parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing. *La Prade v. Department of Water & Power*, 27 Cal.2d 47, 162 P.2d 13; see *Bandini Estate Co. v. Los Angeles County*, 28 Cal. App.2d 224, 231, 82 P.2d 185; cf. *Carstens v. Pillsbury*, 172 Cal. 572, 158 P. 218. Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present. *United States v. Abilene & So. Ry. Co.*, 265 U.S. 274, 44 S.Ct. 565, 68 L.Ed. 1016; *Interstate Commerce Comm. v. Louisville & Nashville R. R. Co.*, 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431; *La Prade v. Department of Water & Power*, supra; *Bandini Estate Co. v. Los Angeles County*, supra; *Carstens v. Pillsbury*, supra. The fact that there may be substantial and properly introduced evidence which supports the board's ruling is immaterial. Cf. *Ohio Bell Tel. Co. v. Public Utilities Comm.*, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093. A contrary conclusion would be tantamount to requiring a hearing in form but not in substance, for the right of a

hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its termination upon information received without the knowledge of the parties. A hearing requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced. *La Prade v. Department of Water & Power*, 27 Cal.2d 47, 52, 162 P.2d 13; *Universal Consol. Oil Co. v. Byram*, 25 Cal.2d 353, 153 P.2d 746.

It has been held that where there is substantial evidence, properly admitted, which supports a tribunal's determination, its order or decision will not be annulled because of errors in ruling on the admission of other evidence. See *Nider v. City Commission*, 36 Cal.App.2d 14, 97 P.2d 293; *Horstmyer v. Trial Board of City of Sacramento*, 21 Cal.App.2d 533, 69 P.2d 1021.

There is considerable difference, however, between the alleged improper admission of evidence, such as hearsay, for example, and the consideration of and reliance upon information received without the knowledge of the parties and at a time and place other than that appointed for the hearing. In the former class of cases, the parties are informed of the evidence to be used against them, they may object to it, explain it, or test it and introduce countervailing evidence. None of those safeguards are available, however, when the board secretly obtains information and bases its determination thereon. The distinction has been recognized by the United States Supreme Court as well as by this court. *United States v. Abilene & So. Ry. Co.*, 265 U.S. 274, 289, 44 S.Ct. 565, 68 L.Ed. 1016; *La Prade v. Department of Water & Power*, 27 Cal.2d 47, 51, 162 P.2d 13.

Since the board, in arriving at its decision sustaining the order dismissing English, relied upon information taken outside the hearing, which English had no opportunity to refute, the trial court properly concluded that he was denied a fair hearing.

[4] The judgment, however, should not have ordered the reinstatement of English



but instead should have remanded the cause to the civil service board for proper proceedings. Code Civ.Proc. § 1094.5(e); *Steen v. City of Los Angeles*, 31 Cal.2d 542, 546, 190 P.2d 937; *La Prade v. Department of Water & Power*, 27 Cal.2d 47, 162 P.2d 13; *Universal Consol. Oil Co. v. Byram*, 25 Cal.2d 353, 153 P.2d 746; *Ware v. Retirement Board*, 65 Cal.App.2d 781, 151 P.2d 549. The fact that the board has heard and decided the matter does not preclude another hearing even though the charter does not provide for a rehearing, and the board cannot be said to have exhausted its power to act until it has given English a fair hearing. Cf. *Aylward v. State Board, etc., Examiners*, 31 Cal.2d 833, 839, 192 P.2d 929.

[5] The trial court assigned no reason for its failure to remand the cause to the board. It is suggested that a fair hearing could not be had after the trial of the mandate action because of lapse of time, and that since the city has continued to employ English, the question of his former fitness is moot. There was no claim, however, that the proceeding was not diligently prosecuted, and there was no showing of any circumstance that might operate to the prejudice of either party as a result of the lapse of time. Cf. *Steen v. City of Los Angeles*, 31 Cal.2d 542, 190 P.2d 937. The continued employment of English by the city resulted from the fact that he obtained a court order directing that this appeal should not operate as a stay of execution of the judgment granting the writ of mandate, Code Civ.Proc. § 1110b, and the city's inability or failure to resist the application for that order was not such a voluntary compliance with the writ as to render the issues moot.

The judgment is reversed, and the trial court is instructed to enter judgment directing the civil service board to set aside its order sustaining petitioner's dismissal and to afford him a full and fair hearing.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

RIANDA et al. v. SAN BENITO TITLE  
GUARANTEE CO.

S. F. 18017.

Supreme Court of California, in Bank.

April 21, 1950.

Hearing Denied May 18, 1950.

Action by Harry Rianda and Marian Hublit against the San Benito Title Guarantee Company, a corporation, for damages allegedly arising from the negligence of defendant in failing to present for payment a check delivered to it in connection with a realty escrow transaction. The Superior Court, San Benito County, A. M. Runnells, J., entered judgment for the defendant and the plaintiffs appealed. The Supreme Court, Gibson, C. J., held that terms of unsigned sales agreement relating to vendor's option to retain all amounts in event of default and authorizing vendor to convert into cash all payments made in other than lawful money, did not constitute instructions to cash check received by defendant from purchaser or put defendant on notice of facts sufficient to place it under a duty to present the purchaser's deposit check promptly for payment and that evidence sustained finding that defendant was not guilty of negligence in failing to present check for payment.

Judgment affirmed.

Prior opinion, 207 P.2d 624.

1. Escrows ⇐9

If title guarantee company in handling an escrow transaction, violated instructions of vendors or acted negligently in retaining check sent to it by vendor and drawn by purchaser, it would be liable for any loss occasioned by its breach of duty.

2. Principal and agent ⇐48, 57

It is the duty of an agent to obey instructions of his principal and exercise in his employment reasonable skill and ordinary diligence.

3. Escrows ⇐9

Where title guarantee company handling an escrow transaction failed to present for payment a purchaser's check delivered to it, terms of unsigned sales agreement relating to vendor's option to retain all amounts paid in event of default and authorizing vendor to convert into cash all

payments made in other than lawful money did not constitute instructions to title company to cash check or put company on notice of facts sufficient to place it under a duty to present check for payment.

#### 4. Escrows ☞9

In action for damages resulting from alleged negligence of title guarantee company in failing to present for prompt payment a deposit check drawn by purchaser in favor of title company, vendor's letter notifying title company of purchaser's contemplated default and demanding payment of check, in absence of proof as to when or where letter was mailed, when it was received or when it should have been delivered to title company in ordinary course of mails or proof as to what time purchaser withdrew money from bank account or notified title company that he had stopped payment, did not compel trial court to find that title company received notice of vendors' claim in time to act.

#### 5. Escrows ☞9

Statute providing that a check must be presented for payment within a reasonable time after its issue or drawer will be discharged from liability thereon to extent of loss caused by delay does not purport to create a duty of diligence to other persons and merely makes a defense available to drawer to extent unreasonable delay in presentment causes loss to him and did not impose duty on title guarantee company representing vendor in escrow realty transaction to promptly present purchaser's check for payment. Civ.Code, § 3265b.

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Phil F. Garvey, San Francisco, John J. Jones and Julia M. Easley, San Jose, for appellants.

Royal E. Handlos, San Francisco, for respondent.

GIBSON, Chief Justice.

Plaintiffs appeal from a judgment for defendant in an action to recover damages arising from the alleged negligence of defendant in failing to present for payment a

check delivered to it in connection with a real estate transaction.

On July 3, 1946, Marian Hublit, a real estate agent and one of the plaintiffs herein, wrote a letter to defendant at Hollister requesting it to "prepare title search, necessary deed and deed of trust etc. covering the sale of 608 acres in San Benito County by Harry Rianda to Nick Daskarolis." She enclosed an unsigned copy of a "Deposit Receipt" or sales agreement on which the names of Daskarolis and plaintiff Rianda were typed after the word "signed" at the appropriate places for their signatures. Under the terms of the agreement, the total sales price was \$91,200, payable \$30,000 within 60 days, and the balance by installment note secured by a deed of trust. The agreement acknowledged receipt of a deposit of \$5,000. (This sum was apparently retained by plaintiffs as a forfeiture and is not involved in this action.) The agreement further provided that the deposit should be increased to 10% of the purchase price upon "acceptance by purchaser," and that any payments could be converted into cash, if made in other than lawful money, and could be retained by the seller in case of default.

On July 5, Hublit sent defendant a \$5,000 check drawn by Daskarolis on a Hollister bank. This check, which named defendant as payee, was not accompanied by any explanations or instructions. Although the check may have been given in pursuance of the agreement that the deposit was to be increased to 10% of the purchase price, defendant was not informed that such was its purpose, and the check was for \$880 in excess of the amount required to complete the necessary deposit of \$9,120. Defendant's manager endorsed the check, "Pay to the order of 12 The Hollister National Bank 12 Hollister, Cal. Escrow Account San Benito Title Guarantee Co.," and placed it in defendant's files with other papers relative to the transaction.

A few days later Hublit told defendant that Daskarolis' wife was to be named as a grantee in the deed from Rianda, that the cash payment was to be \$27,000 rather than

\$30,000, and that the amount of the note secured by trust deed was to be correspondingly increased to \$64,200. Defendant made a title search and prepared a deed, note, deed of trust and proposed escrow instructions. No reference was made in these instructions to the \$5,000 payment mentioned in the deposit receipt, nor to the \$5,000 check made payable to defendant. The seller's instructions, which were signed by Rianda, authorized defendant to deliver the deed to the grantees upon the payment to the defendant of the sum of \$27,000 plus the note and deed of trust for \$64,200. The buyer's instructions were never delivered to or signed by Daskarolis, and he never gave defendant any instructions, oral or written, with respect to the transaction. Although he inspected the note and trust deed at defendant's office, he did not sign them.

In a letter to defendant dated August 23, Rianda's attorney, whose office was in San Jose, demanded that defendant forward \$5,000 to Rianda "covering" the amount deposited with defendant, stating that Daskarolis had indicated his intention not to complete the purchase. On Monday, August 26, Daskarolis withdrew \$5,000 from his commercial account with the drawee bank, leaving a balance insufficient to cover the check, and orally informed defendant that he had "stopped payment" on the check. It does not appear when the letter from Rianda's attorney was received but defendant answered it on August 26, informing the attorney of the action taken by Daskarolis. The time set for performance of the contract by Daskarolis passed, and plaintiffs brought this action seeking to recover the amount of the check on the theory that defendant was negligent in failing to cash or deposit the check promptly. The title company defended on the ground that it had received no instructions from either party to cash or deposit the check and that it was not guilty of negligence in failing to do so.

The court found that defendant had not been negligent, and the question to be determined is whether there is evidence to support this finding.

[1,2] Defendant's duty to plaintiffs is to be determined by the application of ordinary principles of agency, whether defendant be considered as escrow holder with duties to both Rianda and Daskarolis or as agent of plaintiffs alone. It is the duty of an agent to obey the instructions of his principal and exercise in his employment reasonable skill and ordinary diligence, and, if defendant violated instructions or acted negligently in retaining the check in its files, it would ordinarily be liable for any loss occasioned by its breach of duty. See *Jones v. Title Guaranty & Trust Co.*, 178 Cal. 375, 380, 173 P. 586; Rest., Agency, §§ 385, 379; 1 Mechem on Agency [1914], §§ 1245, 1274-1287, 1309; 19 Am.Jur. § 465; 30 C.J.S., Escrows, § 8, pp. 1205-1206.

[3] Plaintiffs contend that the terms of the sales agreement relating to the seller's option to retain all amounts paid in the event of default, and authorizing the seller to convert into cash all payments made in other than lawful money, constituted instructions to cash the check or at least put defendant on notice of facts sufficient to place it under a duty to present the check promptly. We cannot agree, however, that mere knowledge of the terms of the unsigned copy of the agreement placed defendant under such a duty, and, moreover, it is difficult to see how the agreement can be construed as a direction to defendant to cash the check. It does not mention defendant or provide for an escrow, and it does not require anyone to cash checks received from the buyer. Nor is any reference made in the agreement to the check which was subsequently delivered to defendant without instructions. There is nothing in the agreement or elsewhere in the record to show that it was intended or understood as an instruction to defendant to do anything with the check. There was no evidence that defendant was ever informed that the sales agreement had been signed by the parties or that there was a binding contract, and, as we have seen, the instruction signed by Rianda did not follow the terms of the agreement, but contained different provisions as to the amount of the cash payment, the principal



of the note and trust deed, and the parties to be named as grantees. Furthermore, defendant was not informed that the check was a part of a deposit which was then due and which might be forfeited in the event of default by Daskarolis. In this connection, it is significant that, as before stated, the amount of the check did not conform to the amount of the deposit required by the terms of the agreement. It is likewise significant that, although Daskarolis made the check payable to defendant, he never gave defendant any instructions concerning it.

[4] It is argued that the letter of August 23, notifying defendant of Daskarolis' contemplated default and demanding payment of \$5,000, placed defendant under a duty to present the check for payment. Even if we assume that the letter might have placed defendant under such a duty, the record does not show that defendant had any opportunity to act before Daskarolis made the withdrawal from his bank account. There was no proof as to when the letter was mailed, where it was mailed, when it was received, or when it should have been delivered to defendant in Hollister in the ordinary course of the mails. All that the record shows is that the letter was dated at San Jose August 23, which was a Friday, and that it was answered by defendant by a letter dated August 26, which was a Monday. Neither was there any evidence as to what time of day on Monday, August 26, Daskarolis withdrew the money or notified defendant that he had "stopped payment" on the check. Under these circumstances the trial court was not compelled to find that the defendant received notice of plaintiffs' claim in time to act.

[5] Plaintiffs finally contend that even in the absence of instructions to cash the check there was a duty imposed on defendant by statute to present the check promptly. They rely on Civil Code section 3265b, part of the Uniform Negotiable Instruments Law, which provides: "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the ex-

tent of the loss caused by the delay." It is obvious, however, that the code section does not aid plaintiffs here. Regardless of what duty, if any, it imposes upon a holder or payee as to the drawer, it does not purport to create a duty of diligence to other persons. It merely makes a defense available to the drawer to the extent that unreasonable delay in presentment causes loss to him. See Brannan's Negotiable Instrument Law [1932] § 186, p. 1044 et seq.

We cannot say as a matter of law that defendant was guilty of any breach of duty in failing to cash or deposit the check.

The judgment is affirmed.

SHENK, EDMONDS, CARTER,  
TRAYNOR, SCHAUER, and SPENCE,  
JJ., concur.



97 Cal.App.2d 30  
**KLECKNER v. BANK OF AMERICA NAT.  
TRUST & SAVINGS ASS'N et al.**  
Civ. 17408.

District Court of Appeal, Second District,  
Division 1, California.

April 18, 1950.

Rehearing Denied May 5, 1950.

Hearing Denied June 12, 1950.

Action by Leonard Kleckner against the Bank of America National Trust & Savings Association, a national banking association, and Marguerite Bruce Wetherbee, to set aside a sale of realty under a power of sale contained in a second trust deed on ground of misconduct of party conducting sale in refusing to accept other than immediate cash amount of bids proffered. The Superior Court, Los Angeles County, Walter H. Odemar, J., entered judgment for the defendants, and the plaintiff appealed. The District Court of Appeal, Drapeau, J., held that a sale under a power in a mortgage or trust deed must be conducted in strict compliance with terms of power, and since trustee was not advised that bid refused was on behalf of plaintiff as beneficiary under third trust deed

trustee had right to deem bid as it was made a part of conversation and argument then going on, and trustee was not required to hold up sale while bidders left place to go to banks or elsewhere to get cash.

Judgment affirmed.

#### 1. Mortgages ⇨360

A sale under a power in a mortgage or trust deed must be conducted in strict compliance with terms of power and must be made fairly, openly, reasonably and with due diligence and sound discretion to protect right of mortgagor and others, using all reasonable efforts to secure best possible or a reasonable price.

#### 2. Mortgages ⇨363

Where realty was offered for sale under a power of sale in a trust deed, which prescribed that terms of sale were "cash in lawful money of the United States, payable at time of sale", and terms were recited in notice of sale which plaintiff received but trustee was not advised that bid offered and refused was on behalf of plaintiff as beneficiary under third trust deed, refusal of trustee to accept bid on behalf of plaintiff after failure to produce cash to support bid and making sale to owner of second trust deed was not arbitrary.

#### 3. Mortgages ⇨360, 364

Where realty was sold under a power of sale in second trust deed terms of which were prescribed in deed and recited in notice of sale as cash payable at time of sale, trustee was justified in peremptorily demanding instantaneous payment in cash or entire amount bid on behalf of plaintiff owner of third trust deed, and trustee was not obligated to adjourn sale to afford bidder opportunity to obtain currency to meet bid, especially since plaintiff could have tendered amount due on second trust deed and terminated power of sale.

#### 4. Mortgages ⇨360

Once sale under a trust deed has started, it is duty of trustee to continue with reasonable dispatch, and, terms being cash, trustee is not required to hold up sale while sundry bidders leave place to go to banks or elsewhere to get cash.

#### 5. Execution ⇨233

In execution sales, it is duty of sheriff to require immediate payment in cash of all bids. Civ.Code, § 1657.

#### 6. Mortgages ⇨374

Trust deeds are a part of business transactions, and right to sell realty pledged under a power of sale properly exercised implements security for payment of money loaned, and to require trustees to have with them deeds to property pledged to be executed and delivered to purchasers at time of sale would unduly interfere with them.

#### 7. Mortgages ⇨374

Where trustee conducting sale of realty under power of sale in trust deed accepted bid on behalf of plaintiff owner of third trust deed and then asked for cash to close the bid as required in trust deed and stated in notice of sale, but was told bidder did not have cash but would give him a check for amount, and trustee declared bid invalid, trustee was not required to tender deed at time of such sale, and, bid being ineffective, plaintiff had no right to the deed.

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Laurence J. Rittenband and Jack Gold, Los Angeles, for appellant.

Samuel B. Stewart, Jr., San Francisco, Hugo A. Steinmeyer and Robert H. Fabian, Los Angeles, for respondent bank.

J. G. Moser and Richard A. Lavine, Los Angeles, for respondent Wetherbee.

DRAPEAU, Justice.

Dave's Blue Room, Inc., was the corporate owner of a restaurant property on the Sunset Strip in Los Angeles. The real property was subject to three trust deeds, junior to each other in the following order: The first lien was to secure a promissory note to Bank of America; the second lien was to secure a note to the defendant, Marguerite Bruce Wetherbee; the third lien was to secure a note to the plaintiff, Leonard Kleckner.

Default was made in monthly payments of principal and interest due under the second trust deed. Notices of default and of

sale were given, and the property was sold under a power of sale in the deed. The terms of sale prescribed in the trust deed, and recited in the notice of sale, were "cash in lawful money of the United States, payable at time of sale." Plaintiff received and read a copy of the notice of sale.

Defendant, Bank of America, is beneficiary under the first trust deed, and trustee under the second. There is no dispute respecting the first lien, the sale of the property having been made subject to the first trust deed.

This lawsuit grows out of the conduct of the sale by an assistant trust officer of the bank trustee, called by all of the parties the "auctioneer."

A number of persons were present at the sale. Some of them at times were argumentative, to say the least. Some contended with the auctioneer that the sale should be conducted like a bankruptcy sale, with a day or two allowed to get the money to support bids; others that he should take personal checks. When he announced that cash offers only would be accepted, considerable grumbling and rumbling ensued.

The auctioneer read the essential terms of the sale, and called for bids. Fourteen thousand dollars was bid by an attorney for a Mr. Blythe; this covered the amount due on the second lien. Mr. Blythe was a friend and backer of plaintiff. No statement was made that this bid was on behalf of the plaintiff, and the auctioneer had no notice that it was. The auctioneer declared the property sold, pursuant to Mr. Blythe's bid.

The auctioneer asked to whom the trustee's deed should be made, and was informed that K. B. S. Construction Company would be the grantee. K. B. S. Construction Company was a corporation controlled by Mr. Blythe. Mr. Blythe testified on the trial that the title was to be held by his corporation to secure the cash he was advancing to plaintiff if the restaurant continued in operation, or to insure a part of possible profits for himself if the property was sold.

The auctioneer then asked for cash, to conform to the bid. He was told that the

bidder did not have the cash, but would give him a check for the amount. The auctioneer stated that no personal checks would be received; that the sale was for cash; and that if cash was not immediately forthcoming he would declare the bid invalid and sell the property to some other bidder.

The bidder for Mr. Blythe stated that they would immediately go to the bank and get the cash, but the auctioneer refused to delay the sale. The auctioneer would have taken a cashier's check, a certified check, or a postal money order, but none of these was tendered.

The plaintiff and his financial backer left the sale and went by automobile to a bank about fourteen blocks away. They made good time, six and one half minutes each way, and double parked in front of the bank. They were back at the place of sale with the money within fifteen to twenty minutes. But they didn't make it. The auctioneer was gone, and the property had been sold to the beneficiary of the second trust deed for the amount due on her lien.

So the restaurant now belongs to the defendant Marguerite Bruce Wetherbee, subject only to the first trust deed; and the plaintiff finds his junior lien extinguished. And at the time Dave's Blue Room, Inc., was bankrupt.

The case was tried by a judge of the Superior Court. Findings were made, and judgment followed, declaring the beneficiary of the second trust deed owner of the property; that the sale was duly and properly made by the trustee; and that the trustee was not liable to the plaintiff for misconduct in the sale.

Plaintiff appeals from the judgment, and as grounds for reversal urges the following:

"1. Was the trustee justified in peremptorily demanding the *instantaneous* payment in cash of the entire amount bid by the appellant or was it the trustee's duty to procure the highest price for the property and in effectuating this purpose afford the appellant or any successful bidder a reasonable time to produce the necessary cash.



"2. Was the trustee obligated under the circumstances disclosed to adjourn the alleged second sale for a reasonable time to afford bidders at the sale the opportunity to withdraw currency from their banks to meet any bid made.

"3. Before the trustee could avoid the sale to appellant and hold him in default, was it under a duty to tender a deed to the property concurrently with its demand that appellant pay all the cash immediately.

"4. Was there any binding local custom proved on the trial that in sales of real property at public auction a successful bidder must instantaneously pay the entire amount of his bid in cash and no reasonable time accorded him to procure it."

[1] A sale under a power in a mortgage or trust deed must be conducted in strict compliance with the terms of the power. The sale must be made fairly, openly, reasonably, and with due diligence and sound discretion to protect the rights of the mortgagor and others, using all reasonable efforts to secure the best possible or a reasonable price. 59 C.J.S., Mortgages, § 572, page 959.

[2] If the auctioneer had been advised that the bid was on behalf of the plaintiff as beneficiary under the third trust deed, to have refused a request for delay of a few minutes to go to the bank might well have been held an unreasonable exercise of the trustee's power of sale. See *Winbigler v. Sherman*, 175 Cal. 270, 165 P. 943. But no such advice was given to the auctioneer. And he had a right to deem the bid as it was made a part of the conversation and argument then going on. Under the circumstances in this case the sale was not arbitrarily made, as the trial court found.

[3] Moreover, the plaintiff could have tendered to the trustee the amount due on the second lien, and thereby terminated the power of sale under the second trust deed. *Lichty v. Whitney*, 80 Cal.App.2d 696, 182 P.2d 582.

[4] It is the duty of a trustee, once it has started, to continue with reasonable dispatch with a sale under a trust deed; the terms being cash, the trustee is not required to hold up the sale while sundry

bidders leave the place to go to banks or elsewhere to get cash. Such conduct of a sale could well result in confusion, in the dispersal of bidders present, and in loss to persons represented by the trustee.

[5] In execution sales it is the duty of the sheriff to require immediate payment in cash of the bid. *Kelly v. Barnet*, 24 Cal. App. 119, 140 P. 605. Civil Code Section 1657 provides that if an act consists in the payment of money only it must be performed immediately upon the thing to be done being exactly ascertained. In *Wiltzie, Real Property Mortgage Foreclosure*, 5th Ed., 1939, Vol. 2, at page 1081, appears the following: "But if any person other than the mortgagee becomes the purchaser, where the sale is for cash, he must comply strictly with the terms of sale, and pay the price bid in cash; a note to the party entitled to the proceeds of the sale is not cash, and the tender of such note will not be a compliance with the terms of sale. It has also been held that the officer may refuse to receive checks."

What has been said disposes of all of plaintiff's contentions except the one that the trustee had to tender a deed of the property to the plaintiff concurrently with the demand for cash.

[6,7] The answer to this is twofold: First, to state the contention is to deny it. Trust deeds are a part of business transactions. The right to sell property pledged under a power of sale, properly exercised, implements the security for payment of money loaned. To require trustees to have with them deeds to property pledged, to be executed and delivered to purchasers at the very time of sale, would unduly interfere with them. The method used, as shown by the testimony in this case, is for the auctioneer to give the successful bidder a receipt for the money paid; whereupon the deed is delivered in a day or two, giving the trustee time to prepare, and to have the instrument properly executed. And, secondly, the bid being ineffective, plaintiff had no right to a deed anyway.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

97 Cal.App.2d 140

**MERCOLA et al. v. CHESTER et al.**

**CHESTER v. RODEO BUILDING CO.,  
Inc., et al.**  
Civ. 17349.

District Court of Appeal, Second District,  
Division 2, California.

April 24, 1950.

Rehearing Denied May 12, 1950.

Hearing Denied June 22, 1950.

Action for partition of ninety-nine year leasehold interest in realty, together with a building thereon, by Thomas D. Mercola, Archie A. Mercola, Joseph V. Quinn and Beverly Rodeo Company, Inc., against Frank E. Chester and Rodeo Building Company, Inc. The named defendant filed a cross-complaint against Rodeo Building Company, Inc., and the plaintiffs. The Superior Court of Los Angeles County, Joseph W. Vickers, J., entered an interlocutory judgment of partition and Frank E. Chester appealed. The District Court of Appeal, Wilson, J., held that Frank E. Chester was not entitled to share in the profits of the lease until the Mercolas has been repaid the entire amount of their advancements to joint venture for erection of building on premises leased to joint venture, which consisted of Frank E. Chester and the Mercolas.

Judgment affirmed.

#### 1. Judgment ⇨668(1)

Where parties to prior action for declaratory relief for purpose of construing joint venture agreement relating to erection of buildings on premises leased for ninety-nine years to joint venture were same as in instant action for partition of ninety-nine year leasehold interest in realty and building thereon, parties were bound by findings and final judgment in prior action.

#### 2. Tenancy in common ⇨29(2), 32

A tenant assenting to cotenant's expenditures in acquiring lease and erecting building is answerable for such expenditures and lien exists against property for amount of such expenditures.

#### 3. Partition ⇨85

Even though one cotenant does not consent to making of improvement, since

action for partition is essentially equitable in nature, court of equity is required to take into account improvements which another cotenant at his own cost in good faith placed on property which enhanced its value and to award such cost to him.

#### 4. Judgment ⇨524

A judgment must be read as a whole and its terms correlated to one another.

#### 5. Partition ⇨85, 87

Under joint venture agreement providing that parties were tenants in common of lease and of building in proportion of undivided one-half interest in one party and undivided one-half interest in the other two parties, and that the one party and the two parties were each to receive one-half interest in profits from lease and building after the two parties had been repaid out of the profits the amount expended by them in acquiring lease and constructing building, the one party would not be entitled to share in sale price on partition until the two parties had been repaid.

Nathan M. Dicker, Samuel Greenfield and Daniel A. Weber, Beverly Hills, for appellant.

Loeb & Loeb, Herman F. Selvin, Los Angeles, for respondents.

WILSON, Justice.

Action for partition of a 99-year leasehold interest in real property, together with a building thereon, the lease having been made in favor of plaintiff Thomas D. Mercola for the benefit of himself, plaintiff Archie A. Mercola, and defendant Frank E. Chester. The Mercolas subsequently assigned one half of their interest to plaintiff Joseph V. Quinn. An interlocutory judgment of partition was entered in which it was decreed that (1) the parties to the action\* are the owners of an undivided interest in lessee's interest as follows: Plaintiffs Thomas D. Mercola and Archie A. Mercola 12½ per cent each, plaintiff Quinn 25 per cent, and defendant Chester

\* Beverly Rodeo Company, Inc., was joined as a plaintiff and cross-defendant by stipulation in order that it would be bound

by any judgment entered in the action. Rodeo Building Company, Inc., was made a defendant because of its ownership of

50 per cent; (2) a referee be appointed to sell the property; (3) from the proceeds of the sale the expenses and costs of sale and plaintiffs' attorneys' fees be paid, the sum of \$97,026.92 be paid to the Mercolas representing the amount of their investment in the building, and the balance, if any, be divided among and paid to the parties in the respective proportions above mentioned.

Defendant Chester has appealed from the interlocutory judgment, his contention being that after paying the costs of the sale and the attorneys' fees the balance should be divided among plaintiffs and defendant without first deducting and paying to the Mercolas the sum above mentioned.

Prior to January, 1946, Chester and the Mercolas entered into a joint venture agreement with reference to a lease which Chester was to procure. Under date of February 21, 1946, the parties purported to reduce their joint venture agreement to writing by a letter signed by the Mercolas addressed to Chester in which it was stated "you [Chester] are to share equally with us in all net profits received after investment, investment costs, and expenses of every kind and character have been recouped by us." On February 22 a further agreement in the form of a letter was signed with reference to profits that might be received by Chester from a lease and building adjoining the property in question in this action.

The lease was procured by Chester and the building was erected by the Mercolas. Their total expenditure in connection with the acquisition of the lease and the construction of the building amounted to \$101,097.23. From the operation of the building they recovered a portion of their investment, leaving the sum of \$97,026.92 still unrecovered. No issue is presented on this appeal in respect to the correctness of either of such amounts.

Disagreement having arisen between

Chester on the one hand and Quinn and the Mercolas on the other, Chester brought an action for declaratory relief for the purpose of having the two writings construed. In that action the court made findings of fact that the true agreement between the parties was as follows: Chester would procure a long term lease for the benefit of the joint venture which would permit the erection of a store and office building on the leased premises; the lease would be taken in the name of Thomas D. Mercola as lessee for the benefit of the joint venturers; the Mercolas would pay the cost of the acquisition of the lease and of the construction of the building; the parties would become tenants in common of the lease and the building; Chester was to receive a one-half interest in the profits howsoever derived from the lease and the building, and the Mercolas were to receive a one-half interest therein; all profits would be distributed to the Mercolas until they had received an amount equal to the actual cost expended by them in acquiring the leasehold and constructing the building; profits from any interest acquired by Chester in adjoining lots were to be divided equally.

The court further found that in pursuance of the agreement Chester procured the lease, Thomas D. Mercola being named therein as lessee; the writings of February 21 and 22, 1946, did not represent the true agreement of the parties; it was the intention of the joint venturers that division of the profits should be made as above stated "subject to the recoupment by the Mercolas of the actual cost of said lease and building."

As conclusions of law the court determined that Chester was entitled to a judgment reforming and revising the agreement between the parties so as to conform to their true intent. The agreement as reformed by the court is set out in full in the conclusions. Among other things the reformed agreement provides that the par-

an adjoining building which had an entrance and an elevator used in connection with the building involved in this action. The interests of the two corporations are not involved in this ap-

peal. When "plaintiffs," "defendant," "respondents" and "appellant" are mentioned in this opinion such terms will refer only to the individual parties.



ties are tenants in common of the lease and of the building in the proportion of an undivided one-half interest in favor of Chester and an undivided one-half interest in favor of the Mercolas; that Chester on the one hand and the Mercolas on the other are each to receive a one-half interest in the profits, howsoever derived, from the lease and the building subject, however, to the proviso that all net profits shall be distributed to the Mercolas until they shall have received an aggregate amount equal to the actual cost expended by them in acquiring the leasehold plus the actual cost expended in constructing the building.

[1] Judgment was entered in conformity with the findings of fact and conclusions of law. No appeal was taken from the judgment and it had become final at the time of the trial of the instant action. Since the parties to the prior action are the same as those in the case now before us on appeal they are bound by the findings and judgment in the first action.

After the entry of the former judgment the Mercolas and Quinn commenced the instant action for partition of the property. An interlocutory judgment was entered containing the terms set forth in the first paragraph of this opinion.

[2, 3] The language of the findings and conclusions in the prior action and in the reformed agreement is clear and unambiguous. Chester is not entitled to share in the profits of the lease "howsoever derived" until the Mercolas have been repaid the entire amount of their investment. Obviously the profits derived from the lease are not limited to the amount received from rentals of the building after deducting the costs of operation but would include the balance of the sale price of the lease and building remaining after the Mercolas' advancements had been repaid to them. Furthermore, the cost of the acquisition of the lease and the construction of the building having been expended with the assent and authorization of Chester, he is answerable therefor and a lien exists against the property for the amount of such expenditure. *Higgins v. Eva*, 204

Cal. 231, 238, 267 P. 1081. Even though one cotenant does not consent to the making of an improvement, since an action for partition is essentially equitable in its nature, a court of equity is required to take into account the improvements which another cotenant, at his own cost in good faith, placed on the property which enhanced its value and to award such cost to him. *Ventre v. Tiscornia*, 23 Cal.App. 598, 604-605, 138 P. 954.

[4] Appellant contends that since the provision for the Mercolas' right of recoupment is not in the clause of the judgment declaring that Chester on the one hand and the Mercolas on the other are the owners of undivided one-half interests in the leasehold as tenants in common but first appears in a separate clause of the judgment which refers to the division of profits from the lease and building, the recoupment out of "net profits" does not mean recoupment from a judicial sale. The terms of an agreement or of a judgment can not always be stated in one sentence or even in one paragraph. The document must be read as a whole and its terms correlated to one another. So considered, neither the reformed agreement nor the judgment is ambiguous.

[5] If the leasehold and building should be sold for an amount greater than the Mercolas' investment the difference would be a profit to be divided as provided in the former judgment. On the other hand, if the sale should yield an amount insufficient to repay the total amount expended by them, the division of the sale price in the manner contended for by Chester would result in his receiving a cash award without having made any cash investment and in the Mercolas' loss of their funds which were expended in the expectation, affirmed by the explicit contract of the parties, that they would be repaid before any division would be made. The result sought by appellant would be unjust and unsupportable in law or in equity.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

97 Cal.App.2d 1

**PEOPLE v. HINZE.**

**Cr. 2174.**

District Court of Appeal, Third District,  
California.

April 14, 1950.

Jack D. Hinze was convicted in the Superior Court of Shasta County, Albert F. Ross, J., of the crime of escape, and he appealed. The District Court of Appeal, Van Dyke, J., held that evidence that defendant had not been informed of his right to assistance of counsel in prosecution in justice court was inadmissible in prosecution for escape from custody under sentence imposed in justice court upon his plea of guilty.

Judgment affirmed.

Peek, J., dissented.

**1. Escape ☞10**

Evidence that defendant was sentenced to pay a fine of \$250 for a violation of Vehicle Code or be imprisoned in county jail to satisfy such fine, that he was committed to county jail in custody of sheriff until judgment should be satisfied and that he escaped from such custody within the period set by sentence was sufficient to prove the essentials of crime of escape without proof that fine had not been paid, since presumption that sheriff regularly performs his official duty, including that of immediately freeing a prisoner upon expiration of term of sentence, however brought about, would sufficiently prove that nothing had happened to shorten term of imprisonment originally imposed. Pen. Code, §§ 1446, 1456, 4532; Vehicle Code, § 510; Code Civ.Proc. § 1963, subd. 15.

**2. Escape ☞1**

Lawful custody is an essential element of the crime of escape. Pen.Code, § 4532.

**3. Escape ☞4**

A prisoner in a penal institution, whose sentence is irregular or voidable, is guilty of the crime of escape, if, before some court has so adjudged, he defies his guards and runs away. Pen.Code, § 4532.

**4. Escape ☞10**

Evidence that defendant was not informed of his constitutional right to assist-

ance of counsel in prosecution in justice court for a violation of Vehicle Code was properly excluded in prosecution for escape from custody under sentence imposed in justice court upon his plea of guilty, since such evidence would not show that custody was so unlawful as to entitle defendant to escape therefrom with impunity. Pen.Code, § 4532; Vehicle Code, § 510.

Donald R. Colvin, Redding, for appellant.

Fred N. Howser, Attorney General, By:  
Gail A. Strader, Deputy, for respondent.

VAN DYKE, Justice.

This is an appeal from a judgment following conviction of the crime of escape as denounced by Section 4532 of the Penal Code. On April 26, 1948, there was filed in the Justice's Court of Township No. 6, County of Shasta, a complaint charging defendant with driving a vehicle in violation of the provisions of Section 510 of the Vehicle Code and warrant thereupon was issued. On the same day after his arrest he pleaded guilty of the offense charged. Time for judgment was waived and the court rendered the following judgment: "Wherefore it is hereby ordered as punishment for the offense charged, that you, Jack D. Hinze, pay a fine of \$250.00 or be imprisoned in the county jail to satisfy the same in the proportion of one day for every 2 dollars thereof."

Under the same date an abstract of the foregoing proceedings was certified by the Justice of the Peace, and the Sheriff of Shasta County was directed to hold and imprison the defendant until the judgment should have been satisfied as therein prescribed. Nothing further appears concerning the imprisonment of the defendant until on August 12, 1948, when, as shown by the records of the sheriff kept at the county jail, defendant was placed in that jail. On August 21st he was made a trusty and permitted to go outside the jail for the purpose of performing work. He did not return, but disappeared and was not found, though search was made. He next appeared at Ukiah, California, where he turned himself in to the Sheriff of Mendocino Coun-

ty. He was returned to Shasta County and informed against as having violated the aforesaid section of the Penal Code. He was tried before a jury, which found him guilty of the offense charged, and from the judgment following he takes this appeal.

[1] It is first contended by appellant that, because the Justice of the Peace sentenced him to pay a fine of \$250 or be imprisoned in the county jail one day for each \$2 of fine not paid, the People, in order to convict him, must have proved the fine had not been paid. This contention cannot be sustained. The abstract of proceedings and commitment above referred to were received in evidence and therefrom it appears that the appellant had been regularly complained against, arrested upon warrant, informed of his rights, arraigned and his plea of guilty entered. It further appeared that he was regularly sentenced and committed to the county jail in the custody of the sheriff until the judgment should have been satisfied. It was proved that he escaped from that custody within the period set by the sentence. This evidence was sufficient to prove the essentials of the crime charged.

The judgment substantially followed the provisions of Section 1446 of the Penal Code which provides that a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied. Hence the judgment rendered here would result in his being held in the county jail for the term of 125 days unless that term was shortened by whole or partial payment of the fine. "When a judgment is entered imposing a fine, or ordering the defendant to be imprisoned until the fine is paid, he must be held in custody during the times specified in the judgment, unless the fine is sooner paid," Penal Code, Sec. 1456. Upon expiration of the term of sentence, however brought about, it would be the duty of the sheriff to immediately free his prisoner. It is presumed that the sheriff regularly performed his official duty. C.C.P., Sec. 1963, subd. 15; *People v. Serrano*, 123 Cal.App. 339, 11 P.2d 81; *People v. Crider*, 76 Cal.App. 101, 244 P. 113; *People v. Siemsen*, 153 Cal. 387, 390, 95 P. 863;

*National City v. Dunlop*, 86 Cal.App.2d 380, 384, 194 P.2d 788. The application of this presumption sufficiently supplies proof that nothing had happened to shorten the term of imprisonment originally imposed.

It is next contended that the trial court erred in refusing to permit appellant at his trial in this case to prove that he had not, during the proceedings in the Justice's Court, been informed of his right to counsel, it being claimed that if the constitutional rights of the appellant in that proceeding had been denied him, his conviction, sentence and judgment would be thus shown to have been void and that his imprisonment at the time of his escape would have been illegal to the extent that he would have been justified in freeing himself therefrom and would not have been guilty of the crime of escape in so doing. These contentions likewise cannot be sustained. Touching these matters, the following occurred at the trial herein. After the prosecution had closed its case the defendant was called to the stand as a witness in his own behalf. He testified that he recalled his arrest in March, 1948, while driving a car near Fall River Mills. Thereupon a question intended as a preliminary to proof of violation of his constitutional rights was objected to and the court stated, in effect, that it did not consider such testimony would be material and would sustain the objection. Counsel for defendant thereupon made an offer to prove that, if permitted, the defendant would testify he was taken before the Justice of the Peace the day after he was arrested; that the Justice then told him, "I see nothing between you and liberty but 125 days in jail"; that appellant was not then represented by an attorney; that he was never informed by Judge Callison or anyone else that he had any right to be represented by counsel; "that until he discussed the matter with me [defense attorney Colvin] after I had been appointed as his counsel by this Court he did not know that a defendant in a Justice Court charged with a misdemeanor was entitled to representation by counsel"; that had he been so informed he would have insisted that an attorney hired by himself be present; that



he would have asked to have an opportunity to obtain counsel. The court thereupon ruled that the proffered testimony would be inadmissible and after a short cross-examination the defense rested. In support of his present contention appellant relies upon such cases as *People v. Ah Teung*, 92 Cal. 421, 28 P. 577, 15 L.R.A. 190; *People v. Clark*, 69 Cal.App. 520, 231 P. 590; *People v. Avilez*, 86 Cal.App.2d 289, 194 P.2d 829; *People v. Chesser*, 29 Cal.2d 815, 178 P.2d 761; *In re McCoy*, 32 Cal.2d 73, 194 P.2d 531, and *In re Jingles*, 27 Cal.2d 496, 165 P.2d 12.

We shall treat the offer of proof made as fully adequate to present the points relied upon. No objection was made to its sufficiency and it appears from the transcript that the trial court was fully advised of the theory upon which it was claimed that the proffered testimony was admissible. It must be said that if such evidence had been received and would have, taken together with other evidence in the record, supported a verdict in appellant's favor, then it ought to have been received. It must be said, also, that the appellate courts of this State and of the United States have recently given considerable attention to the question of the effect upon criminal trials of any failure of trial courts to preserve and safeguard the constitutional rights of an accused to be represented by counsel in all such proceedings in all courts.

[2] Relative to the proof necessary to convict on a charge of escape, our Supreme Court in *People v. Ah Teung*, supra, 92 Cal. at page 425, 28 P. at page 578, 15 L.R.A. 190, declared: " \* \* \* An escape is classed as a crime against public justice; and the law, in declaring it to be an offense, proceeds upon the theory that the citizen should yield obedience to the law; that, when one has been by its authority or command confined in a prison, it is his duty to submit to such confinement until delivered by due course of law, no matter whether he was committed to await a future trial or as a punishment after judgment of conviction, or for any other purpose authorized by law. But when the imprisonment is unlawful, and is itself a

crime, the reason which makes flight from prison an offense does not exist. In such a case the right to liberty is absolute, and he who regains it is not guilty of the technical offense of escape. \* \* \* there can be no escape, in the sense of the law, unless there was a lawful custody." The foregoing declaration was quoted and followed in *People v. Clark*, supra.

[3] These decisions, in line with many others that might be referred to, undoubtedly declare the rule applicable to a case of this nature. But it does not follow that a person who has been wrongfully imprisoned may always free himself therefrom with impunity. On the contrary, it is often the case that his imprisonment, though wrongful, proceeds from such sources that it is incumbent upon him to apply to a court of proper jurisdiction to declare and adjudge the wrongfulness of his imprisonment and in a proper case have it terminated by the court's order. In such a situation, if the person so wrongfully being imprisoned undertakes to act to free himself by leaving that imprisonment he is guilty of the offense of escape. Such we hold was the situation in which the appellant was placed when on August 21st he escaped from the custody in which he was being held, assuming, for the purpose of this discussion, that by virtue of the things he sought to prove that imprisonment had been arrived at unlawfully. Thus it was said in *Aderhold v. Soileau*, 5 Cir., 67 F.2d 259, at 260: " \* \* \* A prisoner in a penal institution whose sentence is irregular or voidable may not for that reason, and before some court has so adjudged, defy his guards and run away. A difference of opinion might cause a death. Such a doctrine would set discipline at naught."

In *Bayless v. United States*, 9 Cir., 141 F.2d 578, a judgment in a habeas corpus proceeding determined that defendant's conviction in another court was unlawful because defendant did not have assistance of counsel. During a hearing in the habeas corpus proceedings defendant attempted to escape from custody and because of that was later convicted of such attempt to escape. On appeal he contended that the

original judgments and commitments were void relying upon the opinion in the habeas corpus case, and therefore that the custody from which he attempted to escape was alike unlawful. In affirming the conviction the court, citing *Aderhold v. Soileau*, supra, again declared that a prisoner in a penal institution whose sentence is irregular or voidable may not for that reason, and before some court has so adjudged, defy his guards and run away.

Turning to the two cases relied upon by appellant, *People v. Ah Teung*, supra, and *People v. Clark*, supra, there is this to be observed concerning those decisions. In the first case the defendant had assisted one Lee Yick to escape from the Alameda County Jail in which he had been placed by a deputy marshal who had, as was shown in the opinion, no authority to imprison him. The court said that there was nothing to justify the action of the marshal in taking him into custody or removing him from the district in which he was found to the County of Alameda, or for the sheriff of the latter county to imprison him in its jail by direction of such marshal. It was concerning that situation that the language hereinabove quoted was used and the court carefully distinguished between the case before it and cases of informality in the commitment, saying: "The distinction between these two latter cases and the one before us grows out of the wide difference which must necessarily exist between an imprisonment without any process, and *wholly* without authority of law, and an imprisonment under a process which is simply irregular in form." In *People v. Clark*, supra, the court in which the defendant had been convicted of the crime of burglary in the second degree sentenced him to be punished by imprisonment in the state prison for the term prescribed by law and directed that he be delivered to the Warden of the State Prison at San Quentin. Under the same date the court suspended execution of that sentence and remanded the defendant to the custody of the sheriff of that county to work at the county road camp. From this road camp the defendant escaped. The reviewing court declared that the trial

court evidently had in mind subdivision (a) of Section 1203 of the Penal Code, as it then read, providing for the suspending of sentence, but had failed to give proper attention to a portion of that subdivision, which read: "In the case of such suspension of imposition or execution of sentence, the court shall place such person on probation and under the charge and supervision of the probation officer \* \* \* during said suspension." [69 Cal.App. 520, 231 P. 590.] This section, the court held, clearly contemplated that the defendant, while on probation and conforming to the terms thereof, should be at large and not in confinement and said therefore that the trial court upon a suspension of sentence was without authority to further restrain or confine the defendant and declared that he had not been guilty of escape because the court's order gave to the officers no authority to imprison him.

In *re Jones*, decided by this court on habeas corpus, and reported in 88 Cal.App.2d 167, 198 P.2d 520, while declaring that a judgment arrived at through proceedings which denied constitutional rights was a void judgment, nevertheless remanded the petitioner to the superior court from whence he had been committed for further proceedings. That case does not constitute authority for saying that had the person there involved escaped from the custody into which he had been wrongfully committed he would not have been guilty of the crime of escape.

We believe that the case of *In re McCoy*, supra, points out the unsoundness of appellant's position. There the petitioner in habeas corpus had been deprived through acts of the court officers of the benefit of counsel. He came into the hands of the county sheriff after a plea of guilty and a sentence to the county jail. The state contended that if the court determined that he should be discharged from the custody of the sheriff of the county he should still be sent back to the police court, permitted to withdraw his plea, given the right to engage counsel and proceed with his defense. Said the Supreme Court [32 Cal.2d 73, 194 P.2d 533]:

"\* \* \* This presents the question as to whether or not a petitioner who is wrongfully imprisoned may be remanded to the trial court for correction of procedural errors.

\* \* \* \* \*

"No reason appears for treating a case where the defendant is deprived of his right to counsel differently from one in which other procedural error or irregularity has occurred. Accordingly, the writ is discharged and the petitioner is remanded to the custody of the sheriff for further proceedings in the police court of the city of Oakland, in conformity with his constitutional right to counsel."

Had the appellant here either appealed from the judgment of the Justice's Court or in proper time petitioned a court of competent jurisdiction in habeas corpus and been able to establish what he here offered to prove, the utmost relief he could have obtained would have been the setting aside of proceedings subsequent to arraignment and plea in the Justice's Court and his remand to that court for further proceedings. As noted in the case of *In re McCoy*, supra, the acts and proceedings of which he complains "did not acquit him of the offense" and he would be subject to be tried upon any valid charge made against him in the complaint in the Justice's Court so far as the alleged invalidity of the proceedings therein be concerned.

[4] If we be correct in the foregoing, then the offered testimony would not have been sufficient to prove a situation whereunder appellant would have been justified in escaping from his confinement, and on the contrary at most would have shown a situation whereunder appellant's sole remedy would have been application to some court for an order relieving him therefrom. It must be held, therefore, that the trial court did not err in refusing to admit the testimony which it ruled out.

The judgment is affirmed.

ADAMS, P. J., concurs.

PEEK, Justice.

I dissent. I cannot agree with the conclusion reached in the majority opinion.

It appears to me that the situation presented in the instant case falls squarely within the rule enunciated by the Supreme Court in *People v. Ah Teung*, 92 Cal. 421, 28 P. 577, 15 L.R.A. 190 and by the District Court in *People v. Clark*, 69 Cal.App. 520, 231 P. 590.

In the *Ah Teung* case the essential facts were that the defendant was convicted of assisting in the escape of a friend who was being held in a county jail at the request of a Deputy United States Marshal under no formal order or other proper direction. In the *Clark* case the defendant effected an escape from a county road camp where he was being held under an illegal judgment. The basis of the conclusion of the court in each case is embodied in an excerpt from the opinion in the case of *Ah Teung*, which is quoted in the majority opinion herein, that "\* \* \* \* An escape is classed as a crime against public justice; and the law, in declaring it to be an offense, proceeds upon the theory that the citizens should yield obedience to the law; that, when one has been by its authority or command confined in a prison, it is his duty to submit to such confinement until delivered by due course of law, no matter whether he was committed to await a future trial or as a punishment after judgment of conviction, or for any other purpose authorized by law. But when the imprisonment is unlawful, and is itself a crime, the reason which makes flight from prison an offense does not exist. In such a case the right to liberty is absolute, and he who regains it is not guilty of the technical offense of escape. \* \* \* there can be no escape, in the sense of the law, unless there was a lawful custody."

However, it also should be noted that the court recognized the distinction between an imprisonment without any process, and wholly without authority of law, and an imprisonment under a process which is simply irregular in form. On this point the court stated 92 Cal. at page 426, 28 P. at page 578, 15 L.R.A. 190, as follows: "Indeed, for a mere irregularity in the form of a warrant or commitment, the court would not be authorized to discharge a prisoner on habeas corpus, (Pen.Code, §



1488;) and much less would the prisoner himself be justified in treating it with contempt, as he might do if it were wholly void and incapable of amendment."

The rule so enunciated, together with the distinction made therein, which is the majority rule, see *Kelley v. Meyers*, 124 Or. 322, 263 P. 903, 56 A.L.R. 666; *Moore v. Commonwealth*, 301 Ky. 851, 193 S.W.2d 448, 163 A.L.R. 1137, has been neither modified nor disapproved by our Supreme Court.

Thus it seems to me that the one issue presented herein is dependent solely upon the question as to whether the imprisonment of the defendant, following a criminal proceeding in which he was not advised of his constitutional rights, was such an unlawful imprisonment that his departure from confinement did not constitute an escape within the rule laid down in the *Ah Teung* and *Clark* cases.

The Supreme Court of the United States has emphatically declared [subject to certain qualifications not present in the instant case] that the failure to strictly comply with the terms of the Sixth Amendment to the Federal Constitution results in the court losing jurisdiction to proceed and that the judgment of conviction pronounced by "a court without jurisdiction is void." *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 1025, 82 L.Ed. 1461, 146 A.L.R. 357. The courts of this state have approved a like interpretation of the provisions of Article I, section 13 of our Constitution. *People v. Lanigan*, 22 Cal.2d 569, 140 P.2d 24, 148 A.L.R. 176; *In re Jones*, 88 Cal. App.2d 167, 198 P.2d 520; See also 3 A.L.R.2d 1003.

Applying this constitutional rule to the sole question presented in the instant case it would appear that if the reason which makes flight from prison an offense did not exist in the *Ah Teung* case because defendant's custody by the sheriff was without process and therefore void, and if in the *Clark* case such reason did not exist because the process under which the defend-

ant was held was illegal and gave the sheriff no legal authority to hold him, how then can it be said that in the present case the reason which makes flight from prison an offense did exist, since under the cited cases the defendants' conviction was void, and since the court, in the *Ah Teung* case specifically held that "there can be no escape, in the sense of the law, unless there was a lawful custody."

Neither the decision of this court in the *Jones* case nor of the Supreme Court in the *McCoy* case, 32 Cal.2d 73, 194 P.2d 531, both of which are cited and relied upon as the basis for the conclusion reached in the majority opinion, militates against the foregoing conclusion. Neither case involved the question presented herein, to-wit: escape, and therefore cannot be considered either as directly or impliedly overruling the decision in the *Ah Teung* case. In fact it was not even mentioned in either of the two later cases so cited. On the contrary both of those cases support the foregoing conclusion inasmuch as the judgments therein were referred to as being void. Although the defendant in each case was remanded to the trial court for further proceedings such remand was not based upon any process issued by the trial court but, as stated in the *McCoy* case, was predicated upon the authority of the reviewing court under section 1484 of the Penal Code, which places upon the court or judge in a habeas corpus proceeding the obligation "to dispose of such party as the justice of the case may require \* \* \*."

Furthermore I find nothing in the rule enunciated in the federal cases cited in the majority opinion which is applicable here. Not alone because I am convinced that the question has been answered both fully and specifically by the courts of this state but also because of the particular statutes under which these cases arose.

So long as the law as enunciated in the *Ah Teung* case remains unchanged the courts of this state are bound to adhere to it, and I would therefore reverse the judgment.

97 Cal.App.2d 11

**PEOPLE v. GANGER.**

District Court of Appeal, Third District,  
California.

April 14, 1950.

Willis L. Ganger was convicted in the Superior Court of Siskiyou County, James M. Allen, J., of the crime of escape, and he appealed. The District Court of Appeal, Adams, P. J., held that defendant could not contend for the first time on appeal that his detention in county jail was unlawful and that therefore his departure therefrom did not constitute an escape.

Judgment affirmed.

Peek, J., dissented in part.

**1. Criminal law** ¶576(6)  
**Escape** ¶6

Failure to file information in Superior Court within fifteen days after commitment by a magistrate holding defendant to answer upon a charge of burglary merely entitled defendant to dismissal of prosecution by order of court upon his motion, unless good cause to the contrary should be shown, and did not operate as an automatic dismissal of charge so as to entitle defendant to leave jail without authority without being guilty of an escape. Pen.Code, §§ 859, 1382.

**2. Escape** ¶6

Where a defendant has reason to believe that his imprisonment is illegal, he must apply to court for his release and not take it upon himself to terminate his imprisonment by escaping.

**3. Criminal law** ¶1028

Defendant could not contend for the first time on appeal from conviction of crime of escape that his detention in county jail was unlawful and that therefore his departure therefrom did not constitute an escape within the meaning of the law.

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Floyd Merrill, Yreka, for appellant.

Fred N. Howser, Attorney General, By: Gail A. Strader, Sacramento, for respondent.

ADAMS, Presiding Justice.

Appellant was convicted in Siskiyou County of escaping from the county jail on July 4, 1946, while confined therein under a commitment dated May 24, 1946, issued by a magistrate holding him to answer upon a charge of burglary. This appeal was taken from the judgment which followed conviction by a jury. No motion for a new trial was made.

The evidence shows that after defendant's escape he went to Oregon, thence to Washington where he was retaken and returned to Siskiyou County.

Appellant urges, as ground for reversal of the judgment, that: (1) he was illegally confined in the Siskiyou County jail at the time of his escape; (2) that on his trial it was not shown that he had been given a hearing before a magistrate as provided by section 859 of the Penal Code; (3) that there was no showing that the committing magistrate had jurisdiction of the offense with which he was charged, to wit: burglary, or that he was vested with any authority as a committing magistrate; (4) that departure from an unlawful imprisonment or custody is not an escape within the meaning of the law; and (5) that there was no showing that any extradition proceedings were taken for the return of defendant to California from Washington.

The illegality of appellant's imprisonment at the time of his escape is urged upon the ground that he was committed to the custody of the sheriff on May 24, 1946, and his escape was not made until July 4, 1946, more than 15 days after the commitment, and that there was no showing made by the prosecution that within those 15 days any information had been filed in the Superior Court charging him with burglary; that, under section 809 of the Penal Code, it was mandatory that such information be so filed, and in the absence of such action his detention when he made his escape was illegal.

[1] Section 809, *supra*, does provide that when a defendant has been examined and committed it shall be the duty of the

district attorney, within 15 days thereafter, to file an information in the superior court of the county charging the defendant with such offense. And section 1382 of the Penal Code provides that when such an information is not so filed, *the court, unless good cause to the contrary is shown*, must order the prosecution to be dismissed. However, in *People v. Heeley*, 90 Cal.App. 654, 655, 266 P. 555 (hearing in Supreme Court denied), it was held that section 809 is not mandatory; that the fact that an information is not filed within 15 days after commitment does not operate as an automatic dismissal of the charge; that while under section 1382 a defendant then *becomes subject to dismissal by the superior court*, an order by such court is necessary to effect such dismissal; *that it is the duty* of a defendant to move that court for same; and that the court shall do so "unless good cause to the contrary is shown."

[2] In *People v. Newell*, 192 Cal. 659, 669, 221 P. 622, the court said that unless application was made to the superior court for such dismissal before the trial, the right was waived. Also see *People v. Scott*, 74 Cal.App.2d 782, 783, 169 P.2d 970, holding that the benefits conferred by section 1382 may be waived by failure to claim them at the proper time. Also see *People v. Mitsunaga*, 91 Cal.App. 298, 303, 266 P. 1020; *Ex parte Apakean*, 63 Cal.App. 438, 439, 218 P. 767. The same rule appears to be applied elsewhere, that is, if a defendant has reason to believe that his imprisonment is illegal he must apply for his release and not take it upon himself to terminate his incarceration by escaping. In *Whitaker v. Commonwealth*, 188 Ky. 95, 221 S.W. 215, 216, 10 A.L.R. 145, 146, the court said that whatever his legal rights, defendant had his legal remedy; that he was not justified in leaving the jail of his own volition, and his departure from lawful custody before his discharge by process of law was an escape. In *State v. Davis*, 14 Nev. 439, 33 Am.Rep. 563, 564, it was said that a person confined by the law should be delivered by the law, and that no other means were justified. Also see *State v. Clark*, 32 Nev. 145, 104 P. 593, Ann. Cas.1912C, 754; *Aderhold v. Soileau*, 5

Cir., 67 F.2d 259, 260; *United States v. Jerome*, 2 Cir., 130 F.2d 514, 519, certiorari denied 317 U.S. 606, 63 S.Ct. 62, 87 L.Ed. 492; 21 C.J. 826; 30 C.J.S., *Escape*, § 1, p. 1142.

Defendant relies upon *People v. Ah Teung*, 92 Cal. 421, 28 P. 577, 15 L.R.A. 190; but that case was different in that there was no process by which the prisoner could be imprisoned, while here a commitment was issued by a committing magistrate. Furthermore, the *Ah Teung* opinion states, 92 Cal. at page 425, 28 P. at page 577, 15 L.R.A. 190, that when one has been confined in a prison by authority or command, it is his duty to submit until delivered by due course of law.

[3] Scrutiny of the record of the trial reveals no efforts on the part of defendant to secure his release by order of court, and it shows that the commitment issued by the magistrate was received in evidence without objection by defendant, and that he made no claim that his imprisonment was illegal, defending on the sole ground that he had left the jail only because his fellow prisoner, one Cooper, had compelled him to do so by use of a gun. It is apparent, then, that the grounds which appellant urges for reversal of the judgment are being raised for the first time on appeal, and are therefore not entitled to consideration here. *People v. Taminago*, 35 Cal.App. 238, 240, 169 P. 696 (hearing in Supreme Court denied); *People v. Smith*, 96 Cal.App. 373, 380, 274 P. 451; *Shriver v. Silva*, 65 Cal.App.2d 753, 768, 151 P.2d 528; *Downing v. Silberstein*, 89 Cal.App. 2d 838, 844, 202 P.2d 91 (hearing in Supreme Court denied); *People v. Perrin*, 67 Cal.App. 612, 615, 227 P. 924; *People v. Gonzales*, 69 Cal.App. 609, 613, 231 P. 1014; *People v. Walton*, 53 Cal.App. 35, 37, 199 P. 824.

The judgment is affirmed.

VAN DYKE, J., concurs.

PEEK, Justice.

I concur in the conclusion reached in the majority opinion but for the reasons stated in my dissent in *People v. Hinze*, Cal.App.,



217 P.2d 35. I cannot agree with that portion of the opinion wherein the case of *People v. Ah Teung*, 92 Cal. 421, 28 P. 577, 15 L.R.A. 190, is discussed.



96 Cal.App.2d 986

**RUSSELL v. WARNER et al.**

Civ. 17177.

District Court of Appeal, Second District,  
Division 3, California.

April 14, 1950.

Rehearing Denied May 10, 1950.

Hearing Denied June 12, 1950.

Action by William E. Russell against Thomas W. Warner, Jr., and others to recover damages for fraud. From a judgment of the Superior Court of Los Angeles County, D. Oliver Germino, J., in favor of plaintiff, the named defendant appealed. The District Court of Appeal, Vallée, J., held that the evidence supported recovery on the ground that the named defendant had authorized general partner to proceed with the negotiations resulting in an investment of money by plaintiff in partnership, and that he later ratified acts of general partner.

Affirmed.

**1. Partnership ☞375**

In action against copartners to recover damages for fraud, wherein one partner denied liability on ground that he was a limited partner and therefore not liable for false representations by general partner, evidence that an abbreviation of such partner's surname appeared in the partnership name, that he was an authorized cosigner of checks of the partnership, and that certificates required by statute had not been filed, sustained finding that there had been no substantial compliance in good faith with requirements for formation of a limited partnership. Civil Code, §§ 2478(1, 2), 2481, 2483.

**2. Partnership ☞375**

In action against copartners to recover damages for fraud, evidence that general

partner made false representations to plaintiff concerning business and assets of partnership, that copartner claiming to be limited partner authorized general partner to proceed with negotiations and that general partner by further false representations induced plaintiff to invest \$10,000 in partnership, supported recovery from copartner, on ground that he had expressly authorized general partner to proceed with the negotiations and later ratified his acts.

Manuel Ruiz, Jr., Los Angeles, for appellant.

McLaughlin & Hutchinson, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant Thomas W. Warner, Jr., from an adverse judgement in an action to recover damages for fraud.

The court found these facts: At all pertinent times the defendants were copartners under the name of "Warn-Dorf Co.,"; defendant Oberdorf made certain false representations to plaintiff concerning the business and assets of the partnership; defendant Warner, knowing that plaintiff was considering investing money in the partnership, said in the presence of plaintiff that "Oberdorf should proceed with the negotiations with plaintiff"; thereafter Oberdorf made further false representations to plaintiff concerning the financial condition of the partnership and to the effect that if plaintiff would invest \$10,000 in the partnership, defendants would have an agreement prepared evidencing plaintiff's ownership of a one-third interest therein and the right to one-third of the profits; the representations were made to induce plaintiff to pay defendant \$10,000; plaintiff relied on the representations and paid defendants \$10,000. Judgment was for plaintiff against defendants Warner and Oberdorf. Defendant Warner alone prosecutes this appeal.

Appellant's sole point is that he was a limited partner and therefore not liable for the representations of Oberdorf, the general partner.

The court in finding that at all pertinent times the defendants were "copartners", impliedly found they were general partners and that appellant was not a limited partner. In its conclusions of law, the court concluded "there was never any limited partnership existing between defendants Thomas W. Warner, Jr. and George S. Oberdorf in that there was no substantial compliance by either of said defendants in good faith with the requirements of subsection 1 of Section 2478 of the Civil Code of the State of California." This is a mixed conclusion of law and finding of fact. The court further concluded that appellant expressly authorized Oberdorf to proceed with the negotiations and later ratified his acts. Under the circumstances of this case this is a misplaced finding of ultimate fact. The court also concluded that appellant "is liable upon the additional ground that one partner is liable for the frauds committed by another partner in connection with partnership business."

[1] The evidence amply supports the finding that there was no substantial compliance by either defendant in good faith with the requirements relative to the formation of a limited partnership. No complaint is made of any other findings. An abbreviation of appellant's surname appeared in the partnership name. Civil Code, section 2481, now Corporations Code, section 15505 at the times in question provided that "The surname of a limited partner shall not appear in the partnership name" with exceptions not shown to exist here. Appellant was an authorized cosigner of checks of the partnership. Civil Code, section 2483, now Corporations Code, section 15507, provided that a limited partner should not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he took part in the control of the business. Appellant did not produce the original partnership agreement. He produced a signed carbon copy. He could not account for his failure to produce the original. Civil Code, section 2478, now Corporations Code, section 15502, prescribed the

manner of forming a limited partnership and provided in paragraph one that the persons forming the partnership sign and swear to certificates in duplicate, setting forth the detailed information, respecting the partnership, and that one of the certificates be filed in the clerk's office and the other in the recorder's office. No such certificate was ever filed in either office. Section 2478 further provided: "(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph one of this section." In *Siebold v. Berdine*, 61 Cal.App. 158, at page 162, 214 P. 655, at page 656, it was held that a limited partner who had not complied with the provisions of the Civil Code relative to the formation of a limited partnership and limitation of his liability is liable in damages for the fraudulent sale of the partnership business although he took no part in the transaction and had no knowledge of the fraud, the court saying: "[A] general partner's liability is the same as that of a principal for the fraud of his agent while acting within the scope of his authority, and this principle applies in cases involving fraud or misrepresentation by a partner in connection with the sale of the partnership property. 20 R.C.L., pp. 916, 917."

[2] The evidence established that: appellant authorized Oberdorf to conduct the negotiations for bringing plaintiff into the business; Oberdorf in carrying out the negotiations made false representations; appellant knew that Warn-Dorf Co. was in a precarious financial condition but did not reveal the fact to plaintiff; and after defendants had obtained plaintiff's money, plaintiff was ousted from the partnership premises. Irrespective of whether appellant was a limited partner, the judgment is supported by the findings—which are not attacked—that appellant expressly authorized Oberdorf to proceed with the negotiations with plaintiff and that he later ratified his acts.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

96 Cal.App.2d 974

**THOMPSON v. ATCHISON,  
T. & S. F. RY. CO.  
Civ. 17400.**

District Court of Appeal, Second District,  
Division 2, California.

April 14, 1950.

Hearing Denied June 12, 1950.

Charles W. Thompson brought an action under the Federal Employers' Liability Act against the Atchison, Topeka & Santa Fe Railway Company, a corporation, to recover for injuries sustained by plaintiff while pushing a baggage truck on railroad's station platform having a slope of 2.77 per cent. The Superior Court of Los Angeles County, Frank G. Swain, J., rendered a judgment for defendant after jury failed to arrive at a verdict and was dismissed, and the plaintiff appealed. The District Court of Appeal, Wilson, J., held that evidence failed to establish that defendant was negligent either because of the slope of the platform or because of failure to provide additional help for plaintiff, and that granting of judgment for defendant was proper.

Judgment affirmed.

**1. Master and servant ⇨90**

Under the Federal Employers' Liability Act, duty which rests on defendant is the same as at common law, namely, to use reasonable care in furnishing its employees with a safe place to work and safe tools and appliances, and negligence, as used in the act, is the violation of that duty. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

**2. Master and servant ⇨90**

Employer is liable under the Federal Employers' Liability Act for injuries which can be attributed to conditions under his control, when they are not such as a reasonable man ought to maintain in the circumstances. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

**3. Judgment ⇨199(3.9)**

**Trial ⇨142**

When evidence is such that, without weighing credibility of witnesses, there can be but one reasonable conclusion as to the verdict, court should determine the pro-

ceeding by nonsuit, directed verdict, or otherwise in accordance with applicable practice, without submission to jury, or by judgment notwithstanding verdict.

**4. Master and servant ⇨284(1)**

The weight of the evidence under the Federal Employers' Liability Act must be more than a scintilla before case may be properly left to discretion of the trier of fact. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

**5. Master and servant ⇨85**

The maintenance by railroad of a station platform having a 2.77 per cent slope, was not negligence which would render railroad liable under the Federal Employers' Liability Act for injuries sustained by an employee when he fell and injured his hand while pushing a baggage truck on station platform. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

**6. Master and servant ⇨85**

Railroad was not, under the Federal Employers' Liability Act, an insurer against injuries sustained by employee. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

**7. Master and servant ⇨163(1)**

Where baggage truck which railroad's baggage handler was pushing at time of injury, had a load of only 400 or 500 pounds, baggage handler did not at the time request any help in handling the truck, and in the past when he had requested additional help, he was given such help, and load could have been divided into small loads if baggage handler had so desired, railroad was not liable under the Federal Employers' Liability Act for baggage handler's injuries because of its failure to provide additional help. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

**8. Judgment ⇨199(3.9)**

Where there was no evidence of negligence in action by employee against railroad under the Federal Employers' Liability Act for injuries, so that trial court should have granted railroad's motion for a directed verdict, and jury failed to arrive



at a verdict and was dismissed, it was proper to grant railroad's motion for judgment under statute. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.; Code Civ.Proc. § 630.

Hilderbrand, Bills & McLeod, Oakland, for appellant.

Robert W. Walker, H. K. Lockwood, Parker, Stanbury & Reese, Los Angeles, for respondent.

WILSON, Justice.

This is an action for personal injuries brought under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. Defendant's motion for nonsuit was denied as was its motion for a directed verdict. The jury failed to arrive at a verdict and was dismissed whereupon defendant moved for judgment under section 630 of the Code of Civil Procedure<sup>1</sup> and its motion was granted. Plaintiff appeals from the judgment.

The facts are undisputed. Plaintiff was employed by defendant at its railroad station at Muroc. He fell and injured his hand while engaged in pushing a baggage truck on the station platform. The platform was made of blacktop. There was a rise of ten inches in the width of the platform from the tracks to the station house, a distance of thirty feet, making a slope or grade of 2.77 per cent. Plaintiff at the time of his fall was proceeding at a forty-five degree angle toward the station house, the slope at that angle being approximately two per cent. The baggage truck was the standard railway express truck and at the time of the accident it was only half loaded, the load weighing between 400 and 500 pounds. There was

a certain amount of sand and gravel on the platform at the time but plaintiff's cause of action is founded upon his allegation that "defendant carelessly and negligently maintained the said platform in that the same was caused to slope from the said depot down toward defendant's mainline tracks" and "defendant further carelessly and negligently failed and neglected to provide plaintiff with any fellow employee to assist in moving said truck."

The only question to be determined is whether there was in the record any evidence of negligence which should have been submitted to a jury.

Plaintiff contends that the evidence is such that fair-minded men might draw different inferences and the case therefore falls within the rule set forth in *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497, and *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 353, 63 S.Ct. 1062, 87 L.Ed. 1444, 1447.

In the *Wilkerson* case the plaintiff was injured by falling into a wheelpit in the railroad yard when crossing the pit on a narrow boardway. There was a conflict in the evidence as to whether switchmen and other employees habitually used the board as a walkway even after the railroad had put up safety chains enclosing the pit. The court held that since there was a conflict as to the continued use of the board as a walkway by pit workers alone or by employees generally it was for the jury and not the court to resolve that conflict.

In the *Bailey* case the plaintiff was injured while unloading cinders from a hopper car on a bridge over a cattle pass. The court stated that the nature of the task undertaken by Bailey, the hazards involved, the effort which it required, the kind of

1. Sec. 630, C.C.P.: "When a motion for a directed verdict, which should have been granted, has been denied or for any reason not granted, and the jury for any reason, has been discharged without having rendered a verdict, then within 10 days after the discharge of the jury, the court on its own motion, or, after said 10-day period, upon motion, notice of which was given within said 10-day period, may order judgment

to be entered in accordance with the motion for a directed verdict. Except as otherwise provided in Section 12a of this code, the power of the court to act under the provisions of this section shall expire 30 days after the day upon which the jury was discharged, and if judgment has not been ordered within said time the effect shall be the denial of any motion for judgment without further order of the court."

footing he had, the space in which he could stand, the absence of a guardrail, the height of the bridge above the ground and the fact that the car could have been unloaded on level ground were all facts and circumstances for the jury to weigh and appraise in determining whether the defendant was negligent in furnishing Bailey with that particular place in which to perform the task.

[1,2] Under the Employers' Liability Act the duty which rests upon defendant is the same as at common law, namely, to use reasonable care in furnishing its employees with a safe place to work and safe tools and appliances. Negligence as used in the act is the violation of that duty. *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 352, 63 S.Ct. 1062, 87 L.Ed. 1444. The employer is liable for injuries which can be attributed to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances. *Wilkerson v. McCarthy*, supra.

In the instant case the only issue is whether in maintaining its station platform at a 2.77 per cent slope defendant used reasonable care in furnishing plaintiff with a safe place to work and whether under those circumstances defendant was negligent in not providing plaintiff with assistance.

[3,4] The rule is established that "when the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict." *Brady v. Southern R. Co.*, 320 U.S. 476, 479, 64 S.Ct. 232, 234, 88 L.Ed. 239; *Spencer v. Atchison, T. & S. F. Ry. Co.*, 92 Cal.App.2d 490, 494, 207 P.2d 126. Moreover, as stated in the *Brady* case, "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact."

[5,6] The evidence as to the slope and condition of the platform presents no question of negligence for submission to the jury. Defendant is not an insurer. Its sole duty is to use reasonable care. The slope of 2.77 per cent is of such slight degree that there does not appear to us to be room for a difference of opinion as to whether it was reasonably safe or whether a reasonably prudent man could have foreseen a possible injury therefrom.

[7] As to defendant's failure to provide additional help, the evidence is undisputed that only about one baggage truck, loaded or partially loaded, arrived at Muroc during an eight-hour shift; none of the loads required two men to handle them; plaintiff did not request any help and in the past when he had requested it he had had assistance; the load could have been divided into small loads if the baggage handler desired to do so. The facts are similar to those in the case of *Lowden v. Brown*, 199 Okl. 180, 183 P.2d 980. In that case the plaintiff was injured while pushing an overloaded push car which had worn bearings making it difficult of operation. Plaintiff contended his employer was negligent in not providing assistance. The evidence was that the pushing of the car was considered a one-man job but when the car was too heavily loaded for one man others were sent to his assistance. Plaintiff did not request assistance. The court stated that the fact plaintiff previously requested and had been denied assistance under circumstances and for reasons not shown by the evidence did not excuse his failure to ask for help on that particular occasion if in fact he was unable to push the car alone. It was held that the exercise of reasonable care did not require the foreman to anticipate that plaintiff might injure himself by loading the car too heavily and then attempting to push it by himself; that the condition of the car was such that it was reasonably fit for ordinary use, the only effect caused by the use of the worn bearing being that the car was harder to push. The court held that the defendant's motion for a directed verdict should have been granted and the case was reversed with directions to dismiss the action.

[8] Inasmuch as the record discloses no evidence of negligence, the trial court should have granted defendant's motion for a directed verdict and therefore the judgment pursuant to section 630 of the Code of Civil Procedure was proper.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER, J., dissenting.



97 Cal.App.2d 67

**WHITTINGTON v. HILL et al.**  
Civ. 17604.

District Court of Appeal, Second District,  
Division 2, California.

April 19, 1950.

Action by John G. Whittington against Ernest M. Hill, Sr., and another. From an order of the Superior Court, Los Angeles County, Thomas J. Cunningham, J., dismissing the complaint, the plaintiff appealed. The District Court of Appeal, Per Curiam, held that order striking complaint was nonappealable.

Purported appeal dismissed.

**Appeal and error** ⇐103

Order striking complaint was nonappealable and where purported appeal was from judgment and order striking complaint from records and files, but the only order in record was one striking complaint, purported appeal would be dismissed. Code Civ.Proc. § 963.



Chas. T. Rippy, Torrance, for appellant.

Leonard Di Miceli, San Pedro, for respondents.

PER CURIAM.

It appearing that the instant appeal is from the "Judgment and Order \* \* \*

striking the plaintiff's complaint from the records and files in said action" et cet., but that the only order in the record is the one striking the complaint which said order is nonappealable, Code Civ.Proc. sec. 963;

It is therefore ordered that the purported appeal be and is hereby dismissed.



97 Cal.App.2d 80

**KAWECKI et al. v. MAGUIRE et al.**  
No. 14241.

District Court of Appeal, First District,  
Division 1, California.

April 21, 1950.

Susan Kaweckl, a minor, by and through her guardian ad litem, Madge Kaweckl, and Madge Kaweckl, sued John Frederick Maguire, First Doe, Second Doe, and others for injuries resulting when the minor ran out in front of truck parked by street curb and was struck by defendant's automobile which was passing truck. The Superior Court in and for the County of Alameda, Charles W. Snook, J., granted defendant a new trial and plaintiffs appealed. The District Court of Appeal, Schottky, J., pro tem, held that trial judge did not abuse his discretion or exceed his power in granting a new trial.

Order affirmed.

**1. Appeal and error** ⇐979(2)

When a new trial is granted on ground of insufficiency of evidence, order must be affirmed unless it can be said as a matter of law that record does not contain substantial evidence to support contrary judgment. Code Civ.Proc. § 657.

**2. New trial** ⇐71

On motion for a new trial on ground of insufficiency of evidence, trial judge is not bound by finding of jury if there is substantial conflict in evidence. Code Civ. Proc. § 657.



### 3. New trial ⇐68

In action for injuries resulting when small child ran out in front of truck parked by street curb and was struck by defendant's automobile which was passing truck, trial judge under the evidence did not abuse his discretion or exceed his power in granting defendant a new trial after verdict had been entered for child.

Edward E. Craig, Berkeley, for appellant.

Brown, Rosson & Berry, Oakland, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from an order granting a defendant in a personal injury action a new trial upon the ground of the insufficiency of the evidence.

[1] It is a well-established rule of law that when a new trial is granted upon the ground of the insufficiency of the evidence the order must be affirmed unless it can be said as a matter of law that the record does not contain substantial evidence to support a contrary judgment.

In the recent case of *Williams v. Field Transportation Company*, 28 Cal.2d 696, at page 698, 171 P.2d 722, at page 723, our Supreme Court said: "An order granting a new trial upon the ground of the insufficiency of the evidence to sustain the judgment will not be disturbed upon appeal, unless there be a clear showing of abuse of discretion. 'All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground. *Mazzotta v. Los Angeles Ry. Corp.*, 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited. The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party.' *Ballard v. Pacific Greyhound Lines*, 28 Cal.2d 357, 170 P.2d 465. Even if the evidence is uncontradicted, the trial judge may draw inferences from it contrary to those made by the jury, and it is his duty to resolve such conflicts in deter-

mining whether the issues should be retried. Only when, as a matter of law, there is no substantial evidence to support a contrary judgment, may an appellate court reverse an order granting a new trial. *Brooks v. Metropolitan Life Ins. Co.*, 27 Cal.2d 305, 163 P.2d 689; *Mazzotta v. Los Angeles Ry. Corp.*, supra."

In 20 California Jurisprudence, at page 31, it is stated: "Where the evidence is sharply conflicting, or the decision is upon bare questions of fact, an order granting or refusing a new trial will not be disturbed. Nor will such order be disturbed, as a general rule, if there is a substantial conflict in the evidence. In such case an order granting a new trial upon the ground of the insufficiency of the evidence to support the decision is entirely within the legal discretion of the trial court, which will not be deemed to have been abused, unless a decision in favor of the moving party would have no sufficient legal support in the evidence." And in 2 California Jurisprudence, at pages 942-943, it is stated: "Although there may be a substantial conflict in the evidence, the court having heard the evidence, and having had ample opportunity to judge as to the demeanor, manner and credibility of the witnesses, may, if it is dissatisfied with the verdict, and is of the opinion that it is clearly against the weight of the evidence, set it aside and grant a new trial. The judge of the superior court is in a position to judge between the apparent and the real, to detect the fallacy of specious testimony which may have misled the jury, but which his wider experience enables him to readily comprehend."

Bearing in mind these familiar principles of law, we shall summarize briefly the evidence as shown by the record in this case.

Shortly before noon on November 7, 1946, the defendant, John Frederick Maguire, was driving a Nash club coupe east along Via Primero Street in San Lorenzo Village. This was a residential street, not a main thoroughfare. He was driving at between ten and fifteen miles per hour, the streets were dry and the day was clear. His wife was riding with him and while she looked for the street address of No. 16151, where he was expecting to make

a call on an insurance client, he watched the road, knowing he would have to stop soon. On the south side of the street and a little west of No. 16140 Via Primero, a bakery truck, which was making house to house sales, was parked next to the curb. As defendant approached this truck and in order to pass he drove out across the unmarked center of the street, the truck being approximately eight feet wide, defendant's car six or seven feet wide, and the street 29 feet wide. As defendant's car was passing the truck and the front end of his car was still three or four feet behind the front end of the truck, defendant saw the plaintiff, Susan Kawecki, a four or five-year-old girl, run out from in front of the bread truck. He immediately applied his brakes and swerved a little to the left, approximately two or three feet, to avoid running into her. The right end of the front bumper struck her, however, and she was thrown to the pavement. The child was not run over.

Mrs. Kawecki, Susan's mother (who at the time of the trial had remarried and had the name of Madge Mayall), testified that she lived at No. 16140 Via Primero at the time of the accident; that it was her habit to allow the children to go out to purchase bread from the bakery wagon; that it was "their pet treat, so I let them"; that on the day in question she had sent Susan out to buy a loaf of bread, and that though it was not the first time Susan had gone it was "one of the first times" as "she rarely went. It was usually the other children." On this occasion Susan "had gone across the street to get the bread and had bought it, and was headed back" when the accident occurred.

The driver of the bakery truck, Victor Miller, did not see Susan's actual impact with the car because he was busy selling bread to a woman customer on the curb side of the truck, but he did see the child hit the pavement. She fell about three feet in front of the automobile. After the accident defendant got out of his car, but Mr. Miller had already picked up the crying child. Defendant then drove to the Hayward Hospital with Mr. Miller holding Susan in his arms in the front seat of

his car, and defendant's wife and Mrs. Kawecki, who had come from her home across the street, were in the rear seat.

Two doctors, as well as Mrs. Kawecki, testified as to Susan's injuries. There was some question relative to resulting headaches, dizziness, very minor scars, and eyesight, but no serious injuries were shown.

A petition for appointment of herself as guardian ad litem and a complaint in the name of Susan Kawecki by such guardian were filed by Madge Kawecki on October 21, 1947. At the trial, in order that claim for medical expenses and evidence of contributory negligence might be introduced, Mrs. Kawecki individually was made a party. A motion for nonsuit was denied by the court. The jury returned a verdict in favor of Susan Kawecki for \$1,500 against defendant, and in favor of defendant against Mrs. Kawecki.

Defendant moved for a new trial, enumerating as grounds all those given in section 657 of the Code of Civil Procedure. The court ordered "that defendant's said motion for new trial be granted on all issues upon the ground of the insufficiency of the evidence to sustain the verdict and judgment entered thereon in favor of plaintiff, Susan Kawecki, \* \* \*"

[2,3] Notwithstanding appellant's earnest argument that the evidence shows clearly that respondent was negligent, and that the trial court abused its discretion in granting respondent a new trial we believe that the foregoing summary of the evidence indicates there was a substantial conflict as to the issue of respondent's negligence. It is, of course, true that there was evidence to sustain the implied finding of the jury that respondent was negligent. But, upon a motion for a new trial, the trial judge, who is, in effect, the thirteenth juror, is not bound by the finding of the jury if there is any substantial conflict in the evidence. In the instant case the trial judge, in weighing the motion for a new trial, had a right to conclude that respondent was not negligently driving on the wrong side of the road; that he was not negligently inattentive to the road ahead; that he was not negligently driv-

ing with impaired vision; that he was not driving at excessive speed, and that he was not negligently inattentive with regard to the presence of pedestrians.

We conclude, therefore, that the trial court did not abuse its discretion or exceed its power in granting a new trial, and that the order appealed from should be, and the same hereby is, affirmed.

PETERS, P. J., and BRAY, J., concur.



97 Cal.App.2d 46

**GUARANTEE INS. CO. v. INDUSTRIAL  
ACCIDENT COMMISSION OF CAL-  
IFORNIA et al.**

**Civ. 4047.**

District Court of Appeal, Fourth District,  
California.

April 18, 1950.

The Guarantee Insurance Company, insurance carrier, for alleged employer, brought proceedings against the Industrial Accident Commission of the State of California and others to annul an award of the commission of death benefits for death of alleged employee. The District Court of Appeal in and for the Fourth Appellate District, Barnard, P. J., held that evidence sustained finding of commission that deceased was in the employ of the alleged employer at time of death of deceased, and that contention of insurance carrier that deceased submitted himself to a hazard not reasonably anticipated by employment presented a question of fact and could not be disposed of on appeal as a matter of law.

Award affirmed.

**1. Workmen's compensation ☞1461**

In compensation proceeding against fruit packing company to recover compensation for death of deceased who had been employed part of the time as a fruit picker by company and part of the time as a loader by independent contractor who load-

ed and hauled oranges for company, evidence sustained finding that at time of fatal accident deceased was in the employ of the company, rather than in the employ of the independent contractor, so as to render company's insurance carrier liable.

**2. Workmen's compensation ☞1939**

Where evidence, with inferences which might reasonably be drawn therefrom, supported finding of Industrial Accident Commission in compensation proceeding, finding could not be disturbed on appeal by the District Court of Appeal, even though opposite inferences and conclusions were possible.

**3. Workmen's compensation ☞1939**

Where it did not appear from the meager evidence that deceased employee before jumping from moving truck to secure his hat which had blown off, heard warning of truck driver to wait until driver stopped the truck, question whether deceased employee submitted himself to a hazard not reasonably anticipated by his employment was a fact question in compensation proceeding, and could not be disposed of on appeal by District Court of Appeal as a matter of law.

W. N. Mullen, San Francisco, for petitioner.

T. Groezinger and Robert Ball, San Francisco, for respondents.

BARNARD, Presiding Justice.

In this proceeding the petitioner, which is the insurance carrier for Webb Packing Company, seeks to annul an award of the respondent commission based on the death of Ruperto Corona Murrillo.

In the fall of 1947, the Webb Packing Company made an arrangement with one Romero with respect to harvesting an orange crop on its grove near Lindsay. Under this arrangement, Romero was paid 3-1/2¢ per box for supervising the picking crew, for loading the fruit on trucks, and for transporting the workers between their camp at Lindsay and the place of employment. In addition, Romero was paid 4¢



per box for hauling the fruit from the grove to the packing shed. This 4¢ was for hauling alone, and Romero was to pay any costs of loading out of the 3-1/2¢. Webb was to pay the pickers 15¢ per box.

The work began on November 3, 1947, Murrillo being one of the crew of workers. He worked as a picker parts of each day, until November 7. Romero selected his own loaders, taking men from the picking crew, and paying them 80¢ per hundred boxes for loading. He chose Murrillo for this purpose, at times during the five days, and Murrillo had thus earned \$17.42 for loading during that period. It appears without dispute that Romero hired, supervised and paid these loaders and that Webb had no control over the loading operations and did not know what Romero paid the loaders.

On November 7, Murrillo worked both as a picker and as such a loader. After picking had been discontinued for the day and most of the pickers had been sent back to camp in other trucks, Murrillo remained and assisted in loading the truck involved here. After this loading was finished Murrillo got on the truck and Romero drove it along a highway en route to the packing shed, which seems to have been in the same general direction as the labor camp. The only evidence is that Romero intended to stop at the packing shed and, after unloading, to take Murrillo to the camp. While thus en route to the packing shed and thence to the camp Murrillo's hat blew off. He jumped from the moving truck to retrieve his hat, fell under the wheels and was killed.

A claim was filed with the respondent commission, a number of defendants were added, and several hearings were held. In the resulting findings and award it was found that Murrillo's fatal injury arose out of, and in the course of, his employment by the Webb Packing Company and a death benefit was awarded to his dependents as against this petitioner, the proceeding being dismissed as to the other defendants. A rehearing was denied and this application for a writ of review followed.

The petitioner's main contention is that the finding that Murrillo was employed at the time in question by the Webb Packing Company is unsupported by the evidence. No contention is made that Murrillo was not so employed insofar as his *picking* activities are concerned. It is contended, however, that Romero was an independent contractor in connection with the hauling and loading of oranges; that at the time of his injury Murrillo was en route to the packing shed to unload the boxes he had loaded; that he would not have earned the wage Romero was to pay him until the operation was completed and the boxes were unloaded; that he was then rendering a service solely for Romero as an independent contractor, and Romero was his employer at the time; and that the going and coming rule is not applicable because Murrillo was not then going to camp but was on his way to the packing shed to complete his work for Romero.

It clearly appears that Romero was an independent contractor with respect to the hauling. Assuming that he was an independent contractor with respect to both the loading and the hauling, a question remains as to which employment Murrillo was actually engaged in at the time of the injury,—his employment by Webb Packing Company or his employment by Romero. An important consideration is as to whether his actual work for Romero had terminated or whether the unloading of the boxes at the packing shed was a part of that work and necessary to its completion. While a part of the evidence supports the petitioner's contention that Romero expected Murrillo to assist in the unloading of the truck, there is substantial evidence indicating that Murrillo's actual work for Romero had been completed.

Romero testified that he and Murrillo loaded the truck before they left for the packing house. On being asked why Murrillo was on the truck at the time and whether Murrillo was to help him unload when they got to the packing house Romero replied: "Yes. There was no ways of him going home; that way—." He was then asked: "He was on the truck so he

could go home with you?" and he replied: "Yes". When asked "Were you going to do the loading yourself," he replied: "He was going to help—sometimes they help me, then I take them to the camp." He then testified that he would choose a man or two from the crew to help with the loading; that he chose Murrillo and he was loading that day; that "He was picking and when the truck came, he would load, and then he would go and pick"; that Murrillo had loaded and unloaded for him about two or three days; that if he used somebody in unloading "I would tell him I will pay you so much"; that Murrillo did not help him unload on the two or three days he had used Murrillo before; that "All the pickers went home, he was loading the truck; I had to give him a ride and take him to the packing house and from there take him to the camp"; that Murrillo was not going to unload; and that "I was going to unload myself." He further testified that "A few more boys were also on the truck at the time of the accident"; that they were going to do nothing; that "they just stayed over there and was going to the camp"; that he paid Murrillo "for loading—yes—he didn't help me unload"; that Murrillo loaded 600 boxes that day; and that he owed Murrillo \$4.80 for the work he did for the witness that day.

[1,2] The evidence, while conflicting, is sufficient to support the conclusion that at the time he was injured Murrillo had completed his work for Romero, at least for that day, and that he was then being taken back to camp by the only means then available. Under some circumstances, the transportation of Murrillo back to camp might not be considered a part of an earlier employment where, as here, he was later on the same day employed by another. This does not necessarily follow, however, under the circumstances here shown. Romero's agreement with Webb Packing Company required him to transport all of the workers from and to the camp, and he was paid for that service. Where a picker

was thus temporarily used in loading and then returned to picking, the obligation to transport him back to camp would clearly remain. It hardly seems reasonable that Romero would be relieved of this obligation merely because this temporary change of employment occurred at the close of the picking instead of while it was being continued. The temporary work for Romero having been incidental to the entire project and completed at the grove, the matter of transportation back to camp would naturally and logically remain as a part of the original employment under which Murrillo was brought to the grove. While most of the workers had been taken back in other trucks a few remained and were being taken back to camp in this truck, although they had done no work for Romero. The evidence, with the inferences which may reasonably be drawn therefrom, supports the finding in question, and the conclusion reached by the respondent commission may not be disturbed even though opposite inferences and conclusions are possible. *California Casualty Indemnity Exchange v. Industrial Acc. Comm.*, 21 Cal.2d 461, 132 P.2d 815; *Pacific Lumber Co. v. Industrial Acc. Comm.*, 22 Cal.2d 410, 139 P.2d 892.

[3] The petitioner also contends that the deceased submitted himself to a hazard not reasonably anticipated by his employment since he jumped from the truck although he had been warned to wait until it had stopped. The only evidence in this regard is Romero's testimony that "his hat blew off and he said 'My hat blew off' but I tell him 'Wait until I stop'", and that "Then he jumped all of a sudden." It does not appear from the meager evidence that the deceased heard this warning and he may have been in the act of jumping when it was given. Aside from any other consideration, the matter presents a question of fact and cannot be here disposed of as a matter of law.

The award is affirmed.

GRIFFIN, and MUSSELL, JJ., concur.

**STRAUSS v. SUPERIOR COURT IN AND  
FOR LOS ANGELES COUNTY.**

Civ. 17619.

District Court of Appeal, Second District,  
Division 1, California.

April 10, 1950.

Rehearing Denied May 1, 1950.

Hearing Granted June 8, 1950.\*

Original proceeding for a writ of mandate by J. S. Strauss against the Superior Court of the State of California, in and for the county of Los Angeles, to compel issuance of subpoena duces tecum against Union Bank and Trust Company of Los Angeles. The District Court of Appeal, Drapeau, J., held that petitioner was entitled to all of bank's records relative to trust where bank, co-trustee under trust indenture securing an issue of sinking fund bonds could purchase outstanding bonds on open market or from bondholders but refused tenders of bonds by petitioner on ground that sufficient bonds could be bought on open market for less than tenders and petitioner in affidavit to petition for subpoena duces tecum averred that rejection of tenders was wrongful.

Writ of mandate issued with directions in accordance with the opinion.

**1. Discovery** ⇨84

One seeking an inspection of papers and documents in hands of an adverse party or a third person must show clearly that he has right thereto, and that constitutional guarantees will not be infringed. Code Civ.Proc. § 2084.

**2. Discovery** ⇨97(4)

Affidavit in support of demand for inspection must identify desired books, papers and documents and it must clearly show that they contain competent and admissible evidence which is material to the issues to be tried but affiant cannot rely merely upon legal conclusion, stated in general terms, that desired documentary evidence is relevant and material. Code Civ.Proc. § 2084.

**3. Discovery** ⇨84

Rules relating to inspection of writings must be liberally applied and the right of inspection encouraged. Code Civ.Proc. § 2084.

\* Subsequent opinion 224 P.2d 726.

**4. Depositions** ⇨36

In proceeding to perpetuate testimony, determining facts are those stated in the affidavit of petitioner. Code Civ.Proc. § 2084.

**5. Witnesses** ⇨16

Where bank which was co-trustee under trust indenture securing issue of sinking fund bonds and which under terms of trust could purchase outstanding bonds on open market or from bondholders, refused tenders of bonds by petitioner on ground that sufficient bonds could be bought on the open market for less than the tenders but petitioner averred in petition for subpoena duces tecum that rejection of tenders was wrongful and without right, petitioner was entitled to inspection of all of trust company's records relative to the trust. Code Civ.Proc. § 2084.

George I. Devor, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel; Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Loeb & Loeb, and H. F. Birnbaum, Los Angeles, for Union Bank & Trust Co., real party in interest.

DRAPEAU, Justice.

This is a proceeding to perpetuate testimony under Section 2084 of the Code of Civil Procedure.

Union Bank and Trust Company of Los Angeles is co-trustee under a trust indenture securing an issue of sinking fund bonds. The Bank accumulated \$102,806.76 in the trust estate to retire the bonds. By the terms of the trust, the Bank could purchase outstanding bonds on the open market, or from bond holders on tenders.

Petitioner, among others, tendered bonds for payment. All tenders were refused because the trustee determined that sufficient bonds could be bought on the open market for less than the tenders.

Petitioner sought to take the testimony of the Bank and one of its officers, Mr. Lathrop.



Upon the following averments by affidavit a subpoena duces tecum was ordered:

"Said Union Bank and Trust Company is the co-trustee under a certain trust indenture. Consolidated Office Buildings Company, a corporation, is the trustor thereunder. Petitioner is the holder of numerous bonds issued under the terms of said indenture and is, therefore, a beneficiary of said trust. As such trustee, said Union Bank and Trust Company has in its possession and maintains records showing:

- "(1) The number of outstanding bonds;
- "(2) Bonds acquired by purchase, or otherwise;
- "(3) Dates of acquisition of bonds;
- "(4) Prices paid for bonds;
- "(5) From whom said bonds were purchased; and
- "(6) Disbursements for counsel and other fees and charges.

"The petition hereinabove referred to and incorporated by reference, among other things, sets forth: (1) a certain invitation for tenders of bonds made by the co-trustee, (2) the making of said tenders by various persons, including petitioner, (3) the rejection of said tenders by the said co-trustee, and (4) that said rejection by said co-trustee was wrongful and without right. Whether the said rejection was wrongful and without right depends, among other things, upon (a) the terms of the trust indenture, and (b) the prices paid for the bonds, plus all additional costs and expenses in acquiring them. The records of the said co-trustee in its possession and above-described are, therefore, competent and admissible evidence material to the issues."

The subpoena duces tecum called for "all books, documents and records relating to the creation, existence and administration" of the trust.

The Superior Court, on motion, quashed the subpoena as being improvidently issued, and petitioner here seeks a writ of mandate to compel the issuance thereof. The court also ruled it would be detrimental to Mr. Lathrop's health to testify. Petitioner does not seriously question this ruling as to Mr. Lathrop.

[1, 2] In *McClatchy Newspapers v. Superior Court*, 26 Cal.2d 386, at page 396, 159 P.2d 944, 950, the rule respecting the issuance of subpoenas duces tecum is well stated: "The right to have an inspection of papers and documents in the hands of a party to the action or a third person is governed by different rules from these applying to depositions. A party or witness has a constitutional right to be free from unreasonable searches and seizures, and it is therefore incumbent upon the one seeking an inspection to show clearly that he has a right thereto and that the constitutional guaranties will not be infringed. Hence, the affidavit in support of the demand for inspection must identify the desired books, papers and documents and it must clearly show that they contain competent and admissible evidence which is material to the issues to be tried. The affiant cannot rely merely upon the legal conclusion, stated in general terms, that the desired documentary evidence is relevant and material."

[3] The modern tendency in the administration of justice is to relax the rules relating to the inspection of writings. Thus trials of actions may be expedited and justice be more efficaciously and speedily administered. The applicable rules are to be applied liberally, and the right of inspection encouraged. *Milton Kaufmann, Inc. v. Superior Court*, 94 Cal.App.2d 8, 210 P.2d 88.

The Bank contends that the evidence is immaterial because as co-trustee it had the right to purchase the bonds for less than the tenders made by petitioner.

[4, 5] The determining facts are to be looked for in the affidavit of petitioner. It is there averred that the rejection of the tenders by the co-trustee was wrongful and without right, and that the petitioner is a beneficiary under the trust.

Under these averments, the petitioner is entitled to all of the Bank's records relative to the trust.

Let the writ of mandate issue, directing the Superior Court to issue its subpoena duces tecum, requiring the Bank to produce for use on deposition all books, documents and records relating to the creation, exist-

ence and administration of that certain trust of Consolidated Office Buildings Company, dated as of December 1, 1934, securing income mortgage and collateral trust sinking fund bonds.

WHITE, P. J., and DORAN, J., concur.



97 Cal.App.2d 73

Ex parte VALLINDRAS.

Cr. 2675.

District Court of Appeal, First District,  
Division 2, California.

April 20, 1950.

Subsequent Opinion June 30, 1950.

See 220 P.2d 1.

Proceeding in the matter of the application of John A. Vallindras for a writ of habeas corpus. The District Court of Appeal, Nourse, P. J., held that petition was insufficient.

Petition denied.

Habeas corpus ⇨54

Petition for writ of habeas corpus which did not allege that there was no conflict in evidence of petitioner's ability to pay under order nor that there was no evidence supporting the finding was insufficient.

Gus C. Ringole, San Francisco, for petitioner.

NOURSE, Presiding Justice.

The petition for a writ of habeas corpus does not allege that there was no conflict in the evidence of petitioner's ability to pay under the order nor that there was no evidence supporting the finding. Such was the case found in *Re Johnson*, 92 Cal.App.2d 467, 207 P.2d 123.

The petition for a writ of habeas corpus is denied.

96 Cal.App.2d 963

SHOOK v. BEALS et al.

Civ. 4027.

District Court of Appeal, Fourth District,  
California.

April 13, 1950.

Rehearing Denied May 2, 1950.

Hearing Denied June 8, 1950.

Marvin L. Shook brought action against R. F. Beals and others to recover for destruction of airplane which plaintiff as owner had leased to certain of the defendants, on ground that named defendant, who was a pilot, was negligent in operation of the airplane, and Herman Tarvin, one of the defendants, filed a cross-complaint against the plaintiff for injuries. The Superior Court of Tulare County, Frederick E. Stone, J., rendered a judgment for plaintiff for \$9,000, and the defendants appealed. The District Court of Appeal, Griffin, J., held that pleadings could not be questioned by defendants on appeal, that evidence sustained finding that defendants were engaged in a joint adventure or enterprise, so that all defendants were liable for the negligence of the named defendant, and that evidence authorized finding as to the value of the airplane.

Judgment affirmed.

#### 1. Appeal and error ⇨171(1)

The theory on which a case is tried in the trial court, must be adhered to on appeal.

#### 2. Appeal and error ⇨197(1)

Where a case is tried on the theory that certain issues are presented by the pleadings, and evidence is received thereon without objection, the parties may not thereafter question the sufficiency of the pleadings.

#### 3. Appeal and error ⇨197(3)

Where, in action by owner of airplane against pilot and occupants who rented the airplane, no objections were taken by defendants in the trial court that issues of joint venture, joint enterprise, or joint bailment were not involved because not raised by the pleadings, defendants could not successfully contend on appeal that such issues were not presented.

#### 4. Joint adventures ⇨7

Where five defendants, including pilot, agreed that they would rent an airplane

to go on a fishing trip, and pilot was authorized to act for them in making all necessary arrangements for such purpose, and the other four defendants by their checks each paid a fourth of the rental price, and checks were made payable directly to the plaintiff as owner of the airplane, all defendants were engaged in a "joint adventure" or "joint enterprise" so as to render all of them liable for destruction of airplane because of alleged negligence of pilot, though he was allegedly the only one who knew how to pilot airplane.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Joint Adventure" and "Joint Enterprise".

#### 5. Partnership ⚡3

A partnership connotes a community of interest in property.

#### 6. Appeal and error ⚡216(2)

In absence of an explanatory instruction being proffered or requested by defendants on subject of a joint venture, they could not be heard to complain on appeal that instruction defining joint venture made no reference to requirement that defendants must be found to be in joint or common possession and control of airplane, where evidence supported theory that each had, legally, an equal voice in management of the airplane, and, in law, possessed the right of such control.

#### 7. Appeal and error ⚡216(2)

Generally, where a general instruction is given which is correct as far as it goes, being deficient merely by reason of its generality, the injured party may complain on appeal only in case he requests that the charge be made more specific or asks for other qualified instructions, and his request is denied.

#### 8. Bailment ⚡33

The question whether a bailee is guilty of negligence is one for the jury. Civ. Code, §§ 1925, 1928.

#### 9. Trial ⚡228(1), 295(1)

A trial court is not required to state all the law applicable to a case in a single instruction, and the charge must be read

as a whole, that is to say, instructions given should be considered in connection with each other, and if, without straining any portion of the language, the charge harmonizes as a whole and fairly and accurately states the law, a reversal may not be had because of verbal inaccuracies, or because a separate instruction does not contain all conditions and limitations to be gathered from the entire charge.

#### 10. Trial ⚡295(6)

In action by owner and lessor of chartered airplane, against five defendants, one of whom was a pilot, who leased the airplane for a fishing trip, to recover damages for destruction of the airplane because of the alleged negligence of the pilot, instructions construed as a whole were not prejudicially erroneous as to the defendants. Civ.Code, §§ 1925, 1928.

#### 11. Damages ⚡105

In an action for destruction of property, the proper measure of damages is the reasonable market value of the property destroyed.

#### 12. Evidence ⚡474(19)

The owner of personal property, whether generally familiar with reasonable market value or not, is competent to estimate the worth of the property, the lack of knowledge of market value going to the weight rather than to the admissibility of the testimony.

#### 13. Appeal and error ⚡1011(1)

Where evidence merely created a conflict as to value of destroyed airplane, the District Court of Appeal was bound by jury's finding of value.

#### 14. Damages ⚡139

Verdict of \$9,000 for destruction of airplane was authorized, where plaintiff testified that before it was wrecked he thought it was worth \$10,000, and a witness testified that if airplane was in excellent condition it would easily be worth \$10,000, though defense witness placed value only at about \$3,500.

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Bradley & Bradley, McFadzean, Crowe & Mitchell, Visalia, for appellants.



David S. Folsom, Corcoran, for respondent.

GRIFFIN, Justice.

Plaintiff, as the owner and lessor of a chartered airplane, brought this action against five named defendants for damages for the wrecking and loss of his airplane by virtue of the claimed negligence of defendant Beals, the pilot.

Defendants answered the complaint, denied generally the allegations thereof and alleged negligence on the part of the plaintiff in furnishing Beals an airplane with faulty brakes. Defendant Tarvin, who was injured in the accident, filed a cross-complaint against plaintiff seeking damages by reason of the claimed negligence of plaintiff. The jury found against cross-complainant and returned a verdict in favor of plaintiff against all defendants for \$9,000.

There is very little conflict as to the facts presented concerning the questions raised on this appeal. All defendants lived in Tulare County. They were fishing enthusiasts. A friend of defendant LeRoy Martell asked him to come to Garberville, California, to fish. This fact was disclosed to defendant Beals, and he said he would be able to obtain a plane. He inquired as to the number who would be going and Martell told him he thought it would be four. Beals called defendants Carl Swearingen and Tarvin and asked them to go. Beals and Martell saw defendant Phillip Swearingen and each was told of the arrangements and the cost.

Beals testified that Martell and the others had been talking about such a trip for over a year; that he and Martell decided the time was opportune to obtain an airplane and go; that they all "got together", "talked it up", and "made the arrangements, the plans"; that he made negotiations with plaintiff regarding the rental of the plane; that the other named defendants agreed to pay for the cost of the rental, which came to \$100; that each defendant, except himself, paid \$25. The total amount was paid by checks made payable directly to plaintiff. Beals stated that he told plaintiff that there would be four passengers besides himself. Some argument ensued about

carrying five passengers in a four-place Stinson plane, which was only licensed to carry four passengers. Beals assured him that only four would eventually go. Plaintiff was told by Beals of the plans and that they intended landing at Garberville airport. Plaintiff instructed Beals not to land there because of the limited length of the landing field. On the following day Beals, in the absence of the other defendants, took the plane to another airport, loaded the other defendants in, and departed. The plane was only equipped with three passenger safety belts. Three of defendants were seated in the rear seat and some plan was devised to increase the size of one of the two safety belts to accommodate three persons. One defendant testified that before leaving the airport "Beals told us we could not go to this airport (Garberville) and we thought we would go somewhere in the vicinity and find that out later." The party first landed at Stockton to obtain some film ordered by one of the defendants. They next stopped at Mendocino airport for directions and to inquire about the landing field at Garberville. All being present, they were told that the landing there was unsafe with that size plane. The evidence is conflicting as to whether they were told that they should not land at Ft. Bragg. Anyway, they attempted to land there. As the plane came in for such a landing the wheels first struck the ground, arose, and according to defendant Beals' testimony, on the second landing the brakes seemed to freeze. The plane nosed over and upset. All were able to leave the wrecked plane uninjured except one. The wreckage was salvaged and sold for \$300. Beals was the only defendant who was licensed and knew how to fly the plane. On his return, in making up a log of his flying hours, he related that he had only three passengers besides himself.

Plaintiff testified that Beals called and wanted to rent a plane; that he stated he had some passengers who wanted to go fishing near Garberville; that he warned him not to stop at that or any other short landing field; that brake fluid had been leaking on one of the tires and that he instructed Beals how to land and told him

to pump his brake pedal to obtain fluid when stopping. Apparently the fluid in the brakes was checked by Beals and an attendant before leaving. Plaintiff produced evidence that the plane was in good working order before it was rented on this occasion. Plaintiff then testified that he had no personal dealings with the defendants other than Beals about "this particular airplane for which Mr. Beals was their agent, you might say." Beals had flown planes for plaintiff on other occasions.

The amended complaint charges that the named *defendants* hired and received of plaintiff the airplane, and that they did not take ordinary care of it and used it in a careless and negligent manner so that it was wrecked, and failed and refused to return it to plaintiff, to his damage in the sum claimed.

Defendants now argue that under the pleadings plaintiff was barred from showing joint venture or joint enterprise of the defendants or a joint bailment; that it was necessary to allege that Beals operated or flew the airplane as agent, servant or employee of his co-defendants and that defendants were engaged in the joint venture and that each had the right to exercise control over said defendant Beals in renting and in the flying of said airplane before any evidence on that subject was admissible; that since no such issue was raised by the pleadings, instructions on the doctrine of imputed negligence should not have been given and that since the pleadings did not raise these issues there was no basis on which a judgment against the defendants, other than that of defendant Beals, could rest, citing such cases as *Campagna v. Market Street Ry. Co.*, 24 Cal.2d 304, 149 P.2d 281; and *Shain v. Belvin*, 79 Cal. 262, 21 P. 747.

In *Hansen v. Burford*, 212 Cal. 100, 297 P. 908, plaintiff brought an action in assumpsit against certain named defendants to recover the price of lumber alleged to have been sold to them. The court gave judgment against all defendants based on the finding that all of them were engaged in the joint venture and that such lumber was sold to them as such joint venturers.

Defendants endeavor to distinguish this case from the instant one in that the cited case is one in assumpsit and the present case is one in tort. We perceive no distinction in pleading a cause of action in this respect. In the absence of special demurrer, if defendants are liable under the pleadings, the nature of their liability becomes a factual question and if not established by the evidence plaintiff cannot recover. As between plaintiff and cross-complainant Tarvin, this issue was raised by their pleadings. Plaintiff claimed contributory negligence on the part of Tarvin in that he and Beals were at the time engaged in a joint venture or common enterprise. In this case all the parties proceeded to trial, without objections, upon the theory of joint venture or that Beals was the agent for all the defendants and the court instructed the jury on the subject.

[1] It is well settled that the theory upon which a case is tried in the court below must be adhered to on appeal. *Hayward Lumber & Inv. Co. v. Ford*, 64 Cal. App.2d 346, 354, 148 P.2d 689; *Merrill v. Kohlberg*, 29 Cal.App. 382, 386, 155 P. 824. The general rule is stated in 2 Cal. Jur. 242, sec. 71 to be: "Where the trial proceeds in all respects as though the complaint sufficiently states a cause of action, and the defendant goes to trial upon the theory that there is a material issue, and allows evidence to be received upon such issue without objection in any way, and the court makes a finding upon such evidence, upon the theory that the proper issue is made by the pleadings, with no objection from either party, the parties will not, nor will either of them, be allowed on appeal to say, for the first time, there was no such issue. This is especially true where there is not a total absence of allegations essential to a statement of a cause of action." (Citing cases.)

[2,3] Where a case is tried upon the theory that certain issues are presented by the pleadings, and evidence is received thereon without objection, the parties may not thereafter question the sufficiency of the pleadings. 21 Cal.Jur. 260, sec. 181. Since it does not appear that proper objec-



tions were taken in the trial court and the complaint does state a cause of action, the pleadings cannot now be questioned on appeal.

The next question is whether or not the evidence sufficiently establishes a joint venture or joint enterprise within the meaning of that term. The term "joint enterprise" is often used interchangeably with "joint adventure" and has been defined as a single "joint venture" in which the parties thereto are associated together for the joint benefit of all. Some authorities, however, distinguish between the terms "joint adventure" and "joint enterprise", holding that the former applies to associations for mutual profits, whereas the latter applies to undertakings for the mutual benefit or pleasure of the parties. *Greer v. McCrory*, Mo.App., 192 S.W.2d 431, 439; *Pence v. Berry*, 13 Wash.2d 564, 125 P.2d 645; 48 C.J.S., Joint Adventures, § 1, page 803.

*Clark v. Janss*, 39 Cal.App.2d 523, 103 P.2d 175, fully considered several cases bearing on this point and stated the rule to be that in order to constitute a joint enterprise in such a case as this it is not sufficient that the parties in question have a common purpose and a common destination, but the one to whom negligence is sought to be imputed must have exercised control over, or have had the legal right to control, the actions of the other in the driving of the car. (Citing cases.) This court there held that the facts established did not, *as a matter of law*, show a joint venture where the mother loaned her car to her two daughters to take a pleasure trip. In the instant case the question was submitted to the jury and apparently it found that there was a joint venture. Our question is whether there is sufficient evidence to support the finding. It is defendant's argument that although the defendants may have had a common destination and each shared in the expense of the trip, the only common purpose of the defendants was to go fishing, and that the facts established do not prove agency or joint venture so as to allow imputation of actionable negligence on the part of defendant Beals to his co-defendants; that because such defendants neither controlled, sought to control, nor had the

right to control him in renting the plane or in his operation of it, and since none of them were, in fact, licensed or qualified to pilot the plane, they could not be held to have an equal right to govern its movements, citing such cases as *Pope v. Halpern*, 193 Cal. 168, 223 P. 470; *Williamson v. Fitzgerald*, 116 Cal.App. 19, 2 P.2d 201; *Walker v. Adamson*, 9 Cal.2d 287, 70 P.2d 914; *Morrison v. Jose*, 57 Cal.App.2d 795, 135 P. 2d 586; and *Edwards v. Freeman*, 34 Cal. 2d 589, 212 P.2d 883.

All of the cases cited involved the use of an automobile rather than an airplane. In principle we see no distinction. With but one or two exceptions, the automobile was owned by one of the claimed joint venturers. In those cases it was held that there must be a showing that the other joint venturer riding as a passenger had some control or legal right of control over the car at the time, before negligence could be thus imputed to the passenger. However, in *Lloyd v. Mowery et ux.*, 158 Wash. 341, 290 P. 710, it was held that the occupants of an automobile (owned by one of the parties) overturning while they were on a hunting trip, were engaged in a joint venture, where they jointly contributed to the expenses. Whether such a holding was applicable in this State was questioned in *McCann v. Hoffman*, 9 Cal.2d 279, 284, 70 P.2d 909, and it was there stated that the great weight of authority is to the effect that the sharing of the cost of gasoline and oil consumed on a trip, when that trip is taken for pleasure or social purposes, is nothing more than the exchange of social amenities and does not transform into a passenger one who, without such exchange, would be a guest, and consequently is not payment for the transportation or compensation within the meaning of the statute. That case involved a car owned by one, in which a so-called guest was riding, and the guest law was under construction.

A different rule seems to be applicable where the claimed joint venturers themselves, or through their authorized agent, jointly hired, owned or leased an automobile or airplane, which joint ownership or joint hiring, as a matter of law, gives each



such joint venturer control or the right of control over the automobile or airplane. This distinction is noted in Restatement of the Law of Torts, p. 1277, sec. 491, where it is stated that the fact that a driver and another riding with him are joint possessors of a car, either arising from a joint hiring or joint ownership, such fact is some evidence of a joint enterprise, and then states (Subd. g): "The fact that two or more persons, *who do not jointly hire, or own the car*, agree that each shall pay a substantial share of the expenses of a particular trip does not of itself make the trip a joint enterprise. When, however, there are one or more of the following additional factors the determination whether there is a joint enterprise is a question for the jury subject to the power of the court to see to it that the jury reaches a reasonable conclusion. These factors are: (1) a common destination; (2) a power to determine or change the route from time to time by mutual agreement; and (3) the fact that the trip is for a common but *non-business purpose*." (Italics ours.)

In the Annotations thereto, p. 265, many California cases are cited holding that to have a joint venture there must be "a community of interest in objects and equal right to direct and govern movements and conduct of each other with respect thereto. Each must have voice and right to be heard in its control and management" \* \* \* And that "There can be no joint venture in the absence of an agency relationship."

In *Hupfeld v. Wadley*, 89 Cal.App.2d 171, 200 P.2d 564, it was held that where the joint adventure had been established and where the parties were still engaged within the scope of the joint enterprise or undertaking, all members thereof may be jointly liable for injuries resulting from the negligent conduct of one of the parties thereto, and the negligence of one joint venturer is imputable to his associates. See, also, *Di Vita v. Martinelli*, 123 Cal.App. 392, 394, 11 P.2d 423; 48 C.J.S., Joint Adventures, § 14-e, page 870.

In the instant case there was evidence that the five defendants, including Beals, agreed that they would all hire or rent a

plane for the common purpose of going to a particular place to fish and that Beals could and was authorized to act for them in making all necessary arrangements for this purpose; that the rental price of the plane was fixed at \$100, and four of the defendants shared equally in the payment thereof with checks made payable directly to plaintiff. The jury was justified in believing these facts. Plaintiff therefore established a community of interest in the airplane by virtue of the joint hiring thereof for the term specified. Each, legally, had the right of control over the plane and the driver, if he were their agent in operating the plane for them. It was not necessary to establish the fact that some one or all of the defendants, excluding Beals, personally knew how to pilot the plane themselves.

[4] In *Rogers v. Goodrich*, 131 Cal. App. 245, 249, 21 P.2d 122, 124, it is said that "the passenger must exercise some control over the driver, or in law, may be said to possess the right of such control, before it will be held that they are engaged in a joint enterprise." There is sufficient evidence to show that defendants did, in law, have the right of control, and there is some evidence that one or more of the parties did, in fact, exercise some control over the pilot. At their direction he was told to land at Stockton to secure films for a camera. At Mendocino all the parties landed and all engaged in obtaining information as to landing conditions at other airports. The testimony shows that they all made the decision to land at Fort Bragg, notwithstanding a warning that the field was too short for a landing by a plane of that size. It cannot be said, as a matter of law, that there was not sufficient evidence to support the jury's conclusion that the defendants were, at the time, engaged in a joint adventure or enterprise within the meaning of that term and that defendants, other than Beals, had legally no right of control over the pilot or the airplane.

Defendants next complain of instructions given on the subject. After informing the jury of the various claims presented, the court instructed it that the burden was "upon each party to establish by a preponderance of the evidence that the other or

others were negligent and that such negligence was a proximate cause of the accident in question", and then said: "The issues to be determined are these: First, was the plaintiff negligent; Second, were any of the defendants negligent; Third, was the negligence of any of the defendants imputed to the other defendants by reason of their being joint venturers \* \* \*. If you find none of them were negligent then neither the plaintiff or the cross-complainant \* \* \* may recover. If you find that although one or more of them was negligent, the accident was not the proximate result of such negligence then again none of them may recover \* \* \*. If you find that the plaintiff was free from negligence, or if negligent that his negligence did not contribute in any degree as a proximate cause of the injury and if you find that the defendants were negligent or that one of them was negligent and his negligence was imputed to the others and that this negligence was a proximate cause of the accident then the plaintiff is entitled to recover from the defendants, or such of them as were negligent, either in fact or by reason of the doctrine of imputed negligence \* \* \*."

Then followed an instruction as to joint venture, i. e.:

"If the defendants were engaged in a joint venture, the relationship between them, insofar as it involved the immediate management of the airplane, must have been similar to that of a partnership—that is to say, involving by mutual understanding some common objective, some joint enterprise in which they then were engaged, with each authorized to act and acting in pursuit of that common purpose, so that each was acting for the others and for each." And that

"If \* \* \* you should find that the defendants were joint venturers, then, all of them are equally liable for the acts and negligence of each one of them. However, if they were not joint venturers then each of them is liable only for his own acts and negligence."

Defendants charge that the instruction, as given, made no reference to the require-

ment that defendants must be found to be in *joint or common possession and control* of the plane, with each having an equal right to be heard in its control and management.

[5] It is true that the definition of a joint venture, as given, did not elucidate to the extent suggested by counsel for defendants. However, the relationship was described as "similar to that of a partnership" with a mutual understanding of some common objective and where *each* was *authorized* to act *for the others*. A partnership connotes a community of interest in the property. *Fee v. McPhee Co.*, 31 Cal.App. 295, 315, 160 P. 397; *Doan v. Dyer*, 9 Cir., 286 F. 339; 20 Cal.Jur. 689, sec. 9.

[6] In the absence of an explanatory instruction on the subject being proffered or requested by defendants, they cannot now be heard to complain, where the evidence supports the theory that each had, legally, an equal voice in the management of the agency, and, in law, possessed the right of such control. Evidence of these elements was lacking in *Wessling v. Southern Pacific Co.*, 116 Cal.App. 455, 3 P.2d 25, relied upon by defendants.

[7] The general rule is that where a general instruction is given which is correct as far as it goes, being deficient merely by reason of its generality, the injured party may complain on appeal only in case he requests that the charge be made more specific or asks for other qualified instructions, and his request is denied. *Peckham v. Warner Bros. Pictures*, 42 Cal.App.2d 187, 189, 108 P.2d 699; *Eubanks v. Milton G. Cooper & Son, Inc.*, 68 Cal.App.2d 366, 156 P.2d 775; 24 Cal.Jur. 796, sec. 74.

General complaint is made about other instructions given and particularly to one reading: "If you find that the defendants or any or all of them rented the airplane from the plaintiff then he or they were a bailee or bailees of the airplane and were under a duty to the plaintiff to use ordinary care to preserve the airplane and are liable to the plaintiff for any damage to the airplane as a result of their negligence."

It is argued that this instruction is confusing and does not contain all the neces-

sary elements, i. e., that any such negligence on their part would have to be a proximate cause of the accident and that plaintiff would have to be free of any contributory negligence, citing *Spear v. Leuenberger*, 44 Cal.App.2d 236, 112 P.2d 43; and *La Rue v. Powell*, 5 Cal.App.2d 439, 42 P.2d 1063. While this instruction, standing alone, lacked the qualifications mentioned, the trial court did give a general instruction that the burden was on plaintiff to prove negligence on the part of defendants by a preponderance of the evidence; that such negligence was a proximate cause of the accident in question; and that it must be established that plaintiff was free from negligence before a recovery could be had.

[8] Section 1925 of the Civil Code defines a hiring, and section 1928 thereof requires a hirer of a thing to use ordinary care for its preservation. The question whether a bailee is guilty of negligence is one for the jury. *Southern Pacific Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368, 50 P. 650; 4 Cal.Jur. 23, sec. 13.

In *Baugh v. Rogers*, 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043, it was held that when the owner of an automobile gives another person possession of it with permission to operate it, a contract of bailment is created; and that a bailee is responsible in damages to the bailor for any injury to the bailed property resulting from a failure of the bailee to exercise a proper degree of care in protecting it.

In *O'Brien v. Woldson*, 149 Wash. 192, 270 P. 304, 306, 62 A.L.R. 436, it was said: "A bailment for hire is for the mutual benefit of the parties. A joint enterprise is an undertaking for the mutual benefit or pleasure of the parties. The same rule should be applied in the one case as in the other."

[9, 10] It has often been stated that a trial court is not required to state all the law applicable to a case in a single instruction. The charge must be read as a whole,

that is to say, instructions given should be considered in connection with each other, and if, without straining any portion of the language, the charge harmonizes as a whole and fairly and accurately states the law, a reversal may not be had because of verbal inaccuracies, or because a separate instruction does not contain all of the conditions and limitations which are to be gathered from the entire charge. 24 Cal.Jur. 861, sec. 114; *Lonnergan v. Stansbury*, 164 Cal. 488, 129 P. 770. Construed as a whole, the instructions were not prejudicially erroneous. 24 Cal.Jur. 857, sec. 113.

[11-14] The final claim of error is that there is no sufficient evidence to support the damages allowed. Plaintiff, as owner of the airplane, testified that its value before it was wrecked "I think was \$10,000". Another witness testified that in his opinion such an airplane, in good condition, would be worth from \$6,000 to \$10,000, and if in excellent condition "easily be worth \$10,000." There was evidence that the plane was in good condition prior to the accident. A defense witness placed the value at approximately \$3,500. The proper measure of damages is the reasonable market value of the personal property destroyed. *Tatone v. Chin Bing*, 12 Cal.App.2d 543, 55 P.2d 933. It is a recognized rule that the owner of property, whether generally familiar with such values or not, is competent to estimate its worth, the lack of knowledge going to the weight rather than the admissibility of the testimony. *Hood v. Bekins Van & Storage Co.*, 178 Cal. 150, 172 P. 594; *Willard v. Valley Gas & Fuel Co.*, 171 Cal. 9, 151 P. 286; *Schraeder v. Robinson*, 78 Cal. App.2d 328, 177 P.2d 788. The evidence merely created a conflict as to the value of the airplane. We are bound by the familiar rule. *Chichester v. Seymour*, 28 Cal.App. 2d 696, 83 P.2d 301.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



97 Cal.App.2d 74

**KALMUS v. KALMUS et al.**

Civ. 17534.

District Court of Appeal, Second District,  
Division 1, California.

April 20, 1950.

Natalie M. Kalmus sued Herbert T. Kalmus and Technicolor Motion Picture Corporation for accounting and appointment of receiver, and defendant Kalmus cross-complained for declaratory relief and injunction. The Superior Court rendered a judgment adverse to plaintiff, and plaintiff appealed, and plaintiff moved for an order augmenting the record to supply the recorder's transcript of testimony and proceedings upon trial. The District Court of Appeal, Drapeau, J., held that justice would be better served by permitting plaintiff to have for her record on appeal the supporting data which her counsel deemed necessary.

Transcript ordered augmented.

**1. Appeal and error — 659(1)**

Where matter is omitted from record, permitting record to be augmented by addition of such matter is discretionary in District Court of Appeal.

**2. Appeal and error — 659(1)**

Where plaintiff's notice to clerk to prepare record did not specify a demand for a reporter's transcript of testimony and proceedings upon trial, and counsel for plaintiff when notice of appeal and notice to clerk were filed had since died, necessitating substitution of counsel for plaintiff, District Court of Appeal on plaintiff's motion would permit record to be augmented to supply reporter's transcript on ground that justice would be better served by permitting plaintiff to have for her record on appeal the supporting data which her present counsel deemed necessary. Rules on Appeal, rules 12(a), 52.

C. Ray Robinson, Merced, Bruce Walkup, San Francisco, and James A. Cobey, Los Angeles, for appellants.

Jennings & Belcher, Los Angeles, for respondents.

**DRAPEAU, Justice.**

Natalie M. Kalmus filed her complaint for support and maintenance, dissolution of partnership and for accounting and appointment of receiver in the Superior Court. Dr. Herbert T. Kalmus and a number of other defendants were named. The complaint alleges that the plaintiff and Dr. Kalmus (who will hereafter be referred to as the defendant) were married in Massachusetts July 23, 1902, remarried in New York City in February, 1923, and separated June 6, 1944; that the defendant is worth three million dollars or more, and is principal stockholder in a number of prosperous technicolor corporations; and that plaintiff is entitled to an interest in defendant's earnings and property, by way of community, dower, partnership, or otherwise. The complaint avers grievous mental cruelty, desertion, and adultery. It also avers that in addition to her alleged marital rights in defendant's property, plaintiff and defendant have been partners in all of defendant's business enterprises from the date of the marriage. Plaintiff prays for support and maintenance, counsel fees and court costs, and for an accounting of the partnership alleged.

Defendant's answer admits the marriage in Massachusetts; denies the marriage in New York; alleges a decree nisi of divorce in Massachusetts December 22, 1921, which became final six months thereafter; and that defendant and plaintiff have not been husband and wife since the decree. The decree provided for payments of \$625 per month by defendant to plaintiff as alimony, which payments have always been made. The answer also alleges a compromise agreement, set out *in haec verba*, releasing defendant from all asserted claims and demands of plaintiff, and dated February 19, 1945. All of the other material allegations of the complaint are denied.

Defendant also cross-complained for declaratory relief and injunction, setting up the divorce decree and the compromise agreement as a bar to any and all claims by plaintiff against him; and alleging harassment by her of him throughout the

years. The prayer is for declaratory judgment accordingly, and for injunction.

Plaintiff answered the cross-complaint, averring that after the decree nisi she and Dr. Kalmus resumed marital relations and lived together as husband and wife, in her belief that the decree had not become final and was not binding, which relationship continued until 1944; denying the allegations of the cross-complaint; and pleading in bar a pending equity action in Massachusetts to set aside the decree nisi. This action, however, was commenced after the complaint was filed in this proceeding.

After several days of hearings, the Superior Court denied plaintiff any counsel fees, costs, or support money *pendente lite*.

The case was set for trial, and plaintiff notified. At that time she appeared in propria persona. From time to time throughout the litigation she has been represented by several different attorneys.

Counsel specially appeared, requesting a continuance of the trial, which request was denied by the court.

Thereupon the trial came on, on the date set. Defendant and his counsel were present; the defendant Technicolor Motion Picture Corporation and its counsel were present. All of the other defendants had been dismissed. But the plaintiff did not appear. Testimony was taken; the trial court made its findings and judgment, declaring that plaintiff and defendant were not husband and wife, and had not been since the Massachusetts decree nisi became final; that the compromise agreement was valid and binding upon plaintiff; and that she had no rights, either as wife of plaintiff or as a partner, in his earnings or in his property, other than to be paid \$625 per month alimony.

Plaintiff was enjoined from asserting any rights in defendant's earnings or property as his wife or otherwise, and from harassing or annoying him.

From this judgment plaintiff has appealed. All of the matters and things specified in the notice to the Clerk to prepare the record are in the file. The notice

does not specify a demand for a reporter's transcript of the testimony and proceedings upon the trial.

Present counsel for plaintiff now come before this Court, and move for an order augmenting the record, to supply the reporter's transcript. The motion is opposed by counsel for defendant.

In support of the motion plaintiff contends that the appeal is not on the judgment roll, and consequently, proceedings for augmentation are available to her; that the requested augmentation is necessary as a basis for plaintiff to attack the sufficiency of the evidence to support the findings of fact; and to attack the jurisdiction of the court.

Plaintiff cites *Kuhn v. Ferry and Hensler*, 87 Cal.App.2d 812, 197 P.2d 792, to the effect that a denial of the right to augment a record would be an abuse of discretion, when it appears that proceedings were had or evidence introduced on a trial which should be considered on appeal.

Defendant contends that under Rules 12(a) and 52 of Rules on Appeal plaintiff has no right to have the reporter's transcript made a part of the record, and cites in support of his position *Russi v. Bank of America*, 69 Cal.App.2d 100, 158 P.2d 252.

In *Russi v. Bank of America*, supra, 69 Cal.App. at page 102, 158 P.2d at page 253, the Court observes: "Parties are encouraged to bring up only relevant matters on appeal and occasionally it will develop that there has been omitted from the record some paper, exhibit or portion of the oral proceedings. In such case it is desirable and proper upon a showing that the omitted material was relevant and that its omission was excusable, to bring it up in order that the appeal might be determined on an adequate record. But as has been correctly said: 'Even where the matter sought to be added is proper, or the proposed correction is warranted, neither augmentation nor correction is a matter of right; they both may be denied for inexcusable neglect in preparing the record, for delay in presenting the application, or for other reasons. The new rule does not deal expressly with this aspect of the question and

the discretion of the court to deny the application still remains. \* \* \*

[1] It would therefore appear to be within the discretion of this Court to deny or to permit the augmentation of the record.

[2] Counsel for plaintiff when the notice of appeal and the notice to the Clerk were filed was Werner O. Graf, Esq. Mr. Graf has since died. Inasmuch as Mr. Graf may have had one theory relative to the appeal, and present counsel for plaintiff another, it is the opinion of this Court that justice will be better served by permitting plaintiff to have for her record on appeal the supporting data which her present counsel deem necessary.

It is ordered that the record be augmented by adding the reporter's transcript of the proceedings in the trial court as prayed.

WHITE, P. J., and DORAN, J., concur.



97 Cal.App.2d 194

JORDAN et al. v. REYNOLDS et al.  
Civ. 7718.

District Court of Appeal, Third District  
California.

April 26, 1950.

Rehearing Denied May 26, 1950.

Action by D. J. Jordan and M. L. Dos Reis against H. A. Reynolds, W. L. Allenthorp, and others, to recover damages for lost profits allegedly sustained by repossession of lumber mill, and for damages for alleged conversion of uncut logs upon premises at time of repossession. Defendants filed an answer and cross-complaint. The Superior Court of Mendocino County, Lillburn Gibson, J., entered judgment for defendants upon plaintiffs' complaint, and for defendants upon their cross-complaint, and plaintiffs appealed. The District Court of Appeal, Peek, J., held that in absence of a provision in agreement

making time of the essence, mere failure to pay in accordance with terms of agreement was not ground for forfeiture.

Judgment reversed, and cause remanded.

#### 1. Sales ⇨5

Where vendors, in letter to purchasers, authorized purchasers to take over and operate saw mill, and enclosed agreement calling for rental based on board feet of lumber cut by mill, with minimum rental when mill could not be operated, and containing provision to sell mill when payments totaled \$5,000, and further authorizing purchasers to salvage for their own account any and all parts of saw mill after payment of \$5,000, agreement constituted a sale, and not a lease, notwithstanding provision that after payment of \$5,000, rent would be reduced to \$1.00 per year for ground rental and rights of way.

#### 2. Appeal and error ⇨1010(1)

District court of appeal will not interfere with determination of trial court which is reasonable and supported by evidence.

#### 3. Sales ⇨481

Where agreement to sell lumber mill did not expressly provide for a forfeiture, and time was not made of the essence, in action by purchasers to recover damages consisting of lost profits allegedly sustained as result of vendors' repossession of mill, in which trial court failed to make findings as to whether sums expended by purchasers constituted improvements and if so, to what extent, and terms and provisions of agreement, other than payment, judgment forfeiting sums expended by purchasers was improper.

#### 4. Vendor and purchaser ⇨185

In the absence of a provision in a contract, for sale of realty making time of the essence, mere failure of purchaser to pay in accordance with terms of contract is not ground for forfeiture.

Preston & Falk, Ukiah, and Joseph Rattigan, Santa Rosa, for appellants.

Spurr & Brunner, Ukiah, and John B. Lawrence, Ukiah, for respondents.



PEEK, Justice.

This controversy arises out of an agreement concerning a sawmill located upon land in Mendocino county held by respondent Reynolds under a lease from respondent Allenthorp.

Appellants by their action sought to recover damages consisting of lost profits allegedly sustained as the result of Reynolds' repossession of the mill which appellants termed an eviction, and for damages for the alleged conversion of the uncut logs upon the premises at the time of the aforesaid repossession. Respondents filed an answer and cross-complaint and the case was tried before the court without a jury.

The trial court found that Reynolds agreed to sell the sawmill to appellants for \$5,000.00 payable at the rate of \$1.50 per thousand board feet of lumber cut by the mill in not to exceed five years, with a minimum payment of \$25.00 per month when appellants should be unable to operate the mill for a period of thirty days due to bad weather; that appellants entered into possession on or about October 1, 1944, and operated until December 1944 but did not operate thereafter in a consistent and profitable manner; that operations were abandoned by appellants prior to September 2, 1945; that on September 2, 1945, Reynolds served a thirty day notice to quit the premises; that on or about October 25, 1945, Reynolds peaceably took possession of the premises and sold the same for \$4,000.00; that during the period in which appellants were in possession they paid Reynolds \$312.23 and tendered an additional \$175.00 which Reynolds refused; that during said period appellants cut 207,573 feet of lumber; that the sawmill could have reasonably cut from ten to fifteen thousand board feet of lumber per day each day it was operated; that the amount cut by appellants was not a substantial compliance with the terms of the agreement and the payments made were not a substantial compliance with the terms of payment of the agreement; that Reynolds' re-entry and repossession of the mill was legal and proper and did not constitute an eviction of appellants; that appellants built new roads and improved existing ones on the premises, installed a motor at

the mill, and changed the belts and rollers upon the sawing equipment, all of which cost appellants \$7,000.00; that appellants' operating costs during the period in which they operated were \$26.00 per thousand feet; that the price at which appellants sold the lumber averaged \$32.00 per thousand feet and that appellants were the owners of 256,685 feet of uncut logs on October 25, 1945 but were not in possession thereof since they had abandoned them on the premises where the mill was situated and that appellants were not excused by reason of weather conditions or the existence of a claimed labor shortage.

Judgment was entered denying recovery to appellants upon their complaint, and to respondents upon their cross-complaint, from which this appeal is taken.

The agreement entered into by the parties is contained in a letter from Reynolds to appellants assented to by appellants which reads as follows:

"Willits, California

September 15th, 1944

"Messrs. M. L. Dos Reis and D. J. Jordan  
(co-partners operating Outlet Planing  
Mill) Longvale, California.

"Gentlemen:

"In line with my conversation with Mr. Kenneth Bell, representing you, this letter will authorize you to take over and operate my sawmill located on Wheelbarrow Ranch approximately 8 miles northeast of Willits, Mendocino County, California, on the following basis:

"1. I enclose a copy of a lease for sawmill site on said ranch for five years from this date, and it is understood that you will comply with the provisions of said lease insofar as those provisions apply to you.

"2. Upon your taking over said sawmill you are to pay me as rent for said mill the sum of \$1.50 per M. BM for all merchantable lumber sawed by said mill, payment to be made by the 7th and 22nd days of each month for each preceding half month period.

"3. When you shall have paid me a total of Five Thousand Dollars in rentals as above designated, the rent shall be reduced to \$1.00 per year which shall cover ground rental for the mill and rights of way.

"4. You are to so operate your sawmill business that no liens for labor or claims of any kind shall be filed against said mill, to adjust all disputes affecting said mill, and to keep all employees covered by workmen's compensation insurance.

"5. You are to commence operating said mill as soon as labor and weather conditions permit, and to continue operating said mill in a workmanlike manner. In the event you find operating the mill unprofitable you have the privilege of turning the mill back to me, without penalty, provided the mill is returned in as good condition as when received by you.

"6. Should you be unable or fail to operate said mill for a period of thirty days, you are then to pay me the sum of \$25.00 per month after said thirty day period, as rent for said mill, said rent to apply on said \$1.50 per M. rental for sawing.

"Yours very truly,  
H. A. Reynolds

"Accepted:

"M. L. Dos Reis  
D. J. Jordan"

Under the same date Reynolds addressed the following letter to appellants:

"Willits, California  
September 15th, 1944.

"Messrs. M. L. Dos Reis and D. J. Jordan,  
(Co-partners operating Outlet Planing  
Mill) Longvale, California

"Gentlemen:

"This letter will authorize you to salvage for your own account any and all parts of the sawmill located on Wheelbarrow Ranch approximately 8 miles northeast of Willits, Mendocino County, California, at any time after you have paid to me a total rent of \$5,000.00 under rental agreement made this date.

"Should you desire to so salvage said mill before all the timber on said Wheelbarrow Ranch has been logged off, Mr. Allenthorp as owner of said ranch is to have two weeks to meet the best offer you have obtained as salvage price.

"Yours very truly,  
H. A. Reynolds"

[1,2] We find no merit in appellants' contention that the agreement, as evidenced by the foregoing writings, constituted a lease and not a sale. There can be no question but that the agreement is ambiguous, and since the determination of the trial court that it was a sale is reasonable and supported by the evidence, this court will not interfere. See *Nuland v. Pruyn*, — Cal.App.2d —, 216 P.2d 526.

[3,4] However, there is merit to appellants' contention that even if the agreement be construed as one of sale, Reynolds could not repossess since the agreement did not expressly provide for a forfeiture and time was not made of the essence. It is further argued that in any event Reynolds waived such right by the acceptance of late payments. While the court found that the agreement was one of sale there are no findings as to the terms and provisions of such contract of sale, other than payment, which supports a forfeiture of the sums expended by appellants. Thus, the findings are silent as to whether or not the agreement, as one of its terms, provided for a forfeiture of the buyers' interest or made time of the essence. There is no finding as to whether or not the sums expended by appellants constituted improvements and if so, to what extent. While the law permits the buyers' interest to be forfeited under certain circumstances, it is sufficient to note that in the absence of a provision in the contract making time of the essence the mere failure to pay in accordance with the terms of the agreement is not ground for forfeiture. 25 Cal.Jur. 608.

Since by reason of the foregoing the judgment must be reversed it becomes unnecessary to discuss the remaining contentions raised by appellants.

The judgment is reversed, the purported appeal from the order denying appellant's motion for a new trial is dismissed, and the cause is remanded for further proceedings in accordance with the views expressed herein.

ADAMS, P. J., concurs.

**NEWBY v. ANDERSON et al.**

**Civ. 17253.**

**District Court of Appeal, Second District,  
Division 1, California.**

**April 20, 1950.**

**Rehearing Denied May 9, 1950.**

**Hearing Granted June 12, 1950.\***

Action by Nathan Newby, Jr., against William O. Anderson and another, for alleged breach of a royalty agreement. The Superior Court for Los Angeles County, Arthur Crum, J., rendered a judgment for the plaintiff, and the defendants appealed. The District Court of Appeal, White, P. J., held that defendants had not breached their agreement.

Judgment reversed with directions.

**1. Appeal and error ⇐1008(3)**

Interpretation of a document is a question of law; and an appellate court must interpret the document independent of the construction given to it by the trier of fact, and must make a final determination in accordance with applicable principles of law.

**2. Appeal and error ⇐1008(3)**

When trial court's construction of an ambiguous instrument is supported by substantial extrinsic evidence legally admissible in aid of interpretation, appellate court will adhere to interpretation placed by trial court on writings and conduct of parties.

**3. Contracts ⇐154**

A construction of contract which leads to an unconscionable result should be avoided in favor of one which is reasonable, fair and equitable.

**4. Contracts ⇐155**

Where a royalty agreement was drawn by one of the parties who was an attorney, any uncertainty resulting from failure to use more express language, particularly, with respect to assumption by other parties of a serious obligation, would be resolved against the draftsman. Civ. Code, § 1654.

**5. Contracts ⇐202(1)**

Where royalty agreement between distributors and another provided that distributors would do nothing to jeopardize their exclusive distribution rights under an agreement with the manufacturer which

stated that distributors were to purchase a minimum quota in order to retain exclusive rights, distributors were bound under the jeopardize clause to use reasonable diligence and good faith in performing the contract with the manufacturer, and failure to purchase quota after diligent efforts to sell the product was not a breach of the royalty agreement.

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Pat A. McCormick, Morrow & Trippet, Hubert T. Morrow, John C. Morrow, Los Angeles, for appellants.

Newby, Holder & Newby, Nathan Newby, Los Angeles, for respondent.

WHITE, Presiding Justice.

Defendants appeal from a judgment against them after trial before the court, sitting without a jury.

Prima Products, Inc., holder of exclusive distribution rights in the United States of the product "Aquella" (a masonry waterproofing compound), entered into an agreement on December 28, 1945, granting to plaintiff and respondent exclusive distribution rights in the western states. On the same day plaintiff entered into an agreement with Allan Greenwood Company whereby the latter undertook distribution of the product and performance of plaintiff's contract with Prima Products, Inc., and agreed to pay plaintiff a royalty of five cents per gallon of Aquella sold.

On April 1, 1946, in an effort to settle certain disputes that had arisen, plaintiff entered into a new distribution agreement with Allan Greenwood Company. On April 12 or 13, 1946, plaintiff entered into a new agreement with Prima Products, Inc. During this same month the defendants, partners doing business as Anderson Sales Organization, undertook, through one Weibert, to pay \$32,500 for the franchise held by the Greenwood Company and their unfilled orders. The outcome of the negotiations was the execution of a new agreement dated April 22, 1946, directly between Anderson Sales Organization and Prima Products, and a "royalty" agreement, consented to by Prima Products,

\* Subsequent opinion 224 P.2d 673.



whereby Anderson Sales Organization undertook to pay plaintiff a royalty. Under the terms of the royalty agreement, defendants undertook to do nothing which would jeopardize their rights under the agreement with Prima Products. Plaintiff in his complaint charged that defendants breached the royalty agreement by willfully defaulting under the agreement with Prima Products and consenting to the termination of such agreement.

The agreement between Prima Products and the Andersons provided:

"It is agreed that 'The Andersons' shall be the exclusive distributor of Aquella in the following enumerated states and that no sales shall be made except through 'The Andersons', their agents, distributors, salesmen and purchaser. \* \* \*

"\* \* \* In order to permit 'Prima' to plan the orderly production of merchandise needed to fulfill this quota, it is understood and agreed that *in order to retain exclusive distribution* 'The Andersons' must purchase 400,000 gallons of Aquella per annum \* \* \*

"If 'The Andersons' fail to order the minimum quota of Aquella as herein required, 'Prima' shall have the option to sell Aquella direct to purchasers located in said exclusive territory of 'The Andersons', until said minimum quota requirement shall have been met, but it shall not be obligated to do so. In the event there is a default by 'The Andersons' to sell said minimum quota of Aquella as herein required, and 'Prima' does not exercise its option to sell direct to purchasers in said exclusive territory of 'The Andersons', then and in that event, but not otherwise, 'Prima' may cancel this agreement upon giving to 'The Andersons' a written notice of cancellation specifying the alleged default, and 'The Andersons' shall have the ensuing seventy (70) days within which to correct said default \* \* \*."

The Andersons further agreed to diligently prosecute the sale of the product. A further provision permitted the Andersons to assign the agreement to a corporation, provided they retained control of the cor-

poration and the corporation assumed the terms and conditions of the agreement.

The "royalty agreement" recites that plaintiff is the owner of an exclusive right to sell Aquella in the western states (under the agreement with Prima Products dated April 12, 1946); that plaintiff is willing to cancel his agreement with Prima and permit defendants to make a distribution agreement direct with Prima; that it is the intention of the parties that plaintiff should receive a royalty in consideration of his cancellation of his agreement with Prima; that in consideration of the premises it is agreed: (1) Plaintiff agrees to the cancellation, and the execution of a new agreement between Prima and defendants, a copy of which was submitted to and approved by plaintiff. (2) Defendants agree to pay the stipulated royalty. (3) That the obligation to pay royalty should continue as long as the term of the agreement between Prima and defendants, or until April 12, 1969, and for an additional 15 years. (4) "Second Party (defendants) agrees *not to do anything which will jeopardize rights of Second Party under said agreement to be entered into with Prima Products, Inc., \* \* \**" (Emphasis added.)

The appellants contend that the trial court's interpretation of the agreements was erroneous; that the evidence does not support the findings that defendants breached the royalty agreement and that they "wilfully defaulted" under the Prima agreement; that the contracts are ambiguous, and the court therefore erred in refusing to hear extrinsic evidence as to the intention of the parties and the meaning of the language used in the instruments; and that, assuming a breach of the royalty agreement, there is no evidence to support the award of damages.

Although the trial court received considerable evidence as to the circumstances leading up to and surrounding the execution of the agreements in question, it explicitly rejected several offers by defendants to prove that immediately prior to signing the royalty agreement defendant J. I. Anderson asked plaintiff if it was understood that the Andersons would not

be obliged to pay any royalty except when the quotas under the Prima Contract had not only been purchased and received, but delivered and paid for, and that it was on an actual sales basis that the royalties would become due and payable; that plaintiff stated that he understood that to be the fact; that Anderson stated that while they hoped and expected the business would be profitable, he wanted to know whether plaintiff fully understood the Prima contract as providing for certain limited quotas and that unless they made those quotas the agreement was subject to cancellation, and that plaintiff would have to "rise or fall" upon the terms of that contract.

[1,2] It is settled that the interpretation of a document is a question of law, and that it is the duty of an appellate court to interpret the document independent of the construction given to it by the trier of fact, and to make a final determination in accordance with the applicable principles of law. In re Estate of Norris, 78 Cal.App. 2d 152, 159, 177 P.2d 299; In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825; Western Coal & Mining Co. v. Jones, 27 Cal.2d 819, 826, 827, 167 P.2d 719, 164 A.L.R. 685; Union Oil Co. of California v. Union Sugar Co., 31 Cal.2d 300, 306, 318, 188 P.2d 470; In re Estate of Pearson, 90 Cal.App.2d 436, 438, 203 P.2d 52. However, when the trial court's construction of an ambiguous instrument is supported by substantial extrinsic evidence, legally admissible in aid of interpretation, then the appellate court will adhere to the interpretation placed by the trial court on the writings and the conduct of the parties. See Edwards v. Billow, 31 Cal.2d 350, 359, 188 P.2d 748; Palmtag v. Danielson, 30 Cal.2d 517, 522, 183 P.2d 265; In re Estate of Rule, 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319.

A consideration of the two instruments here involved, irrespective of the extrinsic evidence rejected, or of any that was admitted on behalf of defendants, impels the conclusion that the interpretation urged by respondent is not tenable.

Looking at the agreement between Prima Products and the Andersons, we find first

a recital that the Andersons are "desirous of undertaking a right for the exclusive sale and distribution of Aquella"; then it is agreed that the Andersons shall be the exclusive distributors in certain states, subject to certain limitations not here pertinent. It is then "understood" that a minimum quota of 400,000 gallons is essential, and it is agreed that "in order to retain exclusive distribution" the Andersons must purchase 400,000 gallons in quarterly quotas of 100,000 gallons; but this quota, representing 20% of the total sales in the United States, shall be reduced proportionately should the national sales decline.

Paragraph 4 of the agreement specifies two consequences of a failure by Andersons to order the minimum quota. Prima Products might sell direct to purchasers in the Andersons' territory, or, it might elect to cancel the agreement by giving written notice of default, the Andersons then to have 70 days in which to cure the default. The Andersons did not undertake absolutely and at all events to purchase the minimum quota of Aquella, but only that if they failed to do so, their agreement was subject to cancellation. They did undertake, however, to "diligently prosecute" the sale of Aquella and "to do all things reasonably necessary to establish the sale of Aquella in all trade centers and through all proper channels of trade." So long as they were diligent in their efforts to make sales, they were subject to no penalty for failure to purchase the minimum quota except cancellation of the agreement or direct competition from Prima Products.

Although the findings recite that the defendants "willfully" defaulted, no evidence was introduced to show that they did not diligently prosecute the sales campaign, and at the trial plaintiff's counsel clearly stated his position—that whether they were diligent was immaterial, as "they were under the imperative obligation of keeping the Prima Products contract in good standing by the purchase of at least the minimum amount required".

Looking now at the royalty agreement, we find a recital that it is the "intention of the parties" that as long as Aquella is sold through the Andersons, Newby should

be paid a royalty, in consideration of the cancellation of Newby's agreement with Prima Products. Paragraph 2 then provides: "In consideration of said cancellation and execution of the new agreement above referred to, the Second Party agrees to pay to First Party a royalty on all 'Aquella' or other waterproofing compound which would be a substitute for 'Aquella' manufactured by Prima Products, Inc., or sold by Prima Products, Inc., in the eleven Western States through Second Party \* \* \*." It is further provided that the royalty shall be paid on the tenth of the month following the month in which the merchandise is sold. Paragraph 4 provides that "the obligation to pay royalties under this agreement shall last and continue as long as the term of said agreement between Prima Products, Inc., and Second Party, or until April 12th, 1969, and for an additional fifteen years if Second Party is not in default with Prima Products, Inc., and as long thereafter as Second Party shall sell 'Aquella' or any substitute therefor manufactured or sold by Prima Products, Inc., through Second Party in this territory."

By paragraph 6 of the royalty agreement, the Anderson organization agreed "not to do anything which will jeopardize rights of Second Party (Andersons) under said agreement to be entered into with Prima Products, Inc., and agrees not to assign the agreement entered into with Prima Products, Inc., except as therein provided in Paragraph 9, Page 5, of said agreement \* \* \*."

Summarizing the royalty agreement, the Andersons agreed to pay a royalty on Aquella sold in their territory so long as they held their distributorship under the agreement with Prima Products, and agreed further "not to do anything that will jeopardize" their rights under the last-mentioned agreement. The question is, therefore, did their failure to purchase or order the minimum quota, even though they could not with due diligence sell such quota (thus rendering their distributorship agreement subject to cancellation), constitute a breach of their agreement "not to

do anything that will jeopardize their rights" under their agreement with Prima? We have concluded that their failure did not constitute a breach of the royalty agreement. True, taking the language literally, their failure to purchase the minimum quota did operate to "jeopardize" their right to a continued exclusive distributorship. But under their agreement with Prima, they were under no obligation to purchase the minimum quota; they had the "right" to decline to do so without penalty other than loss of their distributorship. Although their obligation was to use due diligence, their "rights" included the right to decline to purchase more Aquella than they could, using such diligence, sell in their territory.

[3] The provision not to "jeopardize" is too broad and uncertain to be enforceable. Construed as respondent seeks to have it construed, it provides that appellants are unconditionally bound to purchase 20% of the Prima Products' output until 1969 and 15 years thereafter, no matter how slow the market might be in their territory. Every year, until 1984, appellants, in order not to "jeopardize their rights", would have to purchase Aquella that they could not sell, and this they would have to do even though their continued purchases added not a nickel to respondent's income, since his royalty is based only on the Aquella sold. A construction which leads to such an unconscionable result should be avoided in favor of a construction which is reasonable, fair and equitable. *Lane-Wells Co. v. Schlumberger etc. Corp.*, 65 Cal.App.2d 180, 187, 150 P.2d 251.

The meaning ascribed by respondent to the disputed terms is at variance with the intentions expressed elsewhere in the royalty agreement—the intention expressed in the preamble that respondent should receive a royalty "as long as" Aquella is sold through the Andersons, and the provision that the obligation to pay royalty should continue "as long as" the term of the Prima Products agreement, or until April 12th, 1969, and for an additional 15 years "if Second Party is not in default."



[4] The royalty agreement was drawn by respondent, himself an attorney. The uncertainty resulting from a failure to use more express language, particularly with respect to the assumption by the Andersons of such a serious obligation, should be resolved against him. *Weil v. California Bank*, 219 Cal. 538, 541, 27 P.2d 904; *Ezmirlan v. Otto*, 139 Cal.App. 486, 493, 34 P.2d 774; Civ.Code, sec. 1654; Rest. Contracts, sec. 236, subd. (d).

[5] We conclude that the only reasonable interpretation of the "jeopardize" clause is that by it the Andersons were bound to use reasonable diligence and good faith in performing under their distributorship contract; but that they were not bound, at whatever cost to themselves, to purchase Aquella that they could not, in the exercise of such diligence, dispose of, in order to preserve respondent's royalty rights. Since no showing of bad faith or lack of diligence was made or attempted, it follows that there was no basis for a recovery against them.

Our conclusion on this point renders discussion of other contentions unnecessary.

The judgment is reversed with directions to enter judgment for the defendants.

DORAN and DRAPEAU, JJ., concur.



PORTER et al. v. BAKERSFIELD & KERN  
ELECTRIC RY. CO. et al.

SHREFFLER et al. v. BAKERSFIELD &  
KERN ELECTRIC RY. CO. et al.  
Civ. 4030.

District Court of Appeal, Fourth District,  
California.

April 25, 1950.

Hearing Granted June 22, 1950.\*

Actions for personal injuries received by  
two school children who were struck by a  
city passenger bus shortly after alighting

217 P.2d—5½

\* Subsequent opinion 225 P.2d 223.

from a school bus by Carol L. Porter and others and by Marvin William Shreffler and others against Bakersfield & Kern Electric Railway Company and others. The actions were consolidated for trial. The Superior Court of Kern County, W. L. Bradshaw, J., entered separate judgments on verdicts in favor of the plaintiffs and against all defendants, and the defendants appealed on the same transcripts. The District Court of Appeal, Barnard, P. J., held that the evidence was sufficient to support findings of negligence on the part of the drivers of both buses.

Judgments affirmed.

#### 1. Automobiles ⇨244(35)

In action for injuries received by two school children who were struck by a passenger bus shortly after alighting from school bus, evidence relating to speed of city bus and watchfulness of city bus driver warranted finding of negligence of such driver.

#### 2. Automobiles ⇨165

The driver of city passenger bus striking school children shortly after alighting from school bus must be free from negligence to rely on presumption that school bus driver would comply with safety regulations governing him and would not compel children to run around school bus and into pathway of city bus.

#### 3. Schools and school districts ⇨121

In action for injuries received by two school children who were struck by city passenger bus shortly after alighting from school bus, evidence relating to ordinary and special care exercised by school bus driver warranted finding of negligence of such driver.

#### 4. Trial ⇨296(3)

In action for injuries received by two school children who were struck by city passenger bus shortly after alighting from school bus, instruction that school bus driver's violation of rule of state board of education concerning driver's duty to children crossing street after leaving bus was negligence as matter of law was not prejudicial, where instruction did not purport to cover proximate cause or other elements and did not direct or suggest any verdict and

was one of large number of instructions in which many other matters, including proximate cause and negligence, were fully covered. Vehicle Code, § 510.

#### 5. Schools and school districts ☞115

In action against school bus driver for injuries received by two school children who were struck by city passenger bus shortly after alighting from school bus, presentation of claim to school bus driver within 90 days after accident was sufficient compliance with statute requiring presentation of claim to employee whose negligence is in question within 90 days after accident, notwithstanding that claim was served after commencement of action. Government Code, § 1981.

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Johnston, Baker & Palmer, Bakersfield, for appellants Bus Co. et al.

Borton, Petrini & Conron, Bakersfield, for appellants School Dist. et al.

Calvin H. Conron, Jr., Bakersfield, for respondents.

BARNARD, Presiding Justice.

These actions involve injuries received by two school children, shortly after alighting from a school bus, when they were struck by a city passenger bus.

The accident occurred about 3:00 P.M. on December 1, 1947, at the intersection of Woodrow and Yosemite Streets, in a residential district adjoining Bakersfield. The day was clear and the streets were dry. The two minor plaintiffs were being returned to the vicinity of their homes by the school bus which, traveling west on Woodrow, made its regular stop on the northeast corner of this intersection. Some twelve or fifteen children, including the minor plaintiffs, got off the bus which remained stopped for several minutes. The children had been instructed not to cross the street until a whistle was blown by the driver.

While this group of children stood near the front of the bus, and possibly while some of them were still leaving it, the minor plaintiffs, who were both eight years

old, started to run in front of the school bus and in a southerly direction across Woodrow Street. They were the only two of this group who lived to the south of Woodrow. About that time the city bus, which was also proceeding west on Woodrow, passed the standing school bus and collided with the minor plaintiffs, causing the injuries in question. The driver of the city bus first saw the children when they were approximately six to ten feet from his bus and came to a stop some 25 or 30 feet after applying his brakes. The evidence is conflicting as to the speed at which the city bus was traveling and as to whether these children started across the street before or after the driver of the school bus blew his whistle.

In each of the actions the city bus company and the driver of its bus, and the school district and its bus driver, were joined as defendants and the actions were consolidated for trial. In each action, the jury returned a verdict in favor of the plaintiffs and against all defendants. Separate judgments were entered from which all defendants have appealed upon the same transcripts.

On the appeal of the city bus company and its driver it is first contended that the sole cause of the accident was the carelessness of the school bus driver; that there was no evidence of undue speed or of other negligence on the part of the driver of the city bus; that this driver was confronted with an emergency caused by the driver of the school bus; and that the resulting conditions were such that a reasonably prudent driver could not have avoided the accident. It is argued that the driver of the school bus, without observing traffic conditions, blew his whistle and caused the children to run in front of the school bus and into the path of the city bus; that it was impossible for the driver of the city bus to see the children until they had passed the front of the school bus; and that he could not stop in time to avoid the accident. It is further argued that although several witnesses testified that the city bus was traveling at a speed of 20, 25 and 30 miles an hour, respectively, this evidence is conclusively disproved by

the physical fact that it stopped before it had completely crossed the intersection, and that the collision would have occurred regardless of any speed at which that bus had been going.

[1] Not only is the evidence conflicting as to whether or not the driver of the school bus blew his whistle before the children started to cross the street, but a conflict appears with respect to negligence on the part of the driver of the city bus. He testified that he observed the school bus standing at this corner when he was about 150 feet to its rear; that he recognized it as a school bus and knew that small children would be leaving it; and that as he approached the intersection he did not see any children around it. However, several passengers on that bus testified that as they approached this intersection the driver was looking back and talking to a young lady about a new car he had bought, and that he looked forward just before he put on his brakes. While he testified that his speed was 10 miles per hour when he observed the children, there is evidence showing that this bus traveled at least 36 feet from that point although the statutory stopping distance is 9.3 feet at 10 miles per hour. Moreover, his view to the north was obstructed and other witnesses testified that the speed of that bus was from 20 to 30 miles per hour. The entire question was one of fact, and the evidence is sufficient to sustain the implied finding of negligence on the part of this driver.

[2] It is further contended that the city bus driver had a right to believe that the driver of the school bus would comply with the safety regulations governing him and would not "compel" the pupils to run around the school bus and into the pathway of the city bus. He was not entitled to rely on this presumption unless he himself were free from negligence, *Doyle v. Loyd*, 45 Cal.App.2d 493, 114 P.2d 398; *Fietz v. Hubbard*, 59 Cal.App.2d 124, 138 P.2d 315.

On the appeal of the school district and its bus driver it is first contended that the accident was caused solely by the neg-

ligence of the driver of the city bus, and that any negligence of the driver of the school bus could not have contributed to the accident since it would have occurred regardless of what he did. It is argued that these children ran into the street before the driver of the school bus blew his whistle; that when he saw them they were almost even with the left side of the school bus; and it was too late for him to have prevented the accident; that in his excitement he then blew his whistle to warn the children of their danger; and that his valiant effort to prevent the accident could not be considered as having caused it.

[3] The school bus driver testified that as he pulled up and stopped he looked both ways and saw no traffic at all on the street; that he did not look again; that his rear view mirror was one which would have enabled him to see for some 300 feet to the rear; and that he first saw the city bus when it was opposite him and about five or six feet from the two children. He further testified that when he saw the children they were about even with the left side of his bus and the city bus about six or eight feet from them; and that he blew his whistle "in the excitement of trying to prevent the accident" and for the purpose of "trying to attract the attention of the kids." Not only was there evidence, by three witnesses, that this driver blew his whistle before the two children started to cross the street, but he admitted that after looking as he approached for a stop he did not again look for traffic, although he was stopped for several minutes, and that he did not see the city bus until it was almost past his own bus. Aside from the main conflict in the evidence in this regard, and assuming that this bus driver did not blow his whistle before the children started to cross the street, it could hardly be held, as a matter of law, that he exercised ordinary care under the circumstances, to say nothing of the special care required of such a bus driver. The question was one of fact and the evidence, with the reasonable inferences therefrom, is sufficient to support a finding of negligence on the part of the driver of the school bus.



It is next contended that the court committed reversible error by giving one instruction relating to a rule of the State Board of Education, as then in effect. The portion of this instruction which is material here reads as follows:

"Whenever a school bus stops at a point \* \* \* to discharge pupils who must cross the street or highway in order to reach their destination, \* \* \* the driver of the bus shall not permit the pupils to cross the street or highway until they may safely do so, and shall, if necessary, escort such passengers across the street or highway.

"A violation of the foregoing rule is negligence as a matter of law."

It is argued that the jury was thus instructed that a violation of this rule is negligence as a matter of law, without being further instructed that the surrounding circumstances must also be considered to determine whether or not it was excused or justified, and without being told that the violation must be a proximate cause of the injuries received; that this instruction took from the jury the entire question as to whether this driver's violation of the rule, by blowing his whistle as a warning after the emergency existed, might be excused or justified under the circumstances; and that its prejudicial nature clearly appears from the rules set forth in *Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, 177 P.2d 279, and followed in *Combs v. Los Angeles Railway Corp.*, 29 Cal.2d 606, 177 P.2d 293.

In the *Satterlee* case, the court considered an offered instruction telling the jury that the violation of a certain statute was negligence, and that its verdict must be for the defendant if it found that the plaintiff had violated it and that such act proximately contributed in the slightest degree to the accident. The court pointed out that "An act or failure to act below the statutory standard is negligence *per se*, or negligence as a matter of law"; [29 Cal.2d 581, 177 P.2d 283] that in applying this rule each violation of this kind must be considered in connection with the surrounding circumstances; that in an emergency

or unusual condition circumstances may be shown to excuse the violation; and that ordinarily the excuse relied on presents a question of fact for the jury. It was then held that the refused instruction did not afford the jury an opportunity to pass upon the question as to whether the circumstances were sufficient to excuse or justify that violation. This was true in that case because the offered instruction directed a verdict if it was found that a violation occurred which contributed at all to the accident.

While the instruction here in question stated that a violation of the rule given is negligence as a matter of law, it did not purport to cover proximate cause or other elements, and did not direct or suggest any verdict. It was one of a large number of instructions in which many other matters, including proximate cause and negligence, were fully covered. In the second instruction given the jury was told not to single out any single instruction and ignore the others, but to consider all the instructions as a whole and to regard each in the light of all the others. In another, the jury was told that "In deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence" and that "An act negligent under one set of conditions might not be so under another." In another, "In determining whether negligence, or proximate cause—has been proved—you should consider all the evidence bearing either way upon the question, regardless of who produced it."

In another instruction the jury was told that a person suddenly confronted with imminent danger to himself or to others is not required to use the same judgment or prudence that would be required in calmer moments, that his duty is to exercise only the care that an ordinarily prudent person would exercise in the same situation, and that this is all that the law requires of him. In another, the basic speed law was given in the language of section 510 of the Vehicle Code, although that section was not mentioned. The next instruction stated

that conduct in violation of the section of the Vehicle Code "just read to you" constitutes negligence *per se*. It then stated that this means that such conduct creates a presumption that the person so doing was negligent, that this presumption is not conclusive, and that it may be overcome by other evidence showing that under all the circumstances such conduct was excusable and was such as might reasonably be expected from a person of ordinary prudence. This instruction was followed by one on speed at an obstructed intersection, by one on unavoidable accidents, and then by the instruction here attacked. Thereafter, fifteen other instructions were given.

[4] Under these circumstances, we are unable to hold that the instruction in question could have had the effect of taking from the jury the consideration of the question as to whether or not any violation of this rule by the driver of the school bus was excusable or justified, or that it was prejudicial. While the jury had a right to consider that element it was left to other instructions, and the criticized instruction did not purport to cover all of the elements necessary to a recovery. Other elements were fully covered in other instructions, including the rules and requirements in cases of sudden peril or imminent danger, and the rule that while a violation of a statute constitutes negligence *per se* this is merely presumptive and not conclusive, and may be overcome by other evidence showing that under all the circumstances such a violation was excusable. At the outset the jury was told not to rely on any one instruction and ignore the others, but to consider them as a whole and to regard each in the light of all of the others. It rather clearly appears that both of these bus drivers were negligent. All of the issues were submitted to the jury and were substantially covered by the instructions given, and

it cannot reasonably be believed that such error as appears in the instruction complained of could have affected the result.

It is finally contended that the judgments against the driver of the school bus must be reversed since no claim was served upon him prior to the filing of these actions, and within the time limited by section 1981 of the Government Code. The accident happened on December 1, 1947. Each plaintiff filed a claim with the secretary of the school district on February 16, 1948. While these claims were not then served on the school bus driver, copies thereof were attached as exhibits to the complaints in these actions and were served on him within ninety days after the accident occurred.

[5] The case of *Artukovich v. Astendorf*, 21 Cal.2d 329, 131 P.2d 831, and *Redlands High School Dist. v. Superior Court*, 20 Cal.2d 348, 125 P.2d 490, are cited in support of the contention that the failure to file such a claim before bringing suit is fatal to the cause of action. The first of these cases involved a section of the Political Code which required the presentation of a claim to the board of supervisors before any action could be brought. The other case, involving a section of the School Code, contains nothing which is controlling here. While Section 1981 of the Government Code requires the presentation of a claim to the employee whose negligence is in question within ninety days after the accident, it contains no requirement that this shall be done before the action is commenced. See *Ansell v. City of San Diego*, 35 Cal.2d 76, 216 P.2d 455. Under the circumstances it must be held that there was a substantial compliance with the requirement of this code section.

The judgments are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

97 Cal.App.2d 132

**SCANLON v. J. J. MOORE & CO. et al.**  
Civ. 14073.

District Court of Appeal, First District,  
Division 2, California.

April 24, 1950.

Suit by Edna M. Scanlon, as administratrix of the estate of Norman Scanlon, deceased, against J. J. Moore & Company, a corporation, and another, to recover for death of a merchant seaman. From a judgment of the Superior Court in and for the City and County of San Francisco, James G. Quinlan, J., in favor of plaintiff, defendants appealed. The District Court of Appeal, Nourse, P. J., held that agents designated in contract for management of vessel owned and operated by the United States through War Shipping Board were not liable under Jones Act for death of merchant seaman caused by negligence of master or crew of such vessel.

Judgment reversed with directions.

#### Seamen ⇐29(5.4)

Agents designated in contract for management of vessel owned and operated by the United States through War Shipping Board were not liable under Jones Act for death of merchant seaman caused by negligence of master or crew of such vessel, since seamen employed under such an agency contract became employees of the United States and not of the general agent. Jones Act, 46 U.S.C.A. § 688.

Hoge, Pelton & Gunther, San Francisco, Leo V. Killion, Reginald M. Watt, San Francisco, of counsel, for appellants.

Elmer P. Delany, Albert Michelson, San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued under the Jones Act, 46 U.S.C.A. § 688, to recover damages for the death of a merchant seaman. The cause was tried to a jury which returned a verdict for plaintiff against both defendants.

They prosecute this appeal on the ground that the vessel on which decedent was employed was owned and operated by the United States through its War Shipping Board, under a written contract designating

these defendants as agents only. Appropriate instructions concerning this issue were proposed by defendants and refused by the trial court. At the time of the trial the responsibilities of those operating under such a contract were in some doubt because of *Hust v. Moore-McCormack Lines*, 328 U.S. 707, 66 S.Ct. 1218, 90 L.Ed. 1534 and *Caldarola v. Eckert*, 332 U.S. 155, 67 S.Ct. 1569, 91 L.Ed. 1968.

Following the judgment in our case, which was entered June 15, 1948, the United States Supreme Court, on June 27, 1949, entered judgment in *Cosmopolitan Shipping Company, Inc., v. McAllister*, 337 U.S. 783, 69 S.Ct. 1317, 1326, 93 L.Ed. 1692, definitely holding that seamen employed under such an agency contract "became employees of the United States and not of the general agent" and that an agent under such a contract was "not liable to a seaman for injury caused by the negligence of the master or crew of such a vessel."

This is precisely the case presented here.

Judgment reversed with directions to enter judgment for defendants.

GOODELL and DOOLING, JJ., concur.



97 Cal.App.2d 50

**HOPKINS v. DETRICK (two cases).**  
**DETRICK v. HOPKINS et al.**  
Civ. 17346.

District Court of Appeal, Second District,  
Division 2, California.

April 19, 1950.

Rehearings Denied May 2, 1950.

Hearing Denied June 12, 1950.

Helen Louise Hopkins brought action for divorce against Lawrence E. Detrick, in which the defendant filed a cross-complaint, which action was consolidated with action by Lawrence E. Detrick against Helen Louise Hopkins and another to quiet title to property involved in the complaint for divorce. Judgments were entered by the Superior Court, Los Angeles County, John J. Ford



and Eugene P. Fay, JJ., and both Lawrence E. Detrick and Helen Louise Hopkins appealed. The District Court of Appeal, Moore, P. J., held that evidence supported finding that husband had agreed that wife's earnings during coverture were to be her separate property and not community property.

Affirmed.

#### 1. Divorce ⇨130, 184(6)

Whether from evidence a court can be reasonably convinced that wife suffered extreme cruelty is to be determined from all the facts including the judicial inspection of the parties, their intelligence, refinement, delicacy of sentiment, and the determination will not be disturbed on appeal.

#### 2. Divorce ⇨130

Evidence supported decree granting wife a divorce for extreme cruelty as against husband's defense of recrimination and assertion that he was entitled to divorce based on wife's mental cruelty.

#### 3. Husband and wife ⇨259

Husband may relinquish to wife the right to her earnings during her coverture without any consideration other than their mutual consent, whereupon wife's earnings become her separate estate.

#### 4. Husband and wife ⇨264

Evidence supported finding that husband had agreed that wife's earnings during coverture were to be her separate property and not community property, notwithstanding that there had been no express agreement to that effect.

#### 5. Husband and wife ⇨264

Income tax returns filed by wife wherein she reported her earnings as community property after husband's relinquishment of claim of ownership of share in wife's earnings did not require finding that wife's earnings were community property, where wife testified that by reporting her earnings as community receipts she did not intend to change their character but acted upon suggestion of tax accountant and that she did not understand meaning of so reporting until she consulted an attorney concerning her domestic infelicities.

#### 6. Appeal and error ⇨1008(1)

Trial court's finding of fact is binding upon court of review in absence of error.

#### 7. Appeal and error ⇨1010(1)

Where evidence upon which trial court based its finding of husband's relinquishment of claim of ownership of share in wife's earnings was reasonable and credible, reviewing court could not say that trial court abused its discretion in making such determination.

#### 8. Husband and wife ⇨265½

Fact that wife filed income tax returns wherein she reported her earnings as community property did not estop her from asserting as against husband that earnings were her own separate property, where husband had knowledge of true state of title of earnings, and he did not rely upon wife's statements as inducements to do some act to his detriment.

#### 9. Husband and wife ⇨249

Husband was not entitled to any of income tax refunds secured by wife by reason of her reporting her income on community basis, although she claimed earnings as her separate property, where it did not appear that husband made any contribution to payment of the income taxes.

#### 10. Statutes ⇨51, 142

Where statute adopts by reference the provisions of another statute, such provisions so adopted are incorporated in the form in which they existed at time of the reference and not as subsequently modified.

#### 11. Statutes ⇨51, 142

In construing statute adopting by reference the provisions of another statute, it must be assumed that legislature intended its acts to have effective operation and that subsequent amendments or failure to amend a conflicting statute will not be construed as depriving the adopting statute of all the effect intended for it by legislature.

#### 12. Statutes ⇨181(2), 184

Generally, statutes are to be given a reasonable interpretation to end that the object of the law will be effectuated.

### 13. Statutes ⇨195

Affirmative expressions in a statute introducing a new rule imply a negative of all not within their purview.

### 14. Divorce ⇨249(3)

Under statute, court in divorce action is not precluded from making an award out of wife's separate estate in favor of husband. Civ.Code, §§ 137, 141.

### 15. Divorce ⇨223

Trial court's order in divorce action directing wife to pay \$1,500 out of her separate property to husband's attorney in addition to \$500 which court had previously required wife to pay on account of attorney's fees and court costs in sum of \$100 was not abuse of discretion, in view of affidavits establishing husband's need. Civ. Code, §§ 137, 141.

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Frank M. Gunter, Beverly Hills, for Lawrence E. Detrick.

Gang, Kopp & Tyre, Los Angeles, Hermione K. Brown, Los Angeles, for Helen Louise Hopkins and Marie Alden Hopkins.

MOORE, Presiding Justice.

Two appeals are involved. Two separate causes were consolidated for trial, namely, an action for divorce, and a suit to quiet title to the property involved in the complaint for divorce. Two separate judgments were entered based upon two separate decisions. Despite the title of the case, the parties are husband and wife. To avoid confusion they will be referred to as "husband" and "wife." The latter's sister, Marie Alden Hopkins, is an incidental party, husband having sued her to quiet title to a certain real property. Her fortunes go with those of Helen Louise.

Husband and wife were married at Rochester, New York, in 1927. Wife had taken a degree in medicine and was then an interne in an eastern hospital. Husband was a student of medicine, but did not graduate from medical school. He specialized in biochemistry and received his Ph.D. They moved to California where they lived with wife's parents for six years. In 1932 she abandoned the name of her husband and by

legal proceeding at Los Angeles was restored to her maiden name. She opened her office for the practice of medicine. In the years that followed a rift that had developed in their romance widened until finally she sued him for divorce. After the trial the court made findings that husband "has been guilty of extreme cruelty to plaintiff and has treated plaintiff in a cruel and inhuman manner, and has caused plaintiff grievous mental and physical suffering without fault on plaintiff's part"; that there is no community property; that all the property in the possession of wife is her own separate estate and all in husband's possession is his separate property.

### There Was Extreme Cruelty.

Husband challenges the findings and the evidence as insufficient to support the judgment. There is nothing wanting in the evidence. He upbraided her at home and outside and bruised her arms and back, broke her lamp, tore pages from her Bible, treated her parents with contempt, would not eat breakfast at their table, grievously hurt and distressed her by his lack of affection; remained away from home once for a week and often late at night without acquainting wife of his whereabouts; took away her automobile which she was using as an employee of the city health department; during the long illness of her father husband made such hideous noises at night with his car, the garage door and his entrance into the dwelling that he so aroused the feeble and aged man that the latter could not that night sleep again, to the discomfort and pain of wife. He refused to go with her to visit her sister; disliked all of wife's family, to her emotional distress; he departed merrily from home to join the army without an expression of regret and did not write his wife for a month. All his letters being impersonal caused her extreme mental anguish. On his return to Los Angeles he first visited with a woman friend before coming home and then did not kiss wife on their meeting. Not only did he cast off all display of gallantry and kindness but he left wife to her own battle for subsistence and success. His income was evidently meager and throughout the years he con-

tributed practically nothing to the maintenance of the home and the household expense. The court found not only the foregoing facts but that husband's putting the entire financial responsibility upon wife caused her grievous mental and physical strain and suffering; that his practice of remaining in bed in the morning and his refusal to join the family at breakfast caused wife unhappiness and embarrassment before her parents; that his failure for many years to bestow upon wife any affection grievously hurt and distressed her—all these things caused her great emotional distress. The foregoing and other findings read in connection with the quoted all-embracing finding of grievous mental suffering complete the factual decision of husband's extreme cruelty. *Ungemach v. Ungemach*, 61 Cal.App.2d 29, 40, 142 P.2d 99; *Carlin v. Carlin*, 114 Cal.App. 186, 190, 299 P. 543.

[1,2] Whether from the evidence a court can be reasonably convinced that a wife has suffered extreme cruelty is to be determined from all the facts including the judicial inspection of the parties, their intelligence, refinement, delicacy of sentiment, and the determination will not be disturbed on appeal. *LaMar v. LaMar*, 30 Cal.2d 898, 900, 186 P.2d 678; *Keener v. Keener*, 18 Cal.2d 445, 447, 116 P.2d 1; *Tompkins v. Tompkins*, 83 Cal.App.2d 71, 74, 187 P.2d 840. Conduct that would cause grievous mental suffering sufficient to constitute extreme cruelty depends upon the circumstances of the case under review. The findings here are sufficient to support a judgment of divorce for extreme cruelty. Conceding that there is evidence tending to show cruelty on the part of wife, the finding that her acts were justified is conclusive in view of substantial evidence in support thereof. *Martin v. Martin*, 79 Cal.App.2d 409, 412, 179 P.2d 655; *Norris v. Norris*, 50 Cal.App.2d 726, 730, 123 P.2d 847. Husband is unfortunate in his insistence that he established the defense of recrimination and that he was entitled to a divorce based on wife's mental cruelty for the reason that the court found that her acts did not constitute cruelty. Whether the conduct of wife was such as to warrant a finding of

extreme cruelty or whether it was sufficiently culpable to necessitate the denial of the relief sought by her is a question of fact addressed to the trial court. *Farmer v. Farmer*, 79 Cal.App.2d 536, 538, 180 P.2d 55; *Witaschek v. Witaschek*, 56 Cal.App.2d 277, 279, 132 P.2d 600.

### There Was No Community Property.

[3,4] The property found to belong to the wife separately consisted of real property and automobiles registered in her name; furniture, moneys in the bank, insurance and annuity contracts; her accounts receivable; her office furniture and equipment. There is an abundance of evidence to support such findings, and the evidence is substantial to support the findings that the personal property in the possession of the husband is his own estate.

The wife testified that at the time of establishing her medical offices and her bank account in her own name she told the husband of her intention and plan to start out in the right way and that she was putting everything in her own name; that she intended by this to establish her own property as separate; that husband made no objections; that for ten years every act of the parties in relation to the earnings of the wife showed that they mutually understood and acted upon the oral agreement. The husband retained no control over her bank account; never drew a check upon it; made no deposits in it; never had use of her safety deposit box; never owned her automobiles, but instead the titles to all her possessions were in her own name. Not only did she take title to her home which she purchased with her own funds but she transacted all the business, signed all the papers, made all the payments out of her own earnings. The husband did not even inquire what she did with her moneys, where she kept them or how she used them. The wife recorded a current account with the husband showing that both of them treated her property as her own, his belongings as his own. When husband borrowed from wife, he paid back the sums in exactly the same amounts that were loaned to him. When she purchased a new car,



she sold her old one to him for cash. Wife's testimony indicates substantial support for the finding that husband relinquished all claim to her earnings at the commencement of her business career in 1932. Such evidence is sufficient. It is the law of California that the husband may relinquish to the wife the right to her earnings during her coverture without any consideration other than their mutual consent, whereupon her earnings become her separate estate. Evidence of the husband's conduct indicating his attitude that her earnings were her separate possessions is sufficient proof. *Pacific Mutual Life Insurance Co. v. Cleverdon*, 16 Cal.2d 788, 791, 108 P.2d 405; *Dee v. San Francisco City & County Employees Retirement System*, 80 Cal.App.2d 590, 591, 182 P.2d 601. Therefore, from the evidence, the finding made was the only reasonable determination.

#### Wife's Explanation of Her Writings.

[5] Husband contends that since there was no express agreement that her earnings should be separate, there is no proof to support the finding that he relinquished all interest in her earnings except the inference drawn from his silence on being advised of her purpose. Such inference he contends must yield to the direct unequivocal evidence of her writing in the joint income tax returns she made in the four years commencing with 1942 in which she reported her earnings as community property. In support thereof he cites *Blank v. Coffin*, 20 Cal.2d 457, 460, 126 P.2d 868; *Engstrom v. Auburn Automobile Sale Corporation*, 11 Cal.2d 64, 70, 77 P.2d 1059; *Roberts v. Brae*, 5 Cal.2d 356, 359, 54 P.2d 698; *Maupin v. Solomon*, 41 Cal.App. 323, 324, 183 P. 198. The rule announced by cited cases is that for the inference to be dispelled the contrary evidence needs only to be clear, positive and uncontradicted. Wife's testimony was that by reporting her earnings as community receipts she did not intend to change their character but acted upon the suggestion of a tax accountant

and that she did not understand the meaning of so reporting until 1947 when she consulted a lawyer concerning her domestic infelicities. Her testimony was not only direct but persuasive. If she had acted upon the advice of a person who she thought could wisely advise her, the court was privileged to accept her explanation of her writing.

#### Other Contentions of Husband.

[6,7] Husband insists that his contention is supported by the principle that earnings of a wife are community property, citing *Bekins v. Dieterle*, 5 Cal.App. 690, 91 P. 173; *Stice v. Stice*, 81 Cal.App.2d 792, 797, 185 P.2d 402; *Heck v. Heck*, 63 Cal.App.2d 470, 474, 147 P.2d 110. These authorities involve the problem of determining whether property acquired prior to marriage was community. It was held that the tax returns were sufficient to establish that the assets were community property. But in every such case<sup>1</sup> the fact finder had to determine from all the evidence before him whether the property in question was community or separate. Such finding is binding upon the court of review in the absence of error. *Nichols v. Mitchell*, 32 Cal.2d 598, 197 P.2d 550. Since the evidence herein upon which the court based its finding of the husband's relinquishment of claim of ownership of a share in the wife's earnings is reasonable and credible the reviewing court cannot say that the trier of fact abused his discretion in making his determination. *Balkema v. Deiches*, 90 Cal.App.2d 427, 430, 202 P.2d 1068.

Husband contends that aside from the doctrine that inference is overcome by written evidence, the wife's recital in her income tax returns is conclusive proof that her earnings were community property, citing *Estate of Watkins*, 16 Cal.2d 793, 797, 108 P.2d 417, 109 P.2d 1. The cited case is not authority for husband's claim. There the spouses had executed a joint and mutual will, a single document that was the equivalent of a contract, whereas herein the wife's returns were separate docu-

1. Including *Estate of Raphael*, 91 Cal.App. 2d 931, 939, 206 P.2d 391; *Kelly v. State Board of Social Welfare*, 82 Cal.App.2d

627, 633, 186 P.2d 429; *Estate of Allan*, 28 Cal.App.2d 181, 187, 82 P.2d 190.

ments, addressed not to the husband but to the government.

[8] Husband contends that in making the tax returns wife was acting as his agent and that having made affirmative written representations that the earnings were community property, she is estopped in her action against her principal to contend otherwise, citing *Wood v. Blaney*, 107 Cal. 291, 294, 295, 296, 40 P. 428. The cited case is not authority. There the agent executed a contract of sale on behalf of his principal reciting the receipt of \$500 as deposit although he had received a worthless note. The agent was estopped to contradict the recitals in the contract. In the instant case wife made no statements for the purpose of deceiving her husband; nor did she make any with culpable negligence. The husband had knowledge of the true state of the title of the earnings; he did not rely upon her statements as inducements to do some act to his detriment; he will not be criminally liable since the returns were not fraudulently made or falsely filed. In no sense was his relationship to the wife's earnings altered. While it is true that husband by approving of the returns subjected himself to a possible liability for a deficiency tax, he is not injured thereby since the wife agreed to pay all the unpaid tax on his income for the five years reported on the community basis as well as any due on her own.

#### Husband Not Entitled to Refunds.

[9] Finally, husband complains that injustice is done by the judgment in awarding wife any refunds on her taxes paid during the five years she reported on the community basis; that the decree does not require her to file amended returns and compels him to become a party to a fraud on the government. To concede such demand would be unfair. Wife paid all the taxes during the same five years. Why should any portion of a refund go to him who did not make the slightest contribution to the payment? It was the duty of the court to dispose of all issues with respect to the property claims of the parties. *Mergenthaler v. Mergenthaler*, 69 Cal.App.2d 525, 528, 160 P.2d 121. It would have been

improper for the court to order the wife to file amended tax returns. *Hansen v. Bear Film Co.*, 28 Cal.2d 154, 176, 168 P. 2d 946.

#### Order for Wife to Pay Husband's Attorney Not Abuse of Discretion

[10, 11] While the wife approves of the judgment in so far as it entitles her to a divorce and determines that the property is not community, she is displeased with the court's order which directs her to pay \$1500 to husband's attorney in addition to the \$500 which the court had previously required wife to pay "on account of attorney's fees \* \* \* and court costs in the sum of \$100." She contends that the court is without authority to make such an award out of a wife's separate estate in favor of a husband; that the power to award suit money is a creature of statute and was not available at common law, citing *Eisenring v. Superior Court*, 34 Cal.App. 749, 750, 168 P. 1062. But notwithstanding the apparent absence of statutory provision for the enforcement of the order, section 137 of the Civil Code clearly provides that the court may in its discretion require the wife to pay "any money necessary to enable \* \* \* the husband to \* \* \* defend the action." In the enactment of such statute the legislature did not intend that it should not be enforced. It is true that section 141, Civil Code, makes provision for the court to resort first to the community property and then to the separate property of the husband and from this the wife argues that the court is precluded from awarding suit money to the husband payable out of the wife's separate estate. But section 141 is embalmed in the same language in which it was written in 1872 whereas the legislature having concluded that section 137 of the Civil Code was antiquated and deeming its amendment essential to the needs of society, so amended it in 1927 as to authorize the courts to award suit money to the husband in a divorce action when necessary to enable him to make a defense. The omission to include the separate property of the wife in section 141 at the time of the 1927 amendment to section

137 is obviously an oversight which should not deprive a litigant of rights definitely established by section 137. Where a statute adopts by reference the provisions of another statute, such provisions so adopted are incorporated in the form in which they existed at the time of the reference and not as subsequently modified. *Palermo v. Stockton Theatres, Inc.*, 32 Cal.2d 53, 58, 195 P.2d 1. In problems of statutory construction it must be assumed that the legislature intended its acts to have effective operation and that subsequent amendments or failure to amend a conflicting statute will not be construed as depriving the adopting statute of all the effect intended for it by the legislature. See *Ramish v. Hartwell*, 126 Cal. 443, 447, 58 P. 920.

[12-14] It is the general rule that statutes are to be given a reasonable interpretation to the end that the object and purpose of the law will be effectuated and also "affirmative expressions in a statute introducing a new rule imply a negative of all not within their purview." *Johnston v. Baker*, 167 Cal. 260, 264, 139 P. 86, 89. Since one of the purposes of section 137, Civil Code, is to assure a needy spouse of funds to defend an action, *Mudd v. Mudd*, 98 Cal. 320, 33 P. 114, the only rational disposition to be made of a divorce controversy is to require payment by the wife out of her separate property when the financial condition of the husband requires it to be done in the interest of justice.

[15] The wife further contends that there is no finding or evidence of need on the part of the husband and that the contrary is shown by the finding that he was earning in excess of \$5000 per year and was able-bodied and in good health, citing *Loeb v. Loeb*, 84 Cal.App.2d 141, 190 P.2d 246. Sufficient need on the part of the husband was established by affidavits filed by him on his application for his order to show cause. He was then earning \$284 per month while his expenses were \$351.50. His salary was increased, but his expenses and taxes likewise increased. Here was a fairly sizeable estate under investigation by the trial court and it was not an easy mat-

ter for decision as demonstrated by the exemplary briefs. The trial court might with reason have made different findings, so acute was the controversy. The case cited by the wife, *Loeb v. Loeb*, supra, is authority for the rule that the allowance of suit money rests with the sound discretion of the trial court.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.



97 Cal.App.2d 929

**Lawrence E. DETRICK, Plaintiff and Appellant, v. Marie Alden HOPKINS and Helen L. Detrick, sometimes known as Helen Louise Hopkins, and as Helen Hopkins, Defendants and Respondents.**

Civ. 17347.

District Court of Appeal, Second District,  
Division 2, California.

April 19, 1950.

Hearing Denied June 12, 1950.

Appeal from the Superior Court, Los Angeles County; John J. Ford, Judge.

Frank M. Gunter, Beverly Hills, for appellant.

Gang, Kopp & Tyre, Los Angeles, Hermione K. Brown, Los Angeles, for respondents.

MOORE, Presiding Justice.

This action was brought to quiet plaintiff's title to certain real property. His claims asserted here are identical with his claims made in the companion action for divorce, Cal.App., 217 P.2d 78, and the two were consolidated for trial in the court below.

Judgment having been rendered against this plaintiff in the divorce action, it is ordered that the judgment herein is affirmed.

McCOMB and WILSON, JJ., concur.



**SOCOL v. KING.**

Civ. 16840.

District Court of Appeal, Second District,  
Division 2, California.

April 19, 1950.

Hearing Granted June 12, 1950.\*

Action by Olivia Socol, as administratrix with will annexed in the estate of Paraschiva Socol King, deceased, and Paul King against Louis King. The Superior Court, Los Angeles County, Ben V. Curler, J., entered judgment for the defendant. From an order denying their motion for a different judgment on ground that it was inconsistent with findings and conclusions, the plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that in view of fact that significance of a joint tenancy was widely known and that decedent began practice of using it in taking titles after her marriage to defendant, deduction was unavoidable that decedent deliberately and with understanding took titles in joint tenancy to all properties purchased by her in California so that defendant's interest would be identical and coextensive with her own.

Order affirmed.

See, also, Cal.Sup., 209 P.2d 577.

**1. Executors and administrators** Ⓒ85(6)

In action by administratrix to determine whether property held by decedent with husband was in fact a joint tenancy, where trial court found that decedent's belief was that half of her California property would go to her children at her death, but also found there was no evidence of any understanding between parties at time of purchase that property would actually be treated as community property or that subsequent to purchase that it was considered by them as community property, findings sustained judgment awarding such property to husband as the surviving joint tenant.

**2. Executors and administrators** Ⓒ85(6)

In action by administratrix to determine whether property held by decedent with husband was in fact a joint tenancy, where greater part of money invested by decedent in California was derived from joint earnings and joint property which

were so intermingled with decedent's separate funds that a segregation of them was not attempted by trial court, and there was no showing that decedent used separate funds to make down payments or amount or origin of sums subsequently paid by decedent and amount paid by husband after her death, findings did not show decedent was a donor of the California property.

**3. Executors and administrators** Ⓒ85(6)

In action by administratrix to determine whether property owned by decedent with husband was in fact a joint tenancy, where trial court found that administratrix did not own one-half of the properties in question, that the funds invested in California properties by decedent were not community funds and husband was owner of properties acquired with such funds, trial court's finding that decedent had a mistaken opinion of the law as to the legal effect of California conveyances was immaterial.

**4. Joint tenancy** Ⓒ3

The act of taking titles in joint tenancy is tantamount to sealed agreement that thereafter they should be held in joint tenancy with all characteristics of such an estate, without regard to origin of money used to acquire them.

**5. Husband and wife** Ⓒ249

**Joint tenancy** Ⓒ1, 6

The distinguishing incident of joint tenancy is right of survivorship and by it one estate is created and that excludes a community ownership of any part of or interest in the property.

**6. Husband and wife** Ⓒ14(3)

A joint tenancy is one estate and in it the right of spouses are identical and co-extensive.

**7. Evidence** Ⓒ461(2)

Where a wife has in the absence of her husband requested a joint tenancy deed to a property she has purchased, she cannot defeat contract which she has composed with her own hands by testimony of a hidden intention at time of taking the joint tenancy deed.

**8. Husband and wife** Ⓒ14(1)

If no contract is made by spouses at time of acquiring title, the true intention

\* Subsequent opinion 223 P.2d 627.

may be shown but if deed contains a specific declaration as to nature of estate created, recital is proof of intention of grantor and grantee and it can be repudiated only by evidence of fraud, mistake or undue influence.

#### 9. Contracts $\S$ 93(4)

A mistake of law on part of one party to a contract in absence of fraud is not ground for avoidance thereof.

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Porter C. Blackburn and Shelby Lee Chambers, Los Angeles, for appellant.

Chas. T. Rippy, Torrance, for respondent.

MOORE, Presiding Justice.

Appeal from an order denying motion for a different judgment on the ground that it is inconsistent with the findings and conclusions. Code Civ.Proc. secs. 663, 663a.

The court found that Paraschiva Socol, decedent, was married to Louis King in 1927; that at that time she had three minor children and resided, and in her own right owned improved business properties, in East Chicago, Indiana; that by reason of the depression she was forced to sell one property and contracted for the purchase of another place on Block Avenue and took the title in joint tenancy with her husband; that they operated a store on Block Avenue and with their net earnings and the income of decedent from her other property they supported the family and made the payments on the Block Avenue store; that in 1937 decedent visited California and purchased certain realty and a bowling alley; that the purchase money was obtained from the sales of their jointly owned Indiana property and of decedent's separate parcels; that the titles to all of them were taken in joint tenancy; that at the time it was decedent's belief that only one-half would belong to respondent and one-half to herself, which latter half at her death would go to her children; that decedent had entertained an erroneous opinion as to the legal effect of her titles but by virtue of the nature of the contract embodied in the joint tenancy deeds the court decided

that respondent as surviving tenant was entitled to the properties in their entirety.

By her motion addressed to the court below and by this appeal, decedent's daughter as administratrix with will annexed of Paraschiva's estate seeks to substitute a favorable judgment for that part of the decree entered below which quiets respondent's titles to the \$20,000 received from the sale of the bowling alley and to the two lots awarded to him. Her first contention is that the *intention* of decedent in causing titles of properties to be vested in joint tenancy with her husband governs the legal effect of the conveyances regardless of their form. She refers to finding 7 "That at the time of the purchase of the real and personal property in California by decedent in the joint names of herself and defendant, she *believed* that one-half of the property belonged to her and one-half \* \* \* to defendant." She cites *Huber v. Huber*, 27 Cal.2d 784, 787, 167 P.2d 708, *Salvater v. Salvater*, 206 Cal. 657, 660, 275 P. 801, and *Luminoso v. Luminoso*, 75 Cal.App.2d 472, 473, 171 P.2d 516, in support of her thesis. Appellant thereby specified two hindrances to her effecting a reversal. In the first place the intention of decedent was a subject upon which no one but decedent herself could have testified. Since she had already passed on to her reward the court was without any competent evidence of her intention other than the deeds she took naming respondent as joint tenant with her. In the second place, *Huber v. Huber*, like many of the decisions therein cited, adjudicated the controversies between husband and wife with respect to the property rights of the husband who was present in court to testify as to his intention at the time he accepted a joint tenancy deed to property which he had purchased with his separate funds. Not only did he face his adversary for cross-examination but he produced other proof of his having used his separate funds to make the purchase in question.

[1] Despite the unsupported finding as to decedent's belief that half of the California property would go to her children at her death, the court found that there was

"no evidence of any understanding between the parties at the time of the purchase \* \* \* that it would actually be treated as community property, the defendant not being present in California at that time \* \* \* neither is there any evidence of any agreement between the parties subsequent to the purchase \* \* \* that it was to be considered by them as community property." This and other findings<sup>1</sup> lend liberal support to the judgment. They establish that decedent had some property at the time of her marriage to respondent; that in 1931 "the depression affected the decedent, and she was forced to sell the property at 3702 Block Avenue \* \* \* and started purchasing on a contract other property located at 3740 Block Avenue \* \* \* in the joint names of the deceased and the defendant." Thereafter they joint-

ly operated the delicatessen store at the 3740 address and used the earnings from that business and from decedent's separate property on Columbus Drive, East Chicago, for payments on the store. Decedent did not acquire the California properties until 1937. She came alone to this state and made her purchases with funds received from the sale of the store jointly owned with respondent and earnings from her own Columbus Drive property.

[2] That decedent knew the meaning of joint tenancy is fairly inferred from her use of it in Indiana and by accepting deeds of the same sort while alone in California when respondent was operating the business in East Chicago. This fact takes on added significance in the light of her having continued to hold the properties in joint ten-

#### 4. Substance of Pertinent Findings

1. Deceased and defendant were married in 1927 at East Chicago, Indiana.

2. Prior to the marriage deceased owned lot 14 of the same city which she sold and with the proceeds purchased 3702 Block Avenue where she operated a delicatessen. At the time of her marriage she owned also lots 2 and 3, block 8, known as 1615 Columbus Drive.

3. In 1931 the depression so affected decedent that she was forced to sell 3702 and contract for the purchase of 3740 Block Avenue. The latter she took in joint tenancy with defendant.

4. Deceased and defendant jointly operated a delicatessen at 3740 Block Avenue. With the earnings therefrom and from the Columbus Drive property the family was supported and payments made on the 3740 Block Avenue place.

5. While on a trip to California in 1937 decedent contracted for the purchase of property in San Fernando Valley and a bowling alley in Torrance. The purchase money came from the sales of the joint property in Indiana and from decedent's property on Columbus Drive.

6. Deceased bequeathed all her separate property to her children. Her will was probated in Indiana.

7. At the time of the purchase of the California property decedent believed that one-half of the property belonged to her and one-half to defendant; that her half would go to her children at her death. But there is no evidence of an understanding between deceased and defendant at the time of the California

purchase that it would actually be treated as community property. Decedent was alone when she directed the kind of deed to be made to her and the kind of contract for the purchase of the personal property. Neither is there any proof of an agreement subsequent to the purchase that the California property was to be considered by them as community.

8. Decedent held the interest of her children paramount. Her ultimate objective was to acquire property which she could leave to her children upon her death.

9. After the death of decedent defendant sold the bowling alley for \$20,000.

10. Decedent entertained a mistaken opinion as to the law on the legal effect of the conveyances of the California property.

11, 12 & 13. The station wagon and a part of the furniture at 4225 Ventura Canyon Avenue, Van Nuys, was purchased with the joint earnings but part of it was the separate property of decedent at death.

17. It is not true that the estate of decedent is the owner and entitled to the possession of one-half interest in lots 1, 2 and 21; it is not true that defendant's claim of same one-half interest is without right; it is not true that the estate of decedent is entitled to the Plymouth station wagon, but that it was community property of decedent and defendant. Also, it is not true that the estate is entitled to the entire interest in the furniture and furnishings at 4225 Ventura Canyon Drive.



ancy until her decease. It is therefore evident that the greater part of the money invested by decedent in California was derived from the joint earnings and joint property which were so intermingled with decedent's separate funds that a segregation of them was not attempted by the court. Moreover, before appellant could make any headway in demonstrating that the California properties were acquired with decedent's separate funds she must have shown not only that the down payments were made with her separate funds but also the amount and origin of the sums subsequently paid by decedent and the amount paid by respondent after her death. There is no finding on either. Therefore, it cannot be said, as appellant contends, that the findings show decedent was in any manner a *donor* of the California property.

[3] It is true that a probative finding declares that decedent had a "mistaken opinion" of the law as to the legal effect of the California conveyances. But such finding is immaterial for the reasons that (1) the ultimate fact found is that appellant does not own one-half of the properties in question, (2) the funds invested in the California properties were not community funds and (3) respondent was owner of the properties acquired with such funds. If the moneys brought from Indiana were not community property after their investment here and if they were joint tenancy funds which had been commingled with decedent's separate moneys, how could any share of the properties acquired be designated as the separate property of decedent or as her share of a community estate in the absence of a finding of the amount of the separate interest or of the community interest of decedent?

[4, 5] The compelling fact remains that the titles were taken in joint tenancy. Without regard to the origin of the money used to acquire them the act of taking the titles in joint tenancy is tantamount to a sealed agreement that thereafter they should be held in joint tenancy with all the characteristics of such an estate. *Siberell v. Siberell*, 214 Cal. 767, 773, 7 P.2d 1003. This decision clearly establishes the nature

and legal significance of a joint tenancy to be utterly contrary to a community estate or to a tenancy in common: on the death of a spouse, property jointly owned is no part of his estate. The distinguishing incident of the joint tenancy is the right of survivorship. By it one estate is created and that excludes a community ownership of any part of or interest in the property. *Id.*, 214 Cal. at page 771, 7 P.2d 1003.

[6] While the *Siberell* decision was published in 1932 the meaning of a joint tenancy has been long a familiar doctrine to the law, having been "founded, like the laws of primogeniture, on the principle of the aggregation of landed estates in the hands of a few and opposed to their division among many persons." *De Witt v. City of San Francisco*, 2 Cal. 289, 297. "A joint tenancy is one estate, and in it the rights of the spouses are identical and coextensive." *Siberell v. Siberell*, 214 Cal. at page 773, 7 P.2d at page 1005. In view of the facts that the significance of a joint tenancy is widely known and that decedent began the practice of using it in taking titles after her marriage to respondent, the deduction is unavoidable that she deliberately and with understanding took the titles in joint tenancy to all the properties purchased by her in California so that respondent's interest would be identical and coextensive with her own.

[7, 8] If appellant's contention should prevail there would be no dependability upon a joint tenancy. The heirs of a deceased person could by their hearsay testimony prove that the decedent had at the time of taking title in joint tenancy with his spouse cherished a secret intention not to create a joint tenancy. Where a wife has in the absence of her husband requested a joint tenancy deed to a property she has purchased she cannot defeat the contract which she has composed with her own hands by testimony of a hidden intention at the time of taking the joint tenancy deed. *Watson v. Peyton*, 10 Cal.2d 156, 158, 73 P.2d 906. It appears to be the rule that if no contract is made by spouses at the time of acquiring title, the true intention may be shown. *Minnich v. Minnich*,

127 Cal.App. 1, 15 P.2d 804. But if a deed contains a specific declaration as to the nature of the estate created, the recital is proof of the intention of the grantor and the purchaser and it can be repudiated only by evidence of fraud, mistake or undue influence. See *Dale v. Dale*, 87 Cal.App. 359, 363, 262 P. 339.

[9] In view of the doctrine that a mistake of law on the part of one party to a contract in the absence of fraud is not ground for the avoidance thereof, *Gardner v. Watson*, 170 Cal. 570, 577, 150 P. 994, and of the findings that the parties never at any time agreed that the property would be treated at community assets and of the finding that the purchase money came from the sales of some property owned in joint tenancy and another owned by decedent in her separate right there is no relief for appellant from the judgment.

Order affirmed.

WILSON, J., concurs.

McCOMB, J., concurs in the judgment.



97 Cal.App.2d 14

PARROTT v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 17288.

District Court of Appeal, Second District,  
Division 1, California.

April 17, 1950.

Rehearing Denied May 4, 1950.

Hearing Denied June 12, 1950.

Zella M. Parrott sued the Bank of America National Trust & Savings Association and others for false arrest and imprisonment, malicious and oppressive conduct, and wrongful discharge from employment. From a judgment of the Superior Court of Los Angeles County, Edwin L. Jefferson, J., on a jury's verdict for plaintiff, defendants appealed. The District Court of Appeal, White, P. J., held that the complaint stated a cause of action and that the evidence was suffi-

217 P.2d—6½

cient to take to the jury the questions of false imprisonment and punitive damages.

Judgment affirmed.

#### 1. False Imprisonment ⇨20(1)

##### Master and servant ⇨39(1)

A complaint was sufficient to state cause of action against bank and officials thereof for false arrest and imprisonment of, malicious and oppressive conduct toward, and wrongful discharge of, bank teller on false charge of defalcation. Pen. Code, § 236.

#### 2. False Imprisonment ⇨5

A threat of force, to constitute false imprisonment, need not be express, but may be implied, and it may be made by conduct or words. Pen.Code, § 236.

#### 3. Appeal and error ⇨916(1)

##### Pleading ⇨34(7)

On appeal from judgment on jury's verdict for plaintiff, the complaint, in absence of demurrer, must be construed most favorably to plaintiff, and all legitimate inferences from facts alleged therein must be drawn in her favor.

#### 4. False Imprisonment ⇨2, 43

"False imprisonment" is unlawful violation of a person's personal liberty, whether violation is treated as a tort or crime. Pen.Code, § 236.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "False Imprisonment".

#### 5. False Imprisonment ⇨5

Use of actual physical force in detaining a person is not prerequisite to unlawful violation of personal liberty, constituting false imprisonment. Pen.Code, § 236.

#### 6. False Imprisonment ⇨5

To constitute false imprisonment, an individual need only be restrained of his liberty, without sufficient complaint or authority, and such restraint may be accomplished by words or acts which he fears to disregard. Pen.Code, § 236.

#### 7. False Imprisonment ⇨6

Temporary detention of person without sufficient complaint or authority is sufficient to constitute false imprisonment. Pen. Code, § 236.

**8. False imprisonment** Ⓒ5

Any unlawful exercise, or express or implied threat, of force, by which a person is deprived of his liberty and compelled to remain where he does not wish to remain, is "false imprisonment." Pen.Code, § 236.

**9. Appeal and error** Ⓒ1003

An appellate court cannot weigh the evidence on appeal from judgment on jury's verdict.

**10. False imprisonment** Ⓒ39

In action against bank and officials thereof for false arrest and imprisonment of teller on false charge of defalcation, evidence was sufficient to take to jury question of such officials' use of force or express or implied threat of force to extort confession from plaintiff. Pen.Code, § 236.

**11. False imprisonment** Ⓒ39

In action against bank and officials thereof for false arrest and imprisonment of bank teller on false charge of defalcation, evidence was sufficient to take to jury question of such officials' failure to proceed carefully in investigation of charge and their lack of probable cause for assuming plaintiff's guilt and detaining her for purposes of securing confession and restitution of money claimed taken by her. Pen. Code, § 236.

**12. False imprisonment** Ⓒ39

Evidence was sufficient to take to jury question whether bank officials actively supervised and directed false imprisonment of bank teller on false charge of defalcation, so as to render them, as well as bank, liable to such teller for damages. Pen. Code, § 236.

**13. False imprisonment** Ⓒ39

Evidence was sufficient to take to jury question of bank officials' guilt of oppression, fraud or malice, express or implied, in detaining bank teller on false charge of defalcation for purpose of obtaining confession and restitution of money claimed to have been taken by her, so as to entitle her to recover punitive damages from bank and such officials for false imprisonment. Pen.Code, § 236.

**14. Appeal and error** Ⓒ840(1)

On defendants' appeal from judgment on jury's verdict for plaintiff in action for false imprisonment after trial court sustained defendants' objection to all evidence of slander on ground that slander count of complaint did not sufficiently plead malice, question whether trial court erred in such ruling cannot be considered. Pen. Code, § 236.

**15. False imprisonment** Ⓒ24

In action against bank and officials thereof for false imprisonment of bank teller on false charge of taking amount of cash deposit in bank, evidence of bank's letters to Federal Bureau of Investigation and national bank examiner, reporting missing deposit, and subsequent letters purporting to retract such accusation, but suggesting doubt as to plaintiff's honesty, and evidence of debiting of plaintiff's savings account with such amount, refusal to reinstate her as employee after depositor found money claimed to have been deposited, and failure to notify plaintiff immediately of such fact, were admissible on question of punitive damages for malice and oppression. Pen.Code, § 236.

**16. False imprisonment** Ⓒ36

A jury's award of \$30,000 compensatory and punitive damages against bank having capital surplus and undivided profits of \$284,000,000, and officials thereof for bank teller's false imprisonment and wrongful discharge, resulting in loss of her health, was not excessive. Pen.Code, § 236.

**17. False imprisonment** Ⓒ29

In awarding punitive damages against bank and officials thereof for false imprisonment and wrongful discharge of bank teller on false charge of defalcation, jury properly considered bank's wealth. Pen. Code, § 236.

**18. False imprisonment** Ⓒ30

In action against bank and officials thereof for false imprisonment and wrongful discharge of bank teller on false charge of taking money erroneously claimed to have been deposited in bank by customer thereof, complaint in plaintiff's separate action against such customer for slander and



compromise thereof were properly excluded from evidence as not alleviating defendants' wrongful acts or mitigating punitive damages. Pen.Code, § 236.

#### 19. Damages ⇐87(1)

The purpose and object of punitive damages are to punish particular defendant for malice, fraud, or oppression.

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Hugo A. Steinmeyer, Geo. L. Beckwith, and McLaughlin & Hutchinson, Los Angeles, for appellants.

Schell & Delamer, Frederick W. Bahl, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff sued defendants for damages for false arrest, imprisonment, malicious and oppressive conduct, wrongful discharge, and slander. At the commencement of trial, the court sustained the objection of defendants to all evidence as to the second cause of action for slander in that it did not state facts sufficient to constitute a cause of action and overruled a similar objection to the first cause of action.

During the course of the trial, defendants' motions to strike all evidence as to any acts occurring on or after August 15, 1946, were denied as was defendants' motion for nonsuit. Objection by plaintiff to defendants' offer in evidence of the complaint filed by plaintiff against Grace M. Sturdevant (who had falsely accused plaintiff of having received the deposit in question) was sustained.

Defendants' motion for a directed verdict was denied and the case went to the jury who found for the plaintiff in the sum of \$30,000. Defendants' motion for a judgment notwithstanding the verdict was denied and judgment was rendered on the verdict. Defendants' motion for a new trial was denied. They now bring this appeal from the judgment.

The events and circumstances upon which the alleged cause of action is based are as follows:

In August, 1943, plaintiff commenced working for defendant bank at its Palm

Springs Branch. In May, 1946, she took a month's vacation and upon her return, she was transferred to the Los Angeles Sixth and Alexandria branch. In July, 1946, she transferred to the Los Angeles Shatto-Wilshire branch. During the major portion of these three years, plaintiff served as a teller and for a short time was engaged in training tellers.

On August 12 or 13, 1946, Mrs. Grace M. Sturdevant, described by one of appellants as "a well-established customer" of long standing, reported to Mr. Vogelsang, the Shatto-Wilshire branch manager, that on August 2nd she had made a deposit of about \$500 consisting of \$280.30 in cash and the remainder in the form of five checks, with a new teller at the branch; that she did not have her passbook at the time and was not certain whether she had received a duplicate deposit slip, but in any case, she could not find it; that on August 9th she returned to the bank with her passbook and requested the same teller to make the entry of August 2nd and the teller informed her that she could find no record of the deposit. Mr. Vogelsang recalled that plaintiff was the only new teller and he pointed her out to Mrs. Sturdevant, asked if that was the teller that waited on her, and Mrs. Sturdevant said "yes."

Mr. Vogelsang conducted a preliminary search to trace the deposit to no avail. He then reported the matter to Mr. Leif, chief of the Southern California Inspection Department of the bank. Mr. Lief in turn assigned the matter to Inspector Sigler in his department.

On August 15th Mr. Sigler conferred with Mr. Vogelsang and the chief clerk of the Shatto-Wilshire branch and reviewed all of the transactions occurring on August 2nd. He talked to Mrs. Sturdevant at her home the same morning and to the manager of the Sturdevant apartment house, the deposit being made up of tenant rent payments. He checked the personnel record of plaintiff by telephone, which revealed a number of shortages at the Palm Springs branch and that plaintiff had taken an extended vacation trip. He obtained a report by telephone from the Seventh and Broadway branch, where plaintiff maintained a

savings account, that there was a balance in plaintiff's account of approximately \$300 and that there had been no withdrawals of any size for some time. Mr. Sigler then told the chief clerk to summon plaintiff to the desk of Mr. Kennedy, the assistant manager. Mr. Kennedy's desk was 5' x 3½' and was not in a private office but was separated from the lobby of the bank by a railing. When plaintiff approached the desk, about 3:00 p.m. in response to the request of Mr. Kennedy, Mr. Sigler was introduced to her as an inspector and investigator for the bank. Plaintiff was then seated between Mr. Kennedy and Mr. Sigler at the desk; during the latter part of the interview Mr. Vogelsang sat in on the conversation and Mr. Kennedy went to another part of the bank.

Mr. Sigler started the conversation by stating that the deposit was missing, that he believed it had been made. Plaintiff denied any knowledge of it. During the course of the interview, Mr. Sigler pointed out to plaintiff her record of shortages at the Palm Springs branch and he said that he concluded from that record, from the non-activity of her savings account and from her refusal of salary advances that plaintiff's shortages at Palm Springs financed her vacation. Plaintiff stated that she had withdrawn \$253 from her savings account for the vacation and that upon her return rather than ask for any salary advance, she had borrowed a small sum from a friend. (Plaintiff's bank book introduced in evidence during trial showed the withdrawal of \$253.)

Sigler said that he believed she had taken the deposit cash and had destroyed the checks inasmuch as they had not cleared. He told plaintiff that it would look very bad for her, that the only assumption he could arrive at was that she was guilty and that the best thing for her to do would be to admit it and agree to make restitution. Otherwise, the matter would be turned over to the FBI and the bank would prosecute, that it would be in the papers, her folks would find out about it, it would be very expensive and embarrassing, and it would be her word against Mrs. Sturdevant and the Bank of America. Plaintiff denied taking the deposit money throughout this interview and

she stated to Mr. Sigler that she did not understand why she should sign a confession and make restitution of the \$280.30 when she did not take it. Mr. Sigler told plaintiff if she signed a confession and made restitution, the bank would probably drop the matter and not do anything further.

By this time plaintiff was nervous, frightened, and crying. She agreed to sign a confession. Mr. Sigler then phoned Mr. Leif that plaintiff said she would sign a confession. Mr. Leif instructed Mr. Sigler to tell plaintiff that the bank could not guarantee her immunity and then to bring her to the downtown office for the purpose of obtaining her signed statement. Mr. Sigler told plaintiff the bank would not guarantee her immunity if she confessed and asked her to go down to the main office to sign a confession. Plaintiff said she would rather think about it overnight and go the next day, but Mr. Sigler said that the Chief Inspector was waiting for her downtown and was expecting her to come that evening. Plaintiff went to the downtown office because, as she testified during the trial, she was frightened and feared arrest that evening or soon thereafter by the FBI and she thought it would be easier to sign a confession and pay the \$280.30 than to face arrest and prosecution. It was then 4:30 or 5:00 p.m.

As plaintiff left the bank with Mr. Sigler, she felt faint and stumbled and Mr. Sigler took hold of her arm and they got into his car. They drove to the home of Mr. Leif's secretary and plaintiff asked permission to use the phone. She called her fiancé, told him of the accusation, that she did not take the money, but that if she did not sign a confession, the FBI would be informed and she would be prosecuted. After her phone conversation plaintiff told Mr. Sigler she would not sign a confession, but Mr. Sigler said she had better come to the downtown office anyway and talk about it to Mr. Leif, who was expecting them.

Plaintiff, Mr. Sigler, and the secretary arrived at Mr. Leif's office about 5:15 or 5:30 p.m. Mr. Sigler told Mr. Leif that plaintiff had in the meantime made a phone call and that she had changed her mind about signing a confession. Mr. Leif stated



that perhaps her friend had given her some bad advice and perhaps she should see an attorney. Mr. Leif told plaintiff that he would have to report the missing deposit to the National Banking authorities and to the FBI and that if plaintiff repaid the money the bank would inform the FBI that the bank would not mind if the matter were dropped, but if the money were not repaid, the bank would let the law take its natural course, and that if plaintiff had taken the money, it would be far better for her to sign a confession and make restitution. Plaintiff refused. Mr. Leif told her she was suspended as an employee until the case was settled. This interview lasted until 6:30 or 6:45 p.m.

On August 16th, Mr. Leif talked to plaintiff again and asked if she had changed her mind and if she would authorize a withdrawal on her savings account. Plaintiff refused.

On August 24th a friend of plaintiff talked to Mr. Vogelsang and asked the status of plaintiff's position with the bank. Mr. Vogelsang said plaintiff was no longer an employee, that the bank considered her unsatisfactory.

On September 25th, the bank debited plaintiff's savings account with the \$280.30. (The hold on plaintiff's savings account was alleged in the complaint to have been made on August 16th and this was admitted in the answer, but the date of September 25th was in evidence during the trial.) On the same day the bank wrote to the Agent in Charge of the United States Bureau of Investigation in Los Angeles, and to E. M. Wright, National Bank Examiner, as follows:

"\* \* \* This is to inform you of a shortage in the account of Zella M. Parrott, former teller at our Shatto-Wilshire Branch, which appears to be a defalcation, in the amount of \$280.30.

"Miss Parrott admitted accepting a deposit containing a number of checks and \$280.30 in cash from a customer of the branch without passing credit to the account. She agreed in the presence of two of our officers to tell the whole story and offered to make restitution. Subsequently, she denied ever having accepted the de-

posit, but evidence on file indicates that possibly she used the cash and misplaced or destroyed the checks. \* \* \*

On October 1st, Mrs. Sturdevant came into the bank and talked to Mr. Vogelsang. She was very much upset—she had been mistaken, she had found the deposit. Mr. Vogelsang phoned this information to Mr. Leif and in compliance with instructions, credited plaintiff's savings account with \$280.30. Mr. Leif phoned plaintiff and told her he would like to see her the following morning at the bank—he did not tell her the reason for his wishing to see her. Plaintiff came to Mr. Leif's office the following day with her attorney. Mr. Leif told plaintiff that the deposit had been found, that Mrs. Sturdevant had misplaced it, that no harm had been done, that it was just a mistake that anybody could make, and that her account had been re-credited with the \$280.30. Plaintiff asked if she still had her job, and he replied, "No."

On October 2nd, the bank wrote again to the U.S. Bureau of Investigation and to the National Bank Examiner, as follows:

"\* \* \* We wrote you on September 25 regarding a shortage in the accounts of Zella M. Parrott, former teller at our Shatto-Wilshire Branch.

"The depositor who claimed to have made the deposit that resulted in the apparent shortage now informs us that the deposit was not made and there is, therefore, no apparent shortage as indicated in our letter. \* \* \*

Under date of November 13th, a prospective employer of plaintiff wrote to the bank asking the reason for plaintiff's discharge as an employee. Under date of November 20th, the bank replied:

"\* \* \* Fairly satisfactory.

"Not adapted to teller work.....lacks accuracy. Would possibly be better suited to a type of clerical work other than we had to offer her in the bank."

As to the ill effects suffered by plaintiff as a result of the false accusation, evidence during the trial revealed that prior to August 15th she had been in good health. On the evening of August 15th she was crying and hysterical and thereafter had a



nervous breakdown. On August 19th she placed herself under a doctor's care necessitating visits to the doctor twice a week for the first year and once a week for the next year. During that time she continued to be frightened and nervous. She cried a great deal and could not sleep without having nightmares. She avoided her friends. She could not maintain a proper diet, her reflexes were exaggerated, she had fainting spells and severe headaches. She lost 17 pounds in weight. Chest X-rays revealed a bronchial condition necessitating rest in bed. She was unable to obtain permanent employment and from August 15, 1946, to the date of trial, March 8, 1949, she had only earned from \$200 to \$300.

Appellants' appeal from the judgment is based upon the following contentions:

(1) The pleadings are insufficient to state any cause of action against any of the appellants;

(2) The evidence, construed most favorably to respondent, shows no false imprisonment;

(3) The trial court erred in submitting the issue of punitive damages to the jury as there was neither evidence, nor any sufficient pleading, of malice;

(4) The acts of appellants subsequent to August 15th were inadmissible; yet the court received evidence as to these on the theory that they may show malice, and that the trial court's instructions on malice constituted reversible error;

(5) There was no evidence to justify a verdict so grossly excessive;

(6) The trial court erred in excluding evidence of respondent's admissions which were contained in her verified pleading in her action against Mrs. Sturdevant, and which were contrary to her testimony.

[1] The first contention of appellants as to the insufficiency of the pleadings is without merit. The allegations of the complaint set forth in appellants' brief state that plaintiff was cross-examined at the branch office for one hour, that she was taken to the main office and cross-examined for an additional two hours, that plaintiff was told if she did not confess the matter

would be turned over to the FBI, that said detention and cross-examination were against her will and that she only submitted thereto because of fear of arrest and prosecution if she refused. There are further allegations that defendants led plaintiff to believe that criminal prosecution would be instituted, that defendants adopted a threatening attitude, and that plaintiff was put in fear of her personal safety.

[2, 3] Appellants contend that in order to constitute false imprisonment there must be actual physical restraint or a threat to immediately apply force to effect such restraint, that fear of prosecution or litigation is not sufficient, and that no threat of arrest or prosecution is alleged. The threat of force in an action for false imprisonment need not be express—it may be implied, *Moffatt v. Buffums' Inc.*, 21 Cal.App. 2d 371, 69 P.2d 424; the threats may be by conduct or words, *Vandiveer v. Charters*, 110 Cal.App. 347, 294 P. 440; 22 Am.Jur. 359. Certainly, the allegations of the complaint sufficiently state an implied threat of force. Furthermore, in the absence of a demurrer and after judgment, the complaint must be construed most favorably to respondent's case and all legitimate inferences from the facts alleged must be drawn in favor of the respondent. *Milovich v. City of Los Angeles*, 42 Cal.App.2d 364, 108 P.2d 960.

As to their second contention that the evidence shows no false imprisonment, appellants again argue that there was no force or threat of force, that fear of litigation or investigation or a criminal proceeding is not sufficient. Appellants seek to point out the care exercised by the bank officials in their investigation and the reasonableness of the assumption of guilt of respondent in view of the Palm Springs shortages, which they urge improved upon respondent's transfer, and her statement that she would sign a confession.

[4] False imprisonment is the unlawful violation of the personal liberty of another. Penal Code, sec. 236. And whether the violation of the personal liberty of another is treated as a tort or a crime, the definition is the same. *Dillon v. Haskell*, 78 Cal.App.

2d 814, 816, 178 P.2d 462; *Donati v. Righetti*, 9 Cal.App. 45, 48, 97 P. 1128.

[5-8] The use of actual physical force in detaining a person is not a prerequisite to unlawfully violating the personal liberty of another. As was said by this court in *Ware v. Dunn*, 80 Cal.App.2d 936, 943, 183 P.2d 128, 132, "All that is necessary to make out a charge of false imprisonment is that the individual be restrained of his liberty without any sufficient complaint or authority therefor, and it may be accomplished by words or acts which such individual fears to disregard. Temporary detention is sufficient, and the use of actual physical force is not necessary." And, in *Moffatt v. Buffums' Inc.*, 21 Cal.App.2d 371, 374, 69 P.2d 424, 425, the court said: "Any unlawful exercise of force, or express or implied threat of force, by which in fact any person is deprived of his liberty and compelled to remain where he does not wish to remain is a false imprisonment."

[9, 10] It is not the province of an appellate court to weigh the evidence. In *re Estate of Isenberg*, 63 Cal.App.2d 214, 196 P.2d 424; 2 Cal.Jur. 921 et seq. The jury could reasonably infer from the evidence that there was force, a threat of force, or an implied threat of force both from the physical facts and from the fact alone that an absolutely innocent person stated that she would sign a confession. Immediately before the interview with plaintiff, there was evidence that both Mr. Vogelsang and Mr. Sigler had some doubt as to the truth of Mrs. Sturdevant's charge; evidence at the trial showed that the Palm Springs branch had a reputation for overages and shortages; Mr. Sigler relied upon a telephone report for his assumption that plaintiff had used her Palm Springs shortages for a vacation trip and it was proved at the trial that plaintiff had made a withdrawal of her savings for that purpose.

[11] With reference to appellants' claim of the care allegedly exercised by the bank officials in their investigation and the reasonableness and probable cause for assuming the guilt of respondent, and therefore detaining her, it should be noted that

while it is true that where a person has reasonable grounds to believe that another is taking his property *as distinguished from those cases where the offense has been completed*, he is justified in detaining the suspect for a reasonable length of time for the purpose of investigation in a reasonable manner, the evidence in the instant case clearly discloses that respondent was not detained for the purpose of investigation but, on the contrary, was detained for the purpose of securing a confession to the theft of money at a prior time and to obtain restitution of said money from respondent. But even if a showing of the lack of care exercised by the bank in its investigation were essential to a cause of action for false imprisonment where an alleged offense has been completed, the jury was entitled to reasonably infer from the above evidence that the bank officials had not proceeded carefully and had not acted upon probable cause.

[12] The appellants further contend that the evidence shows no cause of action for false imprisonment against the individual bank officials. However, the inference might reasonably be drawn that the individual bank officials actively supervised and directed the false imprisonment. *Moffatt v. Buffums' Inc.*, supra, 21 Cal. App.2d page 375, 69 P.2d page 426.

[13] As to the third contention of appellants, the issue of punitive damages was properly submitted to the jury. The jury could reasonably infer both from the facts alleged and the evidence that the defendants were guilty of oppression, fraud, or malice, express or implied 5 Cal.Jur.Supp., False Imprisonment, sec. 13, p. 1024. The jury was entitled to consider the fact that appellant bank refused to reinstate respondent when her innocence was not only proven but actually demonstrated. They had a right to consider whether the bank's report to the federal authorities was fair and truthful. The jury could also consider whether when respondent's innocence was conclusively established, appellant bank's letter to the federal authorities amounted to an unequivocal retraction of the charges. The jury also had for consideration the

letter hereinabove set forth written to a prospective employer of respondent and could draw therefrom such inferences of malice toward respondent as might be justified from a consideration of such letter in the light of the real reason for the latter's discharge, and that such reason was subsequently proven to be groundless.

[14] Appellants point out that the trial court ruled the slander count insufficient as malice had not been sufficiently pleaded. Whether or not the trial court was in error in so ruling is not an issue on this appeal.

[15] The fourth contention of appellants is an objection to the admission of evidence as to acts subsequent to August 15th on the theory of the trial court that they showed malice and that the trial court's instructions on malice should have been omitted inasmuch as malice was not in issue. Appellants point out that the letters to the FBI and the National Bank Examiner were merely the fulfillment of a duty of the bank; that the letter to the prospective employer was justified on the basis of the Palm Springs shortages; that refusal to rehire and termination of services are privileges of an employer; that plaintiff was not damaged by the debiting of her savings account. This contention of appellants is primarily based on the erroneous assumption that the issue of malice was neither pleaded nor proved, hereinabove considered. The jury could reasonably infer from the wording of the letters written by the bank a malicious intent—the letters reporting the missing deposit to the proper authorities contained what subsequently proved to be untrue statements and the letters purporting to retract the accusation suggested a doubt as to the honesty of respondent; the letter of reference was not justified on the basis of the Palm Springs shortages inasmuch as shortages were common at the Palm Springs branch and the jury could reasonably infer that the bank itself at the time the shortages occurred could not have considered them of moment or plaintiff would not have been retained as an employee thereafter. The debiting of plaintiff's account, the refusal to rein-

state her in her employment, and failing to notify her immediately that the deposit was found were all factors to be considered by the jury in fixing punitive damages for malice and oppression.

[16, 17] As to the fifth contention of appellants, in view of the foregoing facts it can not reasonably be said that in awarding respondent \$30,000 damages the jury was actuated by passion and prejudice. Plaintiff suffered loss of health and loss of employment for which she was entitled to compensatory damages, and the remainder of the \$30,000 is punitive damages against the officials of the bank and the bank, which it was stipulated had capital surplus and undivided profits of \$284,000,000. It was proper in the awarding of punitive damages to consider the wealth of defendant bank.

[18, 19] As to the last contention of appellants that it was error to exclude from evidence the complaint against Mrs. Sturdevant filed in a separate action and the compromise thereof in the amount of \$3,500, the admissions of the complaint are not basically at variance with respondent's position in the present action. Furthermore, the only wrong charged against Mrs. Sturdevant, namely, the alleged slander uttered by her, was an entirely different wrong from that charged against appellants. The damages sustained by respondent as a result of Mrs. Sturdevant's charges were different from those she sustained by reason of appellants' conduct. In fact, such charges occurred and were made prior to the first of appellants' wrongful acts, namely, the accusation of dishonesty and defalcation made against respondent. When the purpose and object of punitive damages are considered, viz., punishment of a particular defendant for malice, fraud, or oppression, it is at once manifest that the compromise agreement made with Mrs. Sturdevant could not in any way alleviate the wrongful acts of the appellants or mitigate the punitive damages awarded in the present action against them.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



96 Cal.App.2d 913

**KLOSE v. SUPERIOR COURT IN AND  
FOR SAN MATEO COUNTY et al.**

No. 14413.

District Court of Appeal, First District,  
Division 1, California.

April 11, 1950.

Proceeding by William F. Klose against the Superior Court of the State of California in and for the County of San Mateo, A. R. Cotton, J., and Henry C. Jorgensen, to prohibit the court from further proceedings in mandamus action instituted by Jorgensen against the City Council of the City of San Carlos praying that the City be required to fill, either by appointment or by calling of an election, a vacancy on the council. The District Court of Appeal, Bray, J., held that petitioner who was beneficially interested in prohibition proceeding as an elector and taxpayer of city, and as a person claiming title to office in controversy, was a proper party, that mandamus against city council was not the proper remedy where fact of petitioner's vacancy was disputed, and that prohibition would lie to stay further proceedings in mandamus action.

Peremptory writ of prohibition issued restraining respondent court from proceeding further in mandamus proceeding.

**1. Prohibition ⇨20**

In prohibition proceeding, petition by incumbent of public office alleging he was duly elected and qualified member of council and that council refused to recognize claim that he was not a resident, after investigation and advice by city attorney, sufficiently showed incumbent was beneficially interested as elector and taxpayer of city and as person claiming title to office, and incumbent was a proper party plaintiff.

**2. Mandamus ⇨77(1)**

Where public office is occupied by a de facto incumbent, a writ of mandamus will not lie at request of an outsider seeking some incident of the office or outright admission to the office.

**3. Mandamus ⇨77(3), 172**

Where a de facto public officer brings a mandamus action for some incident of

office, writ of mandate will issue but legal title is not in issue and lack of legal title cannot be raised by defendant.

**4. Mandamus ⇨77(1)**

Where two persons both purport to hold public office, a writ of mandamus will lie to determine which is de facto officer.

**5. Mandamus ⇨76**

Under statute providing that after incorporation, city council is judge of qualifications of its members and of election returns, and that it shall determine contested elections of city officers, where council denied individual's request to make an appointment, denial amounted to a finding that no vacancy existed, and an action in mandamus would not lie to fill office which council determined incumbent was qualified to fill. Government Code, § 36812.

**6. Mandamus ⇨76**

Mandamus cannot be used to compel a municipal board to fill a vacancy unless fact of vacancy is not disputed.

**7. Mandamus ⇨77(1)**

Where there are no conflicting claimants to a public office, and appointing power has refused to determine existence of vacancy, and there is an incumbent claiming office, mandamus must be denied.

**8. Quo warranto ⇨5**

Where part of vacancy is in dispute, quo warranto gives a plain, speedy and adequate remedy to determine who is entitled to public office.

**9. Prohibition ⇨5(3)**

Where incumbent was duly elected and qualified member of council and a resident, and council refused to recognize claim that he was not a resident after investigation and advice by city attorney, writ of prohibition would issue ordering trial court to refrain from further proceedings in mandamus action to require council to fill alleged vacancy arising from incumbent's alleged nonresidence. Code Civ.Proc. § 1103.

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Aaronson & Cohn, Melvin E. Cohn, San Carlos, for petitioner.

Carl Wm. Anderson, Burlingame, amicus curiae.

Frank V. Kington, Redwood City, for respondents.

BRAY, Justice.

One Jorgensen filed a complaint in mandamus in the Superior Court of San Mateo County against the City Council of the City of San Carlos and four of its members, praying that it and they be required to fill, either by appointment or by the calling of an election, a vacancy on the council which he alleged had occurred because the incumbent Councilman Klose had become a nonresident of that city. Thereafter said Klose filed a petition in this court for a writ of prohibition ordering the superior court to refrain from further proceeding in the mandamus action.

Questions Presented.

There are three main questions: 1. Is petitioner a proper party to this proceeding? 2. Will prohibition lie? This question, in turn, depends primarily upon the answer to—3. Will mandamus lie to force a city council to fill an alleged vacancy on the council, the fact of which vacancy is disputed?

Pleadings.

The petition in prohibition annexes a copy of the complaint in mandate and then alleges that the complaint admits and petitioner declares that at a general municipal election held in San Carlos on April 13, 1948, petitioner was elected a member of said city council and qualified as such on April 20; that neither the courts of this state nor the council have declared a vacancy to exist upon said council; that on January 31, 1949, the San Carlos City Attorney rendered an opinion that petitioner is a legal resident of that city, and that on October 28, 1949, said city attorney rendered a further opinion to the same effect. Attached to the petition as exhibits are these opinions, the first one stating, "Upon my own investigation and in an interview with Councilman Klose, I find that he is a legal resident of the City of San Carlos." In the second opinion the city attorney stated that he had again interviewed

petitioner "and checked the facts as they existed in my previous letter to you and find no change; therefore, my opinion previously given to you on the same subject matter has not changed." The petition further alleges that inasmuch as no vacancy has been declared the mandate action would by necessity try the title to the petitioner's office, that the superior court has no jurisdiction to try title at all and also because petitioner is not a party to the proceeding; that petitioner does not have a plain, speedy and adequate remedy at law, because (1) he is not a party to the proceeding; (2) a writ of mandate ordering the filling of the alleged vacancy would put in doubt for months, pending appeal, his right to sit on the council, would hinder him in his performance of his duties as an elected official, would hinder the city government in the performance of its functions; and (3) would precipitate confusion in the government of the city of which he is a citizen and taxpayer; and that an alternative writ was issued on said complaint. The mandate complaint, in addition to the matters referred to in the petition, sets forth that plaintiff Jorgensen is an elector and taxpayer of the city; that Klose at the time of his election and qualifying as a councilman was an inhabitant of San Carlos residing at a stated address therein; that about July 4, 1948, Klose ceased to be an inhabitant and removed the place of residence of himself and family from that address to a designated address outside said city; that on November 21, 1949, plaintiff made written demand upon the council and its members that the vacancy caused by Klose ceasing to be an inhabitant, be filled either by appointment or election; that it and they have failed and refused so to do.

#### 1. Is Petitioner a Proper Party?

[1] Section 1103, Code of Civil Procedure, provides that the writ of prohibition "is issued upon the verified petition of the person beneficially interested." Respondents contend that petitioner is not such a person. While the petition leaves much to be desired in definite statement of petitioner's present residence in San Car-

los, still, taking the allegations of the petition and complaint in mandate together, it is alleged that petitioner was duly elected and qualified as a member of the city council in 1948, at which time he was admittedly a resident; that the council after an investigation by and the advice of the city attorney, refused to recognize plaintiff's claim that petitioner is a nonresident, and that petitioner is a citizen and taxpayer of San Carlos, and "is a part" of the city government. As the questions involved in this case are matters of great importance to the citizens of San Carlos, we do not feel that the case should be decided on technical questions of niceties of pleading. Broadly interpreting the allegations in the petition and complaint, particularly in view of petitioner's offer to amend his petition and allege in positive terms that he still is and claims to be a resident, elector and councilman of San Carlos, it appears that petitioner is beneficially interested in this proceeding (1) as an elector and taxpayer of San Carlos, and (2) as a person claiming title to the office in controversy.

### 3. Is Mandamus the Proper Remedy?

Respondents' main contention that mandamus is a proper remedy is based upon their claim that their complaint shows that Klose is no longer a resident of San Carlos; that automatically a vacancy exists; that the mandamus proceeding does not try the title to the office, but merely is concerned with the filling of it. Respondents admit that if the question of title to office is the main issue, then the proper remedy is quo warranto, but contend that here title to office is a mere incident to the filling of the office. This is putting the cart before the horse, for until some authority decides the dispute as to whether a vacancy exists, there is nothing to fill. Respondents argue that because plaintiff in mandate alleged that petitioner moved his residence out of the city, there was an automatic vacancy created which required no determination of that fact. There can be no question, and all parties concede, that where an elected official of a city of the sixth class removes his resi-

dence from the city, his office becomes vacant. Government Code, § 1770, formerly Political Code, § 996.

Respondents rely on *People ex rel. Tracy v. Brite*, 55 Cal. 79. There the county judge, upon the theory that one Tracy who had theretofore qualified as supervisor had removed from the district, appointed one Brite supervisor in his place. In a quo warranto proceeding brought on the relation of Tracy, the lower court found for Brite apparently on the theory that there had been no proceedings to declare the office vacant. The Supreme Court said that the question to be considered was "whether proceedings must first be had to declare a vacancy, or whether an appointment can be made if the fact of vacancy exists." It then went on to say that when the relator ceased to be an inhabitant of the district, he ceased to be supervisor and a vacancy occurred. It then used this significant language: "The issue of vacancy or not can be, and is to be, determined in this case. The relator has his day in Court in this action upon that issue, and we see no necessity of a previous adjudication. The Legislature was competent so to enact, and, as we have stated, has so enacted." 55 Cal. at page 80. The court then remanded the case to the trial court to determine the question of whether or not the relator had removed from the district, thereby creating a vacancy. This case holds that where the appointing power considers a vacancy to exist, it may appoint a successor, without proceedings to declare the vacancy to exist, and that when it does so appoint the official succeeded may by quo warranto question whether there was any vacancy. In our case the appointing power did not appoint a successor. Moreover, there was no request that the trial court determine whether a vacancy existed. Nor is *Harby v. City of Los Angeles*, 64 Cal.App.2d 911, 149 P.2d 390, applicable here. There the petitioner, after conviction of a crime, had been removed from his office as a city councilman by court action under Penal Code sections 758-772. He sought a writ of mandate to compel payment of salary on the ground



that his removal was illegal as the Los Angeles City Charter provided the exclusive method of removal. In denying the application on the ground that the charter provision was not exclusive, the court said that upon conviction of an offense involving a violation of his official duties, an incumbent's office becomes vacant, *ipso facto*. Other cases cited by respondents, such as *People ex rel. Fleming v. Shorb*, 100 Cal. 537, 35 P. 163, 38 Am.St.Rep. 310, are to the same effect, namely, that removal from the political subdivision causes an *ipso facto* vacancy, and where the appointing power fills the vacancy the incumbent "is not thereby concluded as to the fact of the occurrence of such event. He may still question and contest the allegation of that fact, either before or after the installation of the appointee,—before such installation, if he refuse to vacate the office, in an action by the people to oust him; or, after such installation, in an action by the people on his relation to oust the appointee. Thus, he may always have his day in court before it can be conclusively adjudged against him that the office was vacant at the time the appointment was made." 100 Cal. at page 541, 35 P. at page 164. But these are all cases in which the appointing power, by making an appointment, has, in effect, determined that the facts exist which cause a vacancy. None of these are cases in which the court has compelled the appointing power to appoint, where that power had neither made an appointment nor determined a vacancy to exist.

The question of whether *mandamus* rather than *quo warranto* is the proper remedy where there is a dispute over whether a vacancy in office exists, is rather muddled in California. The courts have almost uniformly stated that *mandamus* cannot be used to try title to office, and then in a number of instances, have, in effect, tried title on the theory that title was only incidentally involved.

The cases which have refused in similar or somewhat similar situations to that in our case, to apply *mandamus*, follow. The latest is *Drescher v. Board of Supervisors*

of Butte County, 191 Cal. 234, 215 P. 902. That was an application for a writ of *mandamus* to compel the board to appoint a member upon the ground that there was a vacancy. "The application shows that the position is now being occupied by one C. F. Cox, who is performing the duties of the office with the acquiescence of his associates and under claim of right." (This is the identical situation as to Klose and his associates.) "Under the circumstances, a writ of *mandamus* should not be issued because, in effect, it would require us to try the title to the office. The writ should not be granted until it has been established by judicial process that there is a vacancy to be filled." 191 Cal. at page 235, 215 P. at page 902. In *Meeker v. Reed*, 70 Cal.App. 119, 232 P. 760, an elector of the city of Santa Rosa, sought a writ of *mandamus* to compel the city clerk to call a special election to fill three alleged vacancies on the city council. The court said that the question to be determined was "whether there was or is a vacancy of a majority of the seats of the city councilmen of the city of Santa Rosa, a question to be determined before the said clerk could act, and a judicial question which must be determined before a writ of mandate can be issued from this court directing the respondent to call a special election in said city for the purposes mentioned. Overton's title to the office of said councilman of said city must be determined before it can be said that a vacancy existed or exists such as authorizes the calling of a special election under the charter section referred to." 70 Cal.App. at page 125, 232 P. at page 763. The court then held that *mandamus* to appoint would not lie until Overton's title to office had been judicially determined. Of all the cases in California, the *Drescher* and *Meeker* cases, *supra*, are the only ones where, as in the case at bar, an official was acting and the appointing power declined to recognize that a vacancy existed.

A review of the other cases in this state upon the subject, and an analysis of the fact situations involved, reveals the following pattern:

[2] 1. Where the office is occupied by a de facto incumbent, mandate will not lie at the request of an outsider seeking some incident of the office or outright admission to the office. *People ex rel. Smith v. Olds*, 3 Cal. 167, 58 Am.Dec. 398 [mandate for records of office]; *People ex rel. Attorney General v. Scannell*, 7 Cal. 432 [mandate for records of office]; *Meredith v. Board of Supervisors*, 50 Cal. 433 [mandate for pay]; *Kelly v. Edwards*, 69 Cal. 460, 11 P. 1 [mandate for admission to office]; *Black v. Board of Police Com'rs*, 17 Cal. App. 310, 119 P. 674 [mandate for pay]; *Humburg v. Board of Police and Fire Com'rs*, 27 Cal.App. 6, 148 P. 802 [mandate for pay].

In holding that mandate is an improper remedy the courts often point out that the incumbent is not a party to the proceedings. "Especially is this true in view of the fact that the actual occupant of the office, whose rights will be vitally affected by the determination of the other questions discussed, is not before the court." *Black v. Board of Police Com'rs*, supra, 17 Cal.App. at page 317, 119 P. at page 676.

The above California cases are consistent with the general rule elsewhere. See 84 A.L.R. 1126.

An apparently exceptional case is *Davenport v. City of Los Angeles*, 146 Cal. 508, 80 P. 684, in which mandate was issued ordering the payment of salary to petitioner as city councilman, on the ground that his supposed recall was invalid. The court settled the question of legal title on the merits, notwithstanding the existence of a de facto councilman occupying the office, who was not a party to the proceedings. The form of the action and the question of trying title to office in a mandate proceeding were not discussed.

[3] 2. Where a de facto officer brings mandate for some incident of office, the writ lies, the court adopting one of two alternate theories: (a) Legal title is an incidental issue and can be passed on by the court. *Bannerman v. Boyle*, 160 Cal. 197, 203, 116 P. 732 [mandate for pay]. (b) The petitioner is entitled to the incidents of office based on his de facto occupancy.

Legal title is not in issue, and *lack* of legal title cannot be raised by the *defendant*. *Turner v. Melony*, 13 Cal. 621 [mandate for pay]; *Elliott v. Van Delinder*, 77 Cal. App. 716, 247 P. 523 [mandate for pay]. This theory was applied in *Petersen v. Morse*, 48 Cal.App. 428, 192 P. 51, which involved the general right to occupy an office, rather than some particular incident of office. The dissenting opinion of Mr. Justice Nourse points out the inapplicability of the doctrine in such a case. 48 Cal.App. at page 437, 192 P. 51. (c) In *Welch v. Ware*, 161 Cal. 641, 119 P. 1080, the court granted mandate ordering salary paid to petitioner, after deciding on the merits that he held legal title to the office, an attempted ouster being invalid. The question of trying legal title by mandate was not mentioned. In *Norton v. Lewis*, 34 Cal.App. 621, 168 P. 388, the court on an application for mandamus for pay against the county auditor by a member of the board of supervisors, passed upon the question of whether such member was a holdover or had qualified for a new term. No question was raised as to the form of the proceeding.

[4] 3. Where two persons are both purporting to hold the office, the court is put to its severest test. The solution worked out is as follows: Mandate lies, to determine which is the de facto officer. Legal title is not adjudicated. However, the court examines the question of legal title, and the person who has the best claim to legal title is held to be the de facto officer. For all practical purposes, this undoubtedly amounts to a decision as to legal title, arrived at on a proceeding for mandate. *Morton v. Broderick*, 118 Cal. 474, 50 P. 644 [mandate for pay, rival boards of supervisors]; *McKannay v. Horton*, 151 Cal. 711, 91 P. 598, 13 L.R.A., N.S., 661, 121 Am. St.Rep. 146 [mandate for pay; secretaries of rival mayors of San Francisco, one "mayor" carrying on from the county jail]. After pointing out that the determination of which of the two was the legal mayor, was merely incidental to the question of which secretary was entitled to salary, the court said: "There cannot be two *de facto* incumbents of one office at the same time,

and where two are acting simultaneously, each under claim of right, that one alone will be recognized who appears to have the better legal title. *Morton v. Broderick*, 118 Cal. 485, 486, 50 P. 644. For the purpose, therefore, of determining who is mayor or *de facto* of San Francisco, we must inquire who appears to be mayor *de jure*." 151 Cal. at page 717, 91 P. at page 600. The court said further that with reference to the question of who was the Mayor of San Francisco the secretary of the ousted mayor "makes the preliminary objection that in this proceeding by *mandamus* we cannot try the title either of the secretary or mayor. We are not cited to any authority for the proposition that the title to an office cannot be tried—that is, inquired into—when it is incidentally involved in a proceeding which a third party has a right to institute. The doctrine which Mr. Boyle means to invoke is more correctly stated in these terms: Title to an office cannot be determined in *mandamus*, where there is another specific remedy prescribed, or where there is another plain, speedy, and adequate remedy at law." 151 Cal. at page 715, 91 P. at page 599. It pointed out that the rule that *mandamus* would not lie to try title to office as set forth in *People ex rel. Smith v. Olds*, *supra*, 3 Cal. 167, 58 Am.Dec. 398, and *Morton v. Broderick*, *supra*, 118 Cal. 474, 50 P. 644, did not apply where the determination of the title to the office was merely incidental to the main issue.

[5] Section 36812 of the Government Code, Stats. 1949, p. 149, dealing with legislative bodies of sixth class cities, provides as follows: "After incorporation, the city council is judge of the qualifications of its members and of election returns. It shall determine contested elections of city officers." While similar provisions have been held not to be exclusive of the court's right to try election contests relating to cities of the sixth class *McGregor v. Board of Trustees*, 159 Cal. 441, 114 P. 566; *Dawson v. Superior Court*, 13 Cal.App. 582, 110 P. 479, section 36812 should be borne in mind here where the council in denying plaintiff's request to make an appointment in effect

found that no vacancy existed. Therefore, if *mandamus* were permitted, it would definitely be trying title to an office as to which the council had determined its incumbent to be qualified to fill.

In *Nielsen v. Gregory*, 60 Cal.App. 574, 213 P. 510 (mandate for approval of bond) the court said that the question was moot and the writ would be denied. It added, however, that the existence of two contesting claimants would not have prevented the court from determining the case, since petitioner would only have to make a *prima facie* showing of legal title, and the court would not actually be adjudicating legal title. 60 Cal.App. at page 557, 213 P. 510. In *McKelley v. Turner*, 96 Cal.App. 292, 273 P. 1101, where there were two claimants. The court granted mandate ordering payment to petitioner on the ground that he had legal title to the office, an alleged resignation being ineffective. The question of trying title to office by mandate was not discussed. *Adams v. Doyle*, 139 Cal. 678, 73 P. 582, likewise was a *mandamus* proceeding to collect pay. No question was raised as to the form of the proceeding and the court determined the right to the office of sheriff as between petitioner and another. In *Robinson v. Moran*, 3 Cal.2d 636, 45 P.2d 206, the court conceded that title could be passed on incidentally in a proceeding for mandate, but said that the case before it contained fact issues which could be handled better in the superior court. The petition was dismissed without prejudice to a similar proceeding in the lower court.

In *Brennan v. Riley*, 3 Cal.2d 736, 46 P. 2d 972 (mandate for pay), the court said: "Inasmuch as both claimants to the office of chairman of the Veterans' Welfare Board have brought action against the controller, neither of them raise any question concerning the right of the court to determine title to the office in a proceeding of this character. It is well, however, to bear in mind the rule announced, together with its limitation, in *McKannay v. Horton*, 151 Cal. 711, 91 P. 598, 13 L.R.A., N.S., 661, 121 Am.St.Rep. 146. In other words, as there, we may inquire into the question of who is the occupant of the office for the



purpose of determining to whom the salary is payable." 3 Cal.2d at page 739, 46 P.2d at page 974.

4. In various other situations the courts discourage attacks on de facto officers but otherwise allow the use of mandate by persons claiming public offices.

In *Satterlee v. San Francisco*, 23 Cal. 314, a party to a contract with the city contended that the contract was invalid because one of the councilmen who voted for it was ineligible to hold office. The court refused to consider this point, on the ground that the eligibility of a de facto officer cannot be attacked collaterally.

In *Hamilton v. Mallard*, 33 Cal.App. 470, 165 P. 725, the job held by Mallard had been abolished and the duties taken over by a different officer. In an attempt to test the validity of that action, petitioner sought mandate ordering Mallard to carry out his former duties. The court refused to go into the matter, stating: "If the proceedings for the transfer of the functions of the office are, as claimed, invalid, such question should be litigated in a direct proceeding, final as to parties directly interested, and not in a suit at the instance of a third party, who, as it appears to us, has no beneficial interest in the matter." 33 Cal. App. at page 473, 165 P. at page 726.

In *Lowy v. Reardon*, 12 Cal.App.2d 748, 55 P.2d 1214, petitioner sought mandate ordering payment of his salary, on the theory that an attempted abolition of the office was invalid. There was of course no de facto occupant. Although denying the writ on the merits, the court held that mandate for pay was a proper remedy. "The defendants contend that *mandamus* is not a remedy available to plaintiff, since he is attempting to compel his admission to the use and enjoyment of a public office, and that a *quo warranto* action is the only proper remedy. It is alleged in the complaint that the defendant officials have refused to issue a warrant for plaintiff's salary. In a number of cases it has been held that the issuance of salary warrants may be compelled by *mandamus* proceedings. [Citing cases.] Therefore plaintiff's cause of action cannot be defeated on the sole ground that the

kind of action selected is not appropriate." 12 Cal.App.2d at page 749, 55 P.2d at page 1214.

In *Bannerman v. Boyle*, supra, 160 Cal. 197, 116 P. 732, a member of the San Francisco Board of Education was granted a peremptory writ of mandate to compel the auditor to pay his salary. The defense was that petitioner was a usurper, although a de facto member of the board. The court determined the legality of his title and said 160 Cal. at page 203, 116 P. at page 734, "There is some discussion in the briefs upon the proposition that the question of title cannot be raised in a suit for *mandamus*, referring to the well-known rule that *mandamus* will not lie to try the title to an office. This rule has no application. Rival claimants, it is true, cannot thus try their title. But this is not an action between rival claimants. It is an action by one asserting that he is the *de jure* officer to compel another public officer, not the claimant, to perform a duty pertaining to his office; that is, to audit and approve the plaintiff's demand for the salary. It is clearly within the terms of the statute authorizing *mandamus*."

5. As shown in the *Drescher* and *Meeker* cases, supra, where petitioner as taxpayer alleges that an office is vacant, notwithstanding a de facto occupant, and asks that the proper authority be forced to fill the alleged vacancy, the courts have usually held mandate an improper remedy.

Respondents cite *Independence League v. Taylor*, 154 Cal. 179, 97 P. 303, as authority that *mandamus* will lie here to compel the council to appoint. However, the facts of that case are entirely dissimilar to those in our case. There the court issued a writ of mandate to compel the San Francisco Mayor to appoint two members of the Independence League as members of the board of election commissioners, although the mayor had already appointed the members of such board. However, the court pointed out that under the law the mayor was required to appoint two members of the league, which he had not done. It was not a matter of trying title to the office of the two non-league members whom he had ap-

pointed, but rather an inquiry as to whether he had obeyed the plain requirement of the law that he appoint two league members.

In *Platnauer v. Board of Supervisors*, 65 Cal.App. 666, 225 P. 12, cited by respondents, petitioner, an attorney at law, was granted a peremptory writ of mandate requiring the county board of supervisors to appoint a city justice of the peace of Sacramento. One of the county judicial townships was identical with the boundaries of the city of Sacramento. A justice of the peace had been duly elected to that office. The board had refused to appoint a city justice of the peace on the theory the city justice of the peace and the township justice of the peace were one office. The court held that they were separate entities and therefore it was the duty of the board to appoint someone to the city office. Title to the office was not tried; merely the legal question of whether or not such office existed. While the case uses the language, 65 Cal.App. at page 669, 225 P. at page 14, "The writ may issue to compel an officer to fill a vacancy", it was not referring to a situation where the alleged vacancy was actually filled.

Respondents have cited many cases to the effect that where the fact of vacancy is not in dispute mandamus is the proper remedy to compel a municipal board to fill it. Those cases are not in point here because the fact is very definitely in dispute.

[6, 7] In reconciling the rulings the following appears: (1) that it is the general rule that mandamus cannot be used for this purpose unless the fact of vacancy is not disputed; (2) that where the circumstances justify a departure from the rule, the courts have done so, usually only where there are conflicting claimants to the office; and (3) where there are no conflicting claimants and the appointing power has refused to determine the existence of the vacancy, and there is an incumbent claiming the office, mandamus must be denied.

In *McKannay v. Horton*, 151 Cal. 711, 716, 91 P. 598, 600, 13 L.R.A., N.S., 661, 121 Am.St.Rep. 146, in considering the

rule, the court said: "\* \* \* That the rule in such cases as the present is, as above stated, merely a rule of procedure—the rule, that is to say of our statute; that the writ of *mandamus* will issue only in cases where there is not another plain, speedy, and adequate, or specially prescribed statutory, remedy. Code Civ.Proc., § 1086. The rule is not jurisdictional, and its application to a particular case involves only the exercise of sound legal discretion." It must be noted that it is referring to the rule "in such cases as the present," namely, where title to office as between two claimants is only incidentally involved.

[8] Quo warranto gives a plain, speedy and adequate remedy. Respondents contend that quo warranto is not such a remedy. That it is, is shown by the fact that in quo warranto, the one claiming the title has a direct right to be heard. In this case, if mandamus were allowed, and if the trial court should order the council to fill the alleged vacancy, an anomaly would result, as Klose would not be bound by the decision. If the council, under mandamus, should appoint another councilman, an action in quo warranto or a mandamus action for payment of salary would have to be brought to determine which was legally entitled to the office. Quo warranto could finally determine the title to the office in one proceeding. Mandamus, if allowed, would necessitate two proceedings.

## 2. Prohibition Will Lie.

[9] The trial court issued an alternative writ of mandate. It should have refused to do so, for the reasons above set forth. It assumed the power to proceed. It did not have such power. It is therefore necessary that any further proceedings in the mandate action should be stayed.

Let a peremptory writ of prohibition issue as prayed, restraining the respondent court from proceeding further with the mandate action.

PETERS, P. J., and SCHOTTKY, J., pro tem., concur.

96 Cal.App.2d 946

**LUBERCO, Limited, v. BOSWELL et al.**

Civ. 17224.

District Court of Appeal, Second District,  
Division 1, California.

April 13, 1950.

Hearing Denied June 8, 1950.

Action by Luberco, Limited, against C. C. Boswell, Catherine A. McKenna, and others, to quiet title. The Superior Court, Los Angeles County, Ralph McGee, J., entered judgment for plaintiff, and defendant McKenna appealed. The District Court of Appeal, Doran, J., held that the evidence was sufficient to sustain finding of trial court that plaintiff was entitled to possession of land in question and was owner of it.

Affirmed.

**1. Adverse possession** ⇨86

In quiet title action, in absence of evidence that defendant had paid any taxes or claimed land adversely to the state, the fact that defendant had forty years' possession of land did not defeat plaintiff's rights by tax title.

**2. Taxation** ⇨734(9)

In quiet title action, where defendant claimed that plaintiff's tax title was void because possessor of land did not receive notice of a tax sale, but delinquent tax list was published and affidavit of publication was filed with county recorder, and no evidence was offered to show that notice was not properly given, failure to receive notice, even if true, did not affect validity of tax deed. Pol.Code, §§ 3769, 3786.

**3. Acknowledgment** ⇨59

In quiet title action, contention by defendant that plaintiff's tax deed was void because it was acknowledged by a deputy tax collector was untenable in absence of proof that deputy tax collector was not also a deputy county clerk whose acknowledgment would be proper.

**4. Quieting title** ⇨44(4)

In quiet title action, evidence was sufficient to sustain finding of trial court that plaintiff was owner of and entitled to possession of property in question and that defendant had no interest therein.

**5. Evidence** ⇨383(3)

In quiet title action, introduction of a tax deed to state in 1931 of land in question and of deed from state to plaintiff in 1944 established a prima facie title in plaintiff. Revenue and Taxation Code, §§ 175, 3726; Pol.Code, § 3787.

**6. Appeal and error** ⇨1008(1)

In quiet title action, where plaintiff established a prima facie title, whether defendant satisfactorily rebutted prima facie case and sustained burden of proof was for trial court. Revenue and Taxation Code, §§ 175, 3726; Pol.Code, § 3787.

**7. Appeal and error** ⇨994(3), 1010(1)

Generally questions of sufficiency of evidence and credibility of witnesses cannot be re-examined where there appears to be substantial evidence supporting trial court's decision.

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Catherine A. McKenna, in pro. per.

Robert E. Rosskopf, John F. Bender, and  
Gizella M. Allen, Los Angeles, for respondent.

DORAN, Justice.

The complaint herein is in three counts: quiet title, partition and declaratory relief. The quiet title count, in simple form, alleges ownership of Lot 13 in Block 59 of H. T. Hazard's East Side Addition to the City of Los Angeles, as per map recorded in Book 24, Page 25, et seq. of Miscellaneous Records, Los Angeles County. The count for partition alleges plaintiff's ownership of a tax title and two street bonds covering the property, and ownership by defendant Zaslow of a certificate under street bond foreclosure. "Interests of other defendants", according to the respondent's brief, "were under the fee, appellant holding an undivided one-half. After issue had been joined, plaintiff redeemed the Zaslow certificate, thus eliminating the 'parity' situation, and resolving the action into one to quiet title".

It further appears that the property, assessed to Anna Dupea, went delinquent for the last half of 1925-1926 city and coun-



ty taxes; was deeded to the State September 1, 1931; and was deeded by the State to plaintiff on October 14, 1944. The appellant denies all allegations contained in the complaint, claiming title and twenty years' adverse possession of the property. The answer also alleges that plaintiff's tax deed is void; that the alleged street bond constitutes no existing lien and that action thereunder is barred under Sections 329, 330, of the Code of Civil Procedure, relating to foreclosure of street improvement liens, and various statutes of limitation covered by Sections 337, 339 and 343. Catherine McKenna's answer offers to do equity by paying to respondent \$175.00, "for a quitclaim of any interest plaintiff might have by reason of the said tax deed".

The trial court, after trial of the issues, found that the respondent-plaintiff, Luberc, Ltd. "is the owner and is entitled to possession" of the property in question, subject to tax and assessment liens, and that appellant McKenna has no interest therein. Judgment pursuant thereto was entered on September 21, 1948. Appellant's motion for a new trial was submitted to the trial court on briefs; the same was denied, and the present appeal followed.

Although, as respondent points out, "Appellant's opening brief contains no statement of facts and virtually defies understanding containing the points raised", the record discloses that one Anna Dupea, a defendant in this action, was the original owner at the time of the tax levy which ultimately resulted in plaintiff's tax deed; that Anna Dupea, said to be an old age pensioner, failed to pay the taxes, gave a mortgage to the County of Los Angeles, and deeded the property to the appellant. Catherine A. McKenna informed the trial court that "I had a former conveyance from the former owner, and I own the entire fee title. Anna Dupea is still in possession as my tenant. That is all."

Anna Dupea testified to having occupied the property forty years; that no notice of the 1931 tax sale of the property was received; that since 1932 Mrs. Dupea had "been living there with \* \* \* (appellant's) help and assistance", and that no

one else had been in possession. No other testimony was taken unless the many statements made by Mrs. McKenna, appearing in propria persona, be deemed such.

Among other questions, appellant's brief inquires whether the "plaintiff's right to maintain an action to quiet title, or to be let into possession of the said lands (was not) barred by the Statutes of Limitations", by reason of the owner's adverse possession for 40 years?

[1] Respondent's brief answers this contention by calling attention to the fact that "There is no evidence that she (appellant) or Anna Dupea *paid any taxes; or* that they ever claimed adversely to the State. Claiming adversely to the State is novel, but claiming adversely without payment of taxes and without the knowledge of the State is ridiculous. Such holding would give a squatter perpetual tax exemption."

It is further argued by appellant that the tax deed under which respondent claims, is void for a variety of reasons. The delinquent tax list is alleged not to have been "published by authority of the Tax Collector, where there was no affidavit or statement of any kind made by the Tax Collector, attached to said list, that its publication had been made or caused to be made by the Tax Collector, or that it was a true or any copy of the delinquent tax list for such year, as required by Section 3769, Political Code, and the law at said date".

Appellant likewise questions whether the tax deeds to the State were not void "for the reason that they were not acknowledged by an officer entitled or qualified to take acknowledgments of deeds, and where no proof of execution of the deeds by the Tax Collector was made, and where they were not in the form and did not in substance contain the recital required by statute?"

[2] In reference to the claim that Anna Dupea did not receive notice of the 1931 tax sale, respondent's brief says: "No evidence was offered to show that notice was not properly given, so we must presume that it was. (Sec. 3786, Pol.Code.) Failure to receive notice, even if true, does not affect the validity. (*Healton v. Morrison*,

162 Cal. 668, 674 [124 P. 240].) Delinquent list was published and affidavit of publication was filed with the County Recorder".

[3] Apropos appellant's contention that the tax deed was void because of its acknowledgment by a Deputy Tax Collector, respondent avers that "No proof of this fact was offered, and it was not shown that he (the deputy tax collector) was not also a Deputy County Clerk, whose acknowledgment was proper". In this connection is cited *Markowitz v. Carpenter*, 94 Cal.App. 2d 667, 211 P.2d 617, November, 1949, holding that where county charter and ordinances so provide, deputies in other departments may act as deputy county clerks authorized to take acknowledgments; and that a deputy tax collector may acknowledge tax deeds executed by the tax collector.

Appellant also insists that "The property (sold for \$32.90) was therefore sold for 1 cent less than the true amount", and that "the sale and resulting tax deed are void and conveys no title." Respondent's brief answers this by saying: "The first installment of taxes (which was paid) was three cents higher than the second installment, due to carrying the odd cent for several district levies on the first installment. This was according to law, but in any event, was cured by the 1943 Validation Act. (Stat. 1943, p. 1993; [*City of*] *Compton v. Boland*, 26 Cal.2d 310 [158 P.2d 397].)"

It is further pointed out in respondent's brief that "Tax deed to State was in 1931. Any attack thereon was barred on September 15, 1946. Revenue and Taxation Code, Sec. 175. Deed to plaintiff was in 1944 and this action was commenced in 1947. Any attack thereon was barred in 1945. Revenue and Taxation Code, Sec. 3726. (*Devault v. Essig*, 80 Cal.App.2d 970 [183 P.2d 39].)" It is appellant's contention that "the Curative Acts were not available to plaintiff or was Section 175, for the reason that they are statutes of limitation, and available only to a tax purchaser in possession".

[4] An examination of the record herein discloses substantial evidence presented

at the trial in support of the findings and judgment. Such record reveals what appears to be a regular tax assessment covering the period and property in question, a failure to pay such taxes followed by the usual sale to the State and ultimately resulting in the customary deed to plaintiff. Such deed, as the respondent's brief mentions, "conveys title to the purchaser free of all encumbrances of any kind existing before the sale", with certain exceptions not here material, as provided in Section 3712 of the Revenue and Taxation Code. Likewise, the previous deed to the State in 1931, under Section 3787, "conveys to the State the absolute title to the property described therein".

[5-7] The introduction in evidence of the above two deeds established prima facie title in plaintiff. Whether appellant satisfactorily rebutted such prima facie case and sustained the burden of proving the allegation that such deeds were void and plaintiff's title invalid, was, of course a question for the trial court to determine. Under the usual rule governing appellate review, questions of sufficiency of evidence and credibility of witnesses cannot be re-examined where there appears to be substantial evidence supporting the trial court's decision.

Appellant's various contentions are wholly untenable. The Curative Acts hereinbefore mentioned were obviously enacted for the purpose of affording greater security to tax titles regularly acquired, by eliminating those technical objections and non-jurisdictional irregularities which have no substantial merit. Arguments contained in appellant's briefs are largely if not entirely of that variety. The record indicates, among other things, that appellant enjoyed all the advantages of a fair and impartial trial and that no errors of a prejudicial nature were committed by the trial court.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

97 Cal.App.2d 84

**TOOHEY v. TOOHEY.**

Civ. 14256.

District Court of Appeal, First District,  
Division 1, California.

April 21, 1950.

Action by Jessie M. Toohey against Clarence J. Toohey to establish an Alaskan divorce decree awarding divorced wife and minor children monthly support payments. The Superior Court, Alameda County, James R. Agee, J., entered judgment establishing such decree as judgment for divorce and support and entitled to enforcement in California. Subsequently divorced wife's motion to correct Superior Court's judgment nunc pro tunc to direct expressly that payments continue after date on which that judgment was rendered was granted and divorced husband appealed and divorced wife moved to dismiss such appeal as frivolous. The District Court of Appeal, Peters, P. J., held that appeal should be dismissed as frivolous and penalty assessed therefor against appellant.

Appeal dismissed.

**1. Appeal and error ☞326**

The appellate court possesses inherent power to dismiss an appeal where an examination of judgment roll discloses that appeal is frivolous, or the record discloses that no relief can be granted appellant.

**2. Costs ☞260(4)**

Where wife brought action in California to establish Alaskan divorce decree awarding her and minor children monthly support, and California court found decree valid and entitled to full faith and credit and awarded wife all moneys accrued to date of judgment from which no appeal was taken, and on her subsequent motion, court corrected judgment nunc pro tunc directing that monthly payments continue after date of its judgment "as provided in said Alaska decree", appeal of husband from nunc pro tunc order was frivolous and penalty would be assessed therefor. Code Civ.Proc. § 957.

**3. Divorce ☞325**

Where wife brought action in California to establish divorce decree provid-

ing for future alimony payments to her and minor children, determination of California trial court that such judgment was valid and was entitled to full faith and credit and establishing it as judgment for divorce and support "entitled to be enforced in this state", was within power of trial court.

**4. Divorce ☞325**

Where wife brought action in California to establish Alaska divorce decree awarding her and minor children monthly support, and California court found decree valid and entitled to full faith and credit and awarded wife all moneys accrued to date of its judgment, correction in such judgment to make husband's obligation to pay continue in the future was a mere clerical order which could properly be added nunc pro tunc.

Stanley D. Whitney, Alameda, H. Albert George, Alameda, of counsel, for appellant.

Landels & Weigel, San Francisco, for respondent.

PETERS, Presiding Justice.

This is a motion by respondent to dismiss an appeal on the ground that such appeal is frivolous.

[1] The appellate courts are reluctant to dismiss an appeal on the ground of frivolity. Normally, the determination that an appeal is frivolous requires a full consideration of the case on its merits, and for that reason should only be considered after full briefing by both litigants. But this is a rule of policy, not one of power. The appellate courts possess inherent power to dismiss an appeal where an examination of the judgment roll discloses that the appeal is frivolous, or where a mere inspection of the record discloses that no relief can be granted appellant. In re Estate of Wunderle's Estate, 30 Cal.2d 274, 181 P.2d 874; Williams v. Duffy, 32 Cal.2d 578, 197 P.2d 341. Stated another way, where the interests of justice require it, the court may exercise such power.



In the present case the appellant has filed his opening brief in which he has fully set forth his contentions. On this motion, the respondent has fully set forth her contentions. The case may be determined upon a mere examination of the clerk's transcript. On the oral argument, counsel for appellant stated that the appeal was taken out of an abundance of caution in order to secure an interpretation of the order appealed from, and that it made no difference to appellant whether such an interpretation was secured as the result of this motion or in an opinion on the merits. Under such circumstances, and because the appeal, by this motion, has already been delayed long past the time it would have been considered on its merits had counsel for respondent briefed the issues involved instead of moving to dismiss, we are inclined to and will consider, on this motion, the issues presented.

The judgment roll discloses that on December 7, 1943, respondent was awarded a decree of divorce against her husband by the United States District Court at Anchorage, Alaska. So far as pertinent here, that decree provided that respondent should have judgment against appellant:

"b. For the sum of \$100.00 per month from the first day of December, 1943, to the first day of July, 1944, in any event; and thereafter the sum of \$100.00 per month for the balance of the period of ten years commencing with the first day of December, 1943, provided the plaintiff lives with the minor children of plaintiff and defendant; provided, however, that in the event plaintiff does not reside with said minor children during said ten-year period subsequent to July 1, 1944, said sum shall be reduced to \* \* \* \$50.00 per month; and further provided that in the event the plaintiff should remarry, all payments herein provided to be made subsequent to July 1, 1944, shall cease as of the date of such remarriage. \* \* \*

"d. For the sum of \$75.00 per month commencing with the first day of December, 1943, for each of the minor children of plaintiff and defendant, to last and continue until each of said minor children shall reach the age of eighteen years, ex-

cept in the event that said child or children shall continue in school or shall be disabled or incapacitated for any reason, then defendant shall continue to make said payments until such of said children shall have attained the age of twenty-one years."

Admittedly, respondent has not remarried, and at all times here involved has resided with the minor children.

[2] In April of 1948, respondent filed an action in Alameda County to establish the Alaska decree. After a trial on the merits, the trial court, on November 15, 1948, found that the Alaska decree, a copy of which was annexed to the judgment and incorporated therein by reference "was and is in every respect a valid judgment and decree for divorce, support of plaintiff, and custody and support of the minor children of plaintiff and defendant, and said judgment and decree is entitled to and shall be given full faith and credit in the courts of this State and is hereby established as such a judgment for divorce and support, entitled to be enforced in this state." The judgment also awarded to respondent all moneys accrued and due to the date of the decree. No appeal was taken from this judgment.

Respondent apparently was disturbed because of the failure of this Alameda County judgment to direct expressly that payments continue after November 15, 1948. On February 14, 1949, she moved to correct *nunc pro tunc* the judgment of November 15, 1948, by making the addition suggested above. The motion was granted, and on March 1, 1949, the trial judge signed a corrected judgment and decree which incorporated all of the original decree and added one new paragraph. The *nunc pro tunc* decree recited that "by clerical misprision, inadvertence, mistake and oversight, the form of said Conclusions of Law signed on said date failed to state the true conclusions of law of said Court." The conclusions of law then adopted were identical with the original conclusions except there was added paragraph "C," which reads as follows:

"C. Two Hundred Fifty Dollars (\$250.00) for said support, as provided in said

Alaska decree, to be paid on the first day of each month from the date of the present decree." From this *nunc pro tunc* order appellant appeals.

It is the theory of appellant that the *nunc pro tunc* order materially changed the provisions of the Alaska decree and of the decree of November 15, 1948. It is claimed that the *nunc pro tunc* order requires payments of \$250 per month to respondent without limitation of time and without regard to any change of circumstance, while in the Alaska decree the payments were conditional. Appellant fears that if the respondent fails to live with the children, or one of them dies, etc., he will be compelled to continue the \$250 monthly payments regardless of the fact that the Alaska decree and the one of November 15, 1948, provided for such contingencies.

[3] A mere examination of these various decrees demonstrates that the fears of appellant are groundless. The *nunc pro tunc* order was entered because it did not expressly provide that the obligations of the Alaska decree would be effective beyond November 15, 1948. But it is apparent that such obligation was in fact and in law contained in the November 15, 1948, decree. That decree provided that the Alaska judgment "was and is in every respect *a valid judgment* and decree for divorce, support of plaintiff, and custody and support of the minor children of plaintiff and defendant, and said judgment and decree is entitled to and shall be given full faith and credit in the courts of this State and *is hereby established as such a judgment* for divorce and support, entitled to be enforced in this state." (Italics added.) It is obvious that under the italicized portions of this decree the obligations of the Alaska decree for future payments were continued. It is equally clear that such a determination was within the power of the trial court. *Biewend v. Biewend*, 17 Cal.2d 108, 113, 109 P.2d 701, 132 A.L.R. 1264; *Tomkins v. Tomkins*, 89 Cal.App.2d 243, 250, 200 P.2d 821. This being so, the corrected judgment of March 1, 1949, added nothing to the decree of November 15, 1948, in so far as making the obligations of the Alaska decree binding thereafter in this

state is concerned. Nor did the corrected judgment in any way change the obligations of the November 15, 1948, decree. While paragraph "C" is somewhat awkwardly worded, and lumps all payments into the sum of \$250 a month, while the Alaska decree provides for \$400 for the wife and \$75 per month for each of the two children, subject to contingencies, it is too clear to require extended comment that the contingencies and amounts of the Alaska decree were incorporated into this *nunc pro tunc* order, as they had been in the November 15, 1948, decree. After stating that the payment was to be \$250 per month, paragraph "C" provides "for said support, as provided in said Alaska decree." The only way \$250 a month can be secured under the Alaska decree is by adding the \$100 to the wife and the two \$75 payments for the children. By providing "as provided in said Alaska decree" the trial court incorporated all of the contingencies set forth in that decree. Thus, the effect of the corrected judgment is exactly the same as that of November 15, 1948. Appellant's duty to pay is qualified by the same contingencies which were in the Alaska decree and which were incorporated in the decree of November 15, 1948.

[4] For these reasons, the appeal is frivolous. If, for any conceivable reason, and there is none, the *nunc pro tunc* decree should be reversed, the obligations of appellant, under the November 15, 1948, decree, from which no appeal was taken, would be identical with those in the Alaska decree. The *nunc pro tunc* order did not add to or change the obligations of the November 15, 1948, decree. If it was necessary to make the *nunc pro tunc* correction in order to make the obligation to pay continue in the future, which it was not, such was a mere clerical order which could properly be added *nunc pro tunc*. *Hansen v. Hansen*, 93 Cal.App.2d 568, 209 P.2d 626.

The appeal being obviously frivolous, this is a proper case to impose damages as provided in section 957 of the Code of Civil Procedure. (See, generally,

2 Cal.Jur. p. 977, § 577.) The courts should not permit the appellate processes to be abused. Not only has this frivolous appeal imposed a wholly unnecessary burden on respondent, but, by improperly consuming the time of a busy court, it has adversely affected the rights of other litigants properly before the court. This warrants the imposition of a penalty. *Hendricks v. Pappas*, 82 Cal.App.2d 774, 187 P.2d 436.

The appeal is dismissed, and, pursuant to the provisions of section 957 of the Code of Civil Procedure, the sum of \$50 is assessed against appellant and added to the costs as a penalty for the taking of a frivolous appeal.

BRAY, J., and SCHOTTKY, J. pro tem, concur.



97 Cal.App.2d 70

**BALDIE v. BANK OF AMERICA NAT.  
TRUST & SAVINGS ASS'N.**  
Civ. 14350.

District Court of Appeal, First District,  
Division 2, California.  
April 20, 1950.\*

Marie Irene Baldie sued August Pacheco to recover Chinese rugs and furniture alleged to have been delivered to defendant for carpenter work, and defendant cross-complained for value of services rendered and materials furnished to plaintiff, and the same plaintiff sued Joseph J. Bullock to recover Chinese furnishings or their value, and defendant cross-complained to have his title to the furnishing quieted. Defendant Bullock thereafter died and the action was continued against Bank of America National Trust & Savings Association (a corporation), and Gerard Wagstaffe, as executors of the estate of Joseph J. Bullock, deceased. The cases were consolidated for trial. The Superior Court in and for the County of San Mateo, A. R.

\* Subsequent opinion 217 P.2d 1011.

Cotton, J., rendered judgments in each case adverse to plaintiff and plaintiff appealed. The District Court of Appeal, Dooling, J., held that judgment in the Pacheco case was required to be affirmed because plaintiff did not point out wherein findings were not supported by evidence and defendant pointed to evidence supporting each finding, and that in the Bullock case legal services rendered by Bullock, in addition to services rendered which were in contemplation of parties when memorandum providing for specified fee was made, were rendered under the memorandum.

Judgment in favor of Pacheco affirmed and judgment in favor of executors of Bullock's estate reversed.

**1. Appeal and error ⇐901, 1010(1)**

In action to recover rugs and furniture alleged to have been delivered to defendant for carpenter work to be done by defendant, wherein defendant cross-complained for value of services rendered and materials furnished to plaintiff, judgment adverse to plaintiff would be affirmed on appeal where plaintiff did not point out wherein findings were not supported by evidence and defendant pointed to evidence supporting each finding.

**2. Attorney and client ⇐144**

Where beneficiary under will employed attorney to represent beneficiary in estate, and attorney agreed to accept specified sum for his services, and will contest was filed, requiring attorney to render services not in contemplation of parties when memorandum relating to fees payable was made, but attorney represented beneficiary in will contest, and showing was not made that attorney insisted upon additional compensation for his services in will contest, services would be held to have continued under the memorandum.

Jonathan H. Rowell, Redwood City, for appellant.

Frank V. Kington, Redwood City, for respondent.

DOOLING, Justice.

Two cases involving the same plaintiff but with different defendants were by stipulation consolidated for trial. From judg-



ments adverse to her in both cases plaintiff appeals. The two cases have no facts in common and we must consider them separately.

#### The Pacheco Case.

[1] Plaintiff sued Pacheco to recover certain Chinese rugs and furniture alleged to have been delivered to Pacheco for carpentry work to be done by him and alleging failure of performance by Pacheco. Pacheco answered and cross-complained for the value of services rendered and materials furnished to plaintiff. The court found that Pacheco had done carpentry work and furnished materials to plaintiff of the reasonable value of \$1183.50; that plaintiff had paid Pacheco \$100 in cash and delivered to him furniture and rugs of the reasonable value of \$536. The court allowed plaintiff a credit for the sum of these items and gave Pacheco judgment for the balance of \$547.50. As to a Chinese rug valued at \$1000 the court found that this was a gift by plaintiff to Pacheco's wife.

Plaintiff does not point out wherein any of these findings are not supported by the evidence and respondent points to evidence supporting each finding. A discussion of the evidence seems therefore unnecessary. This judgment must be affirmed.

#### The Bullock Case.

Plaintiff sued Bullock, an attorney-at-law, to recover certain Chinese furnishings or their value. During his lifetime Mr. Bullock filed an answer and cross-complaint in which he asked that his title to the Chinese furnishings be quieted. He alleged in his cross-complaint that he had received this furniture as payment of the indebtedness to him for legal services performed by him for plaintiff. Mr. Bullock thereafter died and the action was continued against his executors.

On the trial plaintiff produced the following document in the handwriting of Bullock (the name Mrs. Fredericks appearing therein admittedly refers to the plaintiff Baldie):

"May 11th, 1944

"Rec'd from Mrs. Fredericks five hundred (500) Dollars on a/c of fee for services to

be rendered in the Estate of Graham, deceased, balance in full \$500 to be paid very shortly on or about one week hence.

"Joseph J. Bullock."

The evidence developed that plaintiff was a substantial beneficiary under the will of Graham and employed Mr. Bullock to represent her in the probate proceedings in Graham's estate. It further developed that a contest of the will was later filed and Mr. Bullock represented plaintiff in that contest. During the course of the trial the executors obtained leave to file an amended cross-complaint for legal services rendered plaintiff by Bullock alleging the reasonable value of such services to be \$5000. The court found that the will contest was not in contemplation of the parties when the document of May 11, 1944 was given by Bullock to plaintiff, found Bullock's services to be of the value of \$5000 and after crediting the \$500 paid and the Chinese furnishings received at the value of \$2042.50 gave judgment to the executors for the balance of \$2457.50. Included in this were certain services of a minor character performed by Bullock outside the estate of Graham but their value was neither separately testified to nor found by the court.

There was no testimony that Bullock ever informed plaintiff that he intended to charge more than the \$1000 originally agreed upon for his services in Estate of Graham and his own cross-complaint filed before his death contradicts the idea that he did so, since he there alleged that the Chinese furnishings were received "as payment of said indebtedness" and did not assert that there was any balance due.

[2] Under the facts we cannot escape the conclusion that the case is governed by *Lavenson v. Wise*, 131 Cal. 369, 63 P. 622, 623, and *Reynolds v. Sorosis Fruit Company*, 133 Cal. 625, 66 P. 21. In the *Lavenson* case an attorney signed a memorandum in the form of a receipt for a promissory note which contained the following language: "Said John H. Wise to pay upon demand the sum of fifty (\$50.00) dollars for court costs and the sum of five hundred (\$500.00) dollars as a fee upon collection of the same."

Suit was commenced on the note, the action was contested and judgment went for defendant. The attorney at the request of the client gave notice of appeal and prepared a transcript. He demanded a \$500 fee from his client and when this was refused he brought suit through an assignee for his services and recovered \$1000. On appeal the judgment was reversed.

The claim was asserted in that case as it is here that the services performed by the attorney were not in the contemplation of the parties when the memorandum was signed because it was assumed by both that the suit would not be contested. The supreme court reversed the judgment. The court said, 131 Cal. 375, 63 P. 624, that

"It was Mr. Rothschild's duty to inform him (the client) that the answer so changed the matter from its original aspect that a new agreement would have to be made as to his compensation. Saying nothing and doing nothing to indicate an unwillingness to continue as he had begun, Mr. Rothschild must be held to have continued under the only agreement then existing between the parties.

"\* \* \* Mr. Rothschild had good cause for rescinding the contract, or for refusing to proceed under it, but it was too late to rescind after it had been performed."

The appositeness of this decision to the case before us is complete and compelling. Mr. Bullock agreed to accept \$1000 "for services to be rendered in the Estate of Graham." It may be that when the filing of the will contest required services in that estate not in contemplation of the parties when the memorandum was signed Mr. Bullock might then have insisted on additional compensation before proceeding, but there is no proof that he did so and his own cross-complaint indicates strongly that he did not. His services rendered in the Estate of Graham, in the absence of a showing to the contrary, must be held (in the language of the Lavenson case) "to have continued under the only agreement then existing between the parties."

In Reynolds v. Sorosis Fruit Company, supra, legal services were agreed to be per-

formed until "all matters pertaining to the relations with Howard & Co. are adjusted" for a fee of \$400. The attorney attempted to collect an additional fee. Said the court, 133 Cal. 629, 66 P. 22: "Plaintiff said nothing to defendant about any extra charge, or any charge outside the contract, until the suits had been terminated. If he contemplated such charges, it would have been only fair to have so notified defendant. What is said by this court in the late case of Lavenson v. Wise, 131 Cal. 369, 63 P. 622, is applicable here."

These two cases were cited in appellant's opening brief and respondents have not attempted to distinguish nor even to discuss them. They appear to us to be controlling.

The judgment in favor of Pacheco is affirmed. The judgment in favor of the executors of Bullock's estate is reversed.

NOURSE, P. J., and GOODELL, J.,  
concur.



97 Cal.App.2d 124

**RICHARDSON v. PRIDMORE et al.**

Civ. 14268.

District Court of Appeal, First District,  
Division 1, California

April 24, 1950.

Dorothy Richardson sued N. Pridmore and another for unlawful eviction from a leased apartment, damage to plaintiff's clothing, and conversion of her property. From a judgment of the Superior Court, in and for the City and County of San Francisco, William F. Traverso, J., for plaintiff, defendants appealed. The District Court of Appeal, Peters, P. J., held that the evidence established a cause of action in tort and physical injury, as well as mental anguish and pain, suffered by plaintiff as proximate results of the tort.

Judgment affirmed.

**1. Landlord and tenant** ⇨180(1)

In action for unlawful eviction of tenant from leased apartment, evidence established cause of action in tort and physical injury by miscarriage, as well as mental anguish and pain, suffered by plaintiff as proximate result of tort.

**2. Landlord and tenant** ⇨180(1)

While landlord's willful and unlawful eviction of tenant is breach of contract, tenant, suffering mental anguish and pain or physical injury as proximate result of eviction, may waive breach and sue landlord in tort.

**3. Damages** ⇨49

Recovery may be had for person's mental anguish, caused by another's intentional and outrageous conduct, even where there is no physical injury.

**4. Landlord and tenant** ⇨172(1)

A landlord's eviction of tenant may be unlawful, though not accompanied with threats, violence, or abusive language.

**5. Landlord and tenant** ⇨180(4)

An apartment building owner and manager, unlawfully evicting apartment tenant, must be held responsible for damages caused by their deliberate and intentional acts unreasonably subjecting tenant to severe mental stress and physical strain, resulting in physical injury by miscarriage and mental suffering.

**6. Landlord and tenant** ⇨180(6)

In action for unlawful eviction of apartment tenant and her resulting mental suffering and physical injury by miscarriage, whether plaintiff acted reasonably in carrying packages from apartment building basement, to which defendant building manager removed them from apartment, and taking bus trips between building and motel, where plaintiff resided temporarily, with knowledge of her pregnancy, and such acts, with emotional strain caused by eviction, proximately caused miscarriage, were fact questions for jury.

**7. Negligence** ⇨136(25)

Proximate cause of injury is normally a fact question for jury.

**8. Landlord and tenant** ⇨180(6)

One suing for unlawful eviction from leased apartment and resulting injury from miscarriage was not contributorily negligent as matter of law in carrying packages from apartment building basement, to which defendant building manager removed them from apartment, and taking bus trips between building and motel, where plaintiff temporarily resided, with knowledge of her pregnancy.

**9. Torts** ⇨18

Contributory negligence is no defense to intentional tort.

**10. Landlord and tenant** ⇨180(3)

In action for unlawful eviction of tenant, evidence supported allegation of complaint that plaintiff suffered damages in stated sum because of willful, malicious, and deliberate eviction.

**11. Landlord and tenant** ⇨180(3)

In action for unlawful eviction of tenant, allegation that plaintiff was left without shelter for several hours and forced to seek shelter many miles from leased apartment was immaterial.

**12. Landlord and tenant** ⇨180(3)

In action for unlawful eviction of apartment tenant, whether evidence supported allegation of complaint that defendant apartment building manager compelled plaintiff to remove her belongings from building basement, to which such defendant removed them from apartment, was immaterial, in view of evidence supporting jury's finding that plaintiff acted reasonably in removing them.

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Morris M. Grupp, Remington Low, San Francisco, for appellants.

Andrew J. Eyman, Bernard B. Glickfeld, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Dorothy Richardson, and her husband were tenants in an apartment owned by defendant Friedman and managed by defendant Pridmore. The defendants unlawfully evicted the plaintiff and her



husband. Plaintiff then brought this action alleging three causes of action. The first is in tort for damages for the wilful and unlawful eviction of the plaintiff, who was then pregnant and shortly thereafter suffered a miscarriage; the second is for damage to plaintiff's clothing, while the third is for conversion of plaintiff's property. The jury returned verdicts for the plaintiff on all three causes of action, fixing the damages on the first at \$7,250.00, on the second at \$25.00, and on the third for \$50.00. On the motion for a new trial the plaintiff consented to a reduction to a total of \$4,825.00. From the judgment in that amount defendants appeal.

The evidence shows a deliberate and intentional eviction of the plaintiff by defendants. Plaintiff and her husband moved into the Lassen Apartments in San Francisco as month-to-month tenants of a single room in May or June of 1947. To secure even these unsatisfactory accommodations plaintiff and her husband were forced to pay the manager who preceded Pridmore a bonus of \$30.00. Shortly after the plaintiffs moved in, Pridmore became manager. There were 78 apartments in the building. The plaintiff and her husband were desirous of securing more room, but when Pridmore was approached she demanded a substantial bonus. Plaintiff promised to give Pridmore \$50.00 as a bonus, and, as a result, on July 2, 1947, was able to secure a larger apartment in the same building. The bonus was never paid. It is a reasonable inference from the evidence that the failure to pay this bonus was the motivating cause of Pridmore's subsequent actions.

On July 2, 1947, plaintiff paid the rent to Pridmore, and on August 2, 1947, paid the rent for the period expiring on September 2, 1947. The apartment and the furniture were not in good condition, and plaintiff and her husband, at their own expense, repainted the floors and walls, and plaintiff made slip covers for the furniture and bought drapes for the living room and kitchen. Plaintiff received one key to the apartment from Pridmore. Plaintiff's brother arrived in San Francisco shortly after the apartment was rented and, be-

cause he was unable to find a place to stay, lived with plaintiff and her husband for some weeks, with the acquiescence of Pridmore.

In August of 1947, plaintiff was 19 years of age and was a little over two months pregnant. It was her first pregnancy. She was in excellent physical condition. She was a professional entertainer and was working week ends. Her husband was an oiler on construction rigs. He was desirous of securing a union card as an operator, but was unable to do so in San Francisco. He secured an offer of a job at Tracy, which he accepted, where he could work as an operator and thus qualify for an operator's card. His intention was to stay in Tracy only long enough to get his card, and then to return to San Francisco. He had no intention of abandoning the San Francisco apartment.

On August 17, 1947, the plaintiff and her husband left for Tracy. They took with them the husband's work clothes, a few cooking utensils and a small table. They left in the apartment the balance of their belongings, including the slip covers, drapes, most of their dishes, and most of plaintiff's clothes, and some of her husband's. Pinned on the wall of the apartment they left a note to plaintiff's brother which read: "Chuck—Bill and I got a place in Tracy. Will be back in three or four days. Don't say anything about our moving yet. Leave a note and tell us your address. Love, Dot and Bill." Plaintiff testified that the reason for the third sentence was that she did not want to have her brother have their mailing address changed to Tracy, and that her brother would have understood exactly what she meant. This note was removed by Pridmore from the apartment and kept by her. She failed to tell plaintiff's brother about the note, although she saw him several times in and about the apartment house.

As plaintiff's husband, assisted by his brother, were moving their things on August 17th in preparation for the trip to Tracy, they met Pridmore, who asked if they were moving out. Plaintiff's husband testified that he told the manager that they

were not moving, but were simply going out of town for a few days. This was corroborated by his brother. Plaintiff and her husband then went to Tracy, where they moved into a motel, paying for their room on a day-by-day basis.

On August 29, 1947 plaintiff returned to San Francisco to get some of her husband's clothes. She discovered that her key would not operate the lock on her apartment door. She rang the bell and the door was opened by a woman. In her apartment plaintiff saw a man in bed and a small child playing on the floor. She asked what these people were doing in her apartment and the woman told her that she had rented the place, and not to argue with her about it but to go down and see the manager. Plaintiff thereupon went down to see Pridmore and asked her why she could not get into her apartment. Pridmore replied that she had been told by plaintiff that they were leaving. This was denied by plaintiff, who then asked Pridmore where her clothes and other belongings were. Pridmore replied that they were in the basement. Plaintiff thereupon left and went to her sister-in-law's home.

Pridmore denied that plaintiff had been at the apartment on August 29th, testifying that she first returned on the morning of the 30th. She claimed that she did not rent the apartment until September 2nd, and did not have the lock changed until that date. She also testified that the man and woman in the apartment were there solely to clean the apartment. The brother of plaintiff testified that he went to the apartment on August 24th or 25th and that his key would not then work. There was evidence by a locksmith that the lock had been changed on August 18th or 19th, and further, that, after this action was filed, Pridmore asked for a receipt for the work and requested that the receipt be dated, falsely, as of September 2, 1947. These conflicts were for the jury.

After leaving the apartment house on August 29th, plaintiff visited her sister-in-law, who told her to see the district attorney. At that office she was advised to get an attorney, and did so. That night she

returned to Tracy. The following day she returned from Tracy and again consulted a deputy at the district attorney's office. She was sent to a police precinct station where arrangements were made to have a police officer accompany her to the apartment. In his company plaintiff went to the apartment, and in his presence tried the key, but it would not work. The two went down to see Pridmore who told the officer: "Well, I want to get rid of those people; their clothes is down in the basement." Pridmore admitted that the rent was paid, but refused to permit plaintiff to go into the apartment. The three of them then went to the basement where plaintiff's possessions were in an untidy heap on the storeroom floor. Some of the belongings had been placed in large cardboard cartons, but the clothes were on the floor. The officer testified that Pridmore told plaintiff "to get her stuff and take it out of the house, she was in a hurry or something," and that he replied: "Just a minute; don't get so rough about this thing. \* \* \* You can't get away with this kind of stuff; the girl has got her rent paid. You throw her out, lock her room, and then order her out of the house. That isn't the right thing to do." Pridmore would not let plaintiff use the freight elevator, so that plaintiff was required to carry her things through the basement, up a flight of stairs and to the street. She made about five trips carrying her various belongings. The officer called her a cab and plaintiff went to her sister-in-law's house. There she repacked her belongings and made arrangements to have the boxes sent to Tracy. They were so sent, and remained there in the express office unpacked, until they were returned to San Francisco in September. Plaintiff discovered that some of her clothing was missing, and that all of the rest of her clothes needed cleaning. After sending her goods to Tracy on the 30th, plaintiff returned to that city that night. During the next week she returned to San Francisco three times for the purpose of trying to find another San Francisco apartment. All the trips to and from Tracy were made by bus.

The record shows that on the night of August 29th, after plaintiff's experiences at

the apartment that afternoon, she was very upset and cried; that on the night of the 30th she was also very upset, and did not feel well; that the next morning she began to get cramps and had some small discharge; that during the following week the cramps and discharge became worse; that on September 8th she consulted Dr. Longley in Tracy; that the doctor told her that a miscarriage was threatened, prescribed aspirin and advised absolute bed rest; that she went home and went to bed; that that night she had a miscarriage; that before this occurred plaintiff's husband tried to get Dr. Longley, but was unable to reach him; that two other doctors failed to answer their phones; that plaintiff was attended, during the ordeal, by the operator of the motel. Plaintiff also testified that she remained in bed from September 8, 1947, to September 13, 1947, when she again consulted Dr. Longley; that for about two months thereafter she continued to be upset and nervous; that about five months after the miscarriage she again became pregnant and had a normal delivery in September of 1948. Plaintiff and her husband returned to San Francisco on September 17th or 18th, 1947, after the husband had secured his operator's card.

In its pertinent parts plaintiff's testimony was corroborated by her husband, brother, brother-in-law, the motel operator, the police officer, and the locksmith.

Dr. Longley, in response to a hypothetical question embracing all of the essential facts, when asked if such facts would cause a miscarriage, replied "I think that it is possible, not impossible, and very probable." He also testified that the early months of pregnancy were a danger period and that patients were always advised during such months not to undergo "any undue strain or stress or heavy lifting or undue emotional excitement," and that an emotional disturbance or physical strain could cause a miscarriage. He admitted, on cross-examination, that he advised his patients against long trips, but he gave it as his opinion that the miscarriage was not caused by the bus rides.

Another doctor called as an expert testified that, in his opinion, the miscarriage described in the hypothetical question was caused by emotional excitement and anxiety, coupled with undue physical exertion. He also testified that an examination performed by him the day before the trial demonstrated that plaintiff was suffering from a frigidity caused by the unhappy memory of the miscarriage.

[1] This statement of the facts demonstrates that plaintiff has proved a cause of action in tort against defendants, and has proved that, as a proximate result of that tort, she suffered not only mental anguish and pain, but physical injury as well. Defendants' main contentions are that the eviction was a breach of contract, and that plaintiff's damages must be so limited; that no recovery in tort can be had unless threats or abusive language are employed; that in any event the claimed injuries were not proximately caused by the acts of defendants. None of these contentions is sound.

[2,3] While the wilful eviction of a tenant is a breach of contract, California is in accord with the general rule that one suffering mental anguish and pain or physical injury as a proximate result of an eviction may waive the breach of contract and sue in tort. *Emden v. Vitz*, 88 Cal.App.2d 313, 198 P.2d 696; *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 44 P. 320, 32 L.R.A. 193; *Goldman v. House*, 93 Cal.App.2d 572, 209 P.2d 639. We do not have to decide in this case whether recovery could be had solely for mental anguish caused by words alone, because here the plaintiff also suffered physical injury. The better and more modern rule is that, even where there is no physical injury, recovery may be had for mental anguish caused by intentional and outrageous conduct. *Restatement of Torts*, § 312; *Prosser on Torts*, p. 54, § 11, et seq.; *Prosser, Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich.L.Rev. 874; *Green, "Fright" Cases*, 27 Ill.L.Rev. 761; *Magruder, Mental and Emotional Disturbance in the Law of Torts*, 49 Harv.L.Rev. 1033; see, also, the recent and well-



written decision in *Bowden v. Spiegel, Inc.*, 96 Cal.App.2d 793, 216 P.2d 571. In this case the defendants intentionally and unreasonably subjected plaintiff to severe mental stress and physical strain resulting in physical injury and mental suffering to plaintiff.

The facts in the instant case are somewhat similar to those in *Emden v. Vitz*, 88 Cal.App.2d 313, 198 P.2d 696. In that case plaintiff was unlawfully locked out of her apartment. She complained to the manager who yelled and screamed at her. Her mental distress caused a glandular disturbance and pain and suffering. The appellate court approved a judgment for the plaintiff and the Supreme Court denied a hearing without a dissenting vote. After referring to many cases on the subject the court stated, 88 Cal.App.2d at page 318, 198 P.2d at page 700: "As these and other cases cited above amply illustrate, the nature of the wrongful conduct which induces physical harm through its effect on the mind and nervous system is generally immaterial. The determination whether or not given conduct is legally wrongful, of course, may involve factual distinctions of importance and substance \* \* \*; but once the wrongful quality is established, it matters not whether that conduct consisted of acts alone, or of acts accompanied by words, or of mere spoken words alone, for the legal inquiry in each case is thenceforth confined to the well-established channels of proximate cause and damages."

[4, 5] While in the present case no threats or abusive language were employed, and no violence existed, that is not essential to the cause of action. An eviction may, nevertheless, be unlawful even though not accompanied with threats, violence or abusive language. Here the eviction was deliberate and intentional. The conduct of defendants was outrageous. They must be held responsible for the damages caused by their deliberate and intentional acts.

[6, 7] The contention that the damages were not proximately caused by defendants' acts warrants but scant consideration. Whether plaintiff acted reasonably in car-

rying out the packages and in taking the bus trips when she knew that she was pregnant were matters for the jury. Proximate cause is normally a question of fact for the jury. The jury could well have found that plaintiff's action in carrying out the boxes was reasonable under the circumstances, and that this act, plus the emotional strain caused by the unlawful eviction, proximately caused the miscarriage. The jury also properly determined that the bus trips did not constitute the proximate cause of the condition.

[8, 9] This is also an answer to defendants' contention that plaintiff was guilty of contributory negligence as a matter of law. In addition, this defense was not pleaded. Moreover, contributory negligence is no defense to an intentional tort. *Goldman v. House*, 93 Cal.App.2d 572, 209 P.2d 639; *Seeger v. Odell*, 18 Cal.2d 409, 414, 115 P.2d 977, 136 A.L.R. 1291; *Prosser on Torts*, § 52, at p. 402.

[10-12] Defendants also contend that plaintiff failed to support with evidence three of the allegations of her complaint. The allegation that because of the wilful, malicious and deliberate eviction, plaintiff suffered damages in an alleged sum, is amply supported by the evidence. That was the vital allegation. The allegation that plaintiff was left without shelter for several hours and forced to seek shelter many miles distant is an immaterial allegation. The allegation that Pridmore "compelled" plaintiff to remove her belongings is perhaps an overstatement of what was proved, although the police officer's testimony would indicate that pressure was exerted on plaintiff to remove her belongings. At any rate, whether plaintiff was "compelled" to remove her belongings is immaterial as long as the finding of the jury that she acted reasonably in removing them is supported.

The other contentions of defendants are so insubstantial as not to require discussion.

The judgment is affirmed.

BRAY, J., and SCHOTTKY, Justice, pro tem., concur.

97 Cal.App.2d 78

**NELSON v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.**

Civ. 17690.

District Court of Appeal, Second District,  
Division 1, California.

April 20, 1950.

Charles Nelson filed a petition against the Superior Court of the State of California, in and for the County of Los Angeles, for writ of mandate requiring Superior Court to file defendant's cross-complaint in action by assignee of corporation to recover from defendant money which defendant allegedly collected on account notwithstanding defendant had assigned account to corporation. The District Court of Appeal, Drapeau, J., held that averments of cross-complaint had to do with the transaction, a part of which was involved in action, and that defendant was entitled to have cross-complaint for damages filed and to bring in corporation as a party cross-defendant, although the same contract was not involved.

Peremptory writ issued.

**1. Pleading** ⇨138

The provisions of Code respecting cross-complaints and counterclaims are to be interpreted liberally. Code Civ.Proc. § 442.

**2. Mandamus** ⇨39

Parties ⇨51(4)

Pleading ⇨149

In action by assignee of claim of corporation to recover from defendants money which defendants allegedly collected on account notwithstanding defendants had assigned account to corporation, where averments of a defendant in cross-complaint dealt with transaction, a part of which was involved in action, defendant could file cross-complaint for damages and bring in corporation as a party cross-defendant, although the same contract was not involved, and defendant was entitled to writ of mandate requiring trial court to permit filing of cross-complaint.

**3. Assignments** ⇨119

In action by assignee of claim of corporation to recover from defendants money which defendants allegedly collected on ac-

count notwithstanding defendants had assigned account to corporation, assignee for purposes of action was an agent of the corporation as assignor.

**4. Mandamus** ⇨48

Mandamus is to be used to compel a court to give a full hearing to the case before it, not as to how it should rule with respect to the merits of the case.

Goldman & Chaitkin, Pasadena, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

DRAPEAU, Justice.

The third amended complaint alleges that plaintiff is assignee of a claim of Sonelco, a corporation, against defendants; that defendants assigned to Sonelco an account with Hansen; and that, notwithstanding the assignment of the account, defendants collected moneys from Hansen and kept them for themselves, with a balance of \$3,143.49 due from defendants to plaintiff as assignee.

Defendant Charles Nelson moved to file a cross-complaint with the following allegations: That he and his son were partners and organized the Sonelco corporation to continue the partnership business; that it was agreed between the corporation and defendant that defendant would be the exclusive distributor and agent for the corporation's products in the southern half, approximately, of the state of California; that Sonelco repudiated this agreement after the death of defendant's son and control of the corporation passed to other hands; that because of this repudiation defendant lost money on a number of contracts he had made for the sale of Sonelco's products, and that Sonelco, after repudiating the contract, invaded defendant's territory. For all of which defendant demands judgment against Sonelco for \$27,395.36.

The Superior Court denied defendant's motion to file the cross-complaint, and defendant petitions this Court for a writ of mandate, requiring the Superior Court to

file the same. In effect this would add Sonelco as a party cross-defendant, and enlarge the issues to be tried.

The ruling of the trial court was undoubtedly made because of the statement of counsel for defendant that the cross-complaint did not involve the same contract. See Section 442, Code Civ.Proc. Defendant contends that while it does not involve the same contract it does involve the same transaction; that the assignment of the Hansen contract to Sonelco, and the later collection of the money due from Hansen to Sonelco was a part of the larger transaction involving defendant's distributor status with the corporation, and the breach of defendant's contract with Sonelco.

The word "transaction" as used under the facts in this case has a broad and comprehensive meaning. *California Trust Co. v. Cohn*, 214 Cal. 619, 7 P.2d 297.

[1] The provisions of the Code respecting cross-complaints and counterclaims are to be interpreted liberally. *Thorpe v. Story*, 10 Cal.2d 104, 73 P.2d 1194.

[2] The averments in the proposed cross-complaint have to do with the transaction, a part of which is involved in the action, and the defendant has the right to file his cross-complaint and bring in the corporate defendant.

[3] The assignee for the purpose of the suit is an agent of the assignor. *Elam v. Arzaga*, 122 Cal.App. 742, 10 P.2d 805.

In the return and answer to the petition for writ of mandate, it is suggested that mandamus does not lie in any event, because the writ is not available to correct errors in the ordinary course of judicial proceedings. Under the circumstances in this case, it is the duty of the trial court, unmingled with discretion, to permit the cross-complaint to be filed and to bring in the additional party defendant. Thus the rights of all of the parties to the whole transaction will be determined. 16 Cal. Jur., sec. 33, p. 819 et seq.

[4] Mandamus is to be used to compel a court to give a full hearing to the case before it, not as to how it should rule

with respect to the merits of the case. *Sampsell v. Superior Court*, 32 Cal.2d 763, 197 P.2d 739.

Let a peremptory writ of mandate issue as prayed.

WHITE, P. J., and DORAN, J., concur.



# **GOLCEFF v. SUGARMAN et al.**

Civ. 14203.

District Court of Appeal, First District,  
Division 2, California.

April 20, 1950.

Hearing Granted June 12, 1950.\*

Walter P. Golceff sued Edward Sugarman, and others, for injuries incurred by plaintiff in a fall from a ladder in a retail store owned by named defendant. The Superior Court in and for the city and county of San Francisco, Theresa Meikle, J., entered a judgment of nonsuit at close of plaintiff's case and plaintiff appealed. The District Court of Appeal, Dooling, J., held that *res ipsa loquitur* rule was applicable under the evidence and that whether danger should have been readily apparent to plaintiff was a fact question. Judgment reversed.

## **1. Appeal and error ☞927(3)**

On appeal from judgment of nonsuit, evidence would be construed most strongly in plaintiff's favor.

## **2. Negligence ☞121(3)**

*Res ipsa loquitur* rule was applicable under evidence that store employee who climbed ladder to store balcony to find what plaintiff wanted to buy, requested plaintiff to climb ladder, and that ladder slipped when plaintiff had climbed the first few steps of ladder and after store employee released hold on ladder which employee had when plaintiff started to climb ladder, causing plaintiff to fall.

\* Subsequent opinion 222 P.2d 665.



**3. Master and servant ⇨329****Principal and agent ⇨189**

The act of an agent or employee acting for his principal or employer within the scope of his authority or employment may be pleaded as the act of the principal or employer.

**4. Master and servant ⇨329**

In action against store owner and store employee for injuries resulting when plaintiff fell from ladder in store, where complaint alleged that defendants negligently permitted the ladder to become dangerous, defective and in an unsound condition, proof that acts allegedly causing the plaintiff's injuries were committed by employee was not a variance amounting to failure of proof as against store owner.

**5. Principal and agent ⇨189**

A contract made by an agent may be pleaded as having been made by the principal, omitting all mention of the agent.

**6. Master and servant ⇨332(1)**

Where store employee climbed ladder to store balcony to find what plaintiff wanted to buy, and requested plaintiff to climb ladder, and ladder slipped when plaintiff had climbed the first few steps of ladder and after store employee released hold on ladder which employee had when plaintiff started to climb ladder, causing plaintiff to fall, whether danger should have been readily apparent to plaintiff was a fact question.

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Hallinan, MacInnis & Zamloch, Nicholas Alaga, San Francisco, for appellants.

Alexander, Bacon & Mundhenk, San Francisco, Herbert Chamberlin, San Francisco, for respondents.

DOOLING, Justice.

Plaintiff appeals from a judgment of nonsuit entered at the close of his case. The action was one for personal injuries incurred by plaintiff in a fall from a ladder in defendant's retail store. Plaintiff gave the only testimony directed to the facts leading up to his injuries. That evidence may be summarized as follows: Plaintiff

entered defendant's store to purchase a tank cover. He there met an employee, showed him a pattern of the tank cover and told him what he wished to buy. The employee asked plaintiff to hold a ladder which led to a balcony in the store and while plaintiff did so the employee mounted the ladder to the balcony. While the employee was holding the ladder at the top he invited plaintiff to "come on up here." Plaintiff had climbed the first two or three steps of the ladder when the employee took the pattern from him and went away. The last thing that plaintiff remembers "The ladder starts to slip—the slip of the ladder." When plaintiff regained consciousness he was in a hospital.

[1,2] Applying the settled rule applicable to nonsuits that the evidence must be construed most strongly in plaintiff's favor the evidence above recited, while obviously sketchy, was sufficient to take the case to the jury. Ladders properly constructed, placed and maintained do not ordinarily slip. This ladder was under the exclusive control of defendant and his employee. The jury might reasonably infer that the employee knew that the ladder was apt to slip from his request to plaintiff to hold it. These facts are sufficient to bring the case within the *res ipsa loquitur* rule. *Haag v. Harris*, 4 Cal.2d 108, 48 P.2d 1; *Michener v. Hutton*, 203 Cal. 604, 265 P. 238, 59 A.L.R. 480; *Hinds v. Wheadon*, 19 Cal.2d 458, 121 P.2d 724.

Defendant argues that there was a fatal variance amounting to a failure of proof. The complaint alleged that "said defendants did negligently permit said step ladder to become dangerous, defective and in an unsound condition so that plaintiff \* \* \* was caused to fall off said step ladder \* \* \*."

Defendant says: "The cause of action stated in the complaint charged respondent with primary liability. The theory of proof advocated by appellant invokes the doctrine of *respondeat superior* and contemplates a cause of action charging respondent with secondary liability, since the liability of a negligent employee is unquestionably a primary one."

[3, 4] This argument ignores the rule that the act of an agent or employee acting for his principal or employer within the scope of his authority or employment may be pleaded as the act of the principal or employer. The rule is thus stated in 57 C.J.S., Master and Servant, § 614, p. 386: "In order to state a cause of action against defendant for a wrong committed by his servant, the ultimate fact necessary to be alleged is that the wrongful act was in legal effect committed by defendant. This may be alleged either by alleging that defendant by his servant committed the act, or, without noticing the servant, by alleging that defendant committed the act." See 7 Labatt, Master and Servant, 2d Ed., sec. 2527, p. 7776 and the cases collected in the note in 4 A.L.R.2d 292.

[5] While we have found no tort case in this State applying this rule it is well settled that a contract made by an agent may be pleaded as having been made by the principal, omitting all mention of the agent (1 Cal.Jur., Agency, sec. 138, p. 963), and we can see no good reason for applying a different rule of pleading in cases sounding in tort.

[6] The knowledge of the employee of the dangerous condition of the ladder which the jury might reasonably infer from his conduct above recited was sufficient to bind the employer and the facts would support the conclusion that defendant had negligently failed in his duty to the plaintiff "to use ordinary care for the safety of persons he invites to come upon the premises." *Hinds v. Wheadon*, supra, 19 Cal.2d 458, 460, 121 P.2d 724, 726. Where the employee, as here, invited the business visitor to mount the ladder and held it while he did so, only leaving it after the plaintiff was on the second or third step, the question whether the danger should have been readily apparent to plaintiff was certainly a question of fact.

The attempted appeal from the order denying a new trial is dismissed. The judgment is reversed.

NOURSE, P. J., concurs.

## SWAYZE v. SWAYZE.

Civ. 14303.

District Court of Appeal, First District,  
Division 1, California.

April 21, 1950.

Elbert V. Swayze sued Jane J. Swayze, plaintiff's former wife, to recover an automobile or its value. Defendant filed a cross-complaint to recover a diamond ring and salary due for services performed as plaintiff's employee during their marriage. From a judgment of the Superior Court in and for the County of Monterey, H. G. Jorgensen, J., for plaintiff, defendant appealed. The District Court of Appeal, Peters, P. J., held that the evidence supported the trial court's findings that plaintiff made no gift of the automobile to defendant and that defendant was not entitled to recover the ring.

Judgment affirmed.

### 1. Appeal and error ⇐996, 1010(1)

The District Court of Appeal has no power to interfere with Superior Court's judgment on appeal presenting nothing more than attack on findings supported by evidence or reasonable inferences therefrom.

### 2. Husband and wife ⇐49½(8)

In action against plaintiff's former wife to recover an automobile or its value, evidence supported trial court's finding that plaintiff made no gift of automobile to defendant during their marriage.

### 3. Divorce ⇐321½

In action against plaintiff's former wife to recover an automobile or its value, evidence supported trial court's finding that defendant was not entitled to recover a diamond ring from plaintiff under cross-complaint.

### 4. Appeal and error ⇐996

Where evidence would have supported either of two contrary fact findings, District Court of Appeal has no power to interfere with judgment on finding made by trial court.

J. A. Murphy, Salinas, for appellant.

Thompson & Thompson, Monterey, for respondent.

PETERS, Presiding Justice.

Plaintiff Elbert Swayze brought this action against his former wife Jane Swayze to recover from her an automobile or its value alleged to be owned by Elbert. Jane denied that the automobile belonged to Elbert and cross-complained to recover from him a diamond ring, which she alleged he had given her and then taken back, and for salary allegedly due her from her husband for services performed while working for him as a beauty operator during their marriage. Judgment was rendered for Elbert on all causes of action, and Jane appeals.

[1] The appeal presents nothing more than an attack on findings supported by evidence or by reasonable inferences from that evidence. This being so, this court has no power to interfere with the judgment.

[2] The parties were married in June of 1948, separated in September of that year, and divorced December 13, 1948. Elbert testified that he purchased the automobile in question in 1940 as a birthday present for his first wife; that title was taken in their joint names, and that after her death the automobile was registered in his name; that he had possession of the car from 1940 until January 4, 1949, when Jane, without his consent, took the car from his place of employment where it was parked; that sometime during his marriage to Jane he signed the back of the ownership certificate, but that he had no recollection of doing so; that Jane used the car during their marriage, but that there was no delivery of possession of the automobile to her. He unequivocally testified that at no time did he make or intend to make a gift of the car to her. He also stated that during the divorce proceedings Jane apologized to him for sending in the pink slip to re-register the car in her name, stating that she did so on the advice of her attorney.

Jane testified that during September, 1948, Elbert wanted to buy a new car and give it to her, but that she demurred because she felt that they could not afford it; that on September 13, 1948, Elbert en-

dorsed the certificate and gave it to her; that this occurred on a Monday morning after he had a "bad" week end during which he had abused her; that he signed the slip over to her to soothe her feelings; that she registered the car in her name on October 26, 1948, on the advice of her attorney.

This summary of the evidence demonstrates that the finding that no gift was made is supported. While the possession of the endorsed pink slip by Jane and her testimony, would have supported a finding in her favor, the court was not bound to believe her testimony. There had been a divorce proceeding a short time before. The parties were married but a short time. Upon the separation, Elbert kept the car in his possession. While Elbert could not explain the possession of the endorsed certificate by his wife, he did testify that he did not make a gift of the car to her. The trial judge, who saw and heard these witnesses, was entitled to decide who was telling the truth. He elected to believe Elbert and to disbelieve Jane. We have no power to disturb that finding.

[3, 4] The finding of the trial court adverse to Jane on her cause of action to recover the diamond ring is also supported. The ring was a man's ring that admittedly had been in Elbert's family for many years. Jane testified that Elbert gave her the ring shortly after they were married, and that she had had it made smaller to fit her finger. She also testified that the ring was given to her as "sort of a gift and an engagement ring," and that one Saturday, sometime after the gift had been made, Elbert, who she claimed was drunk at the time, pulled the ring off her finger and never returned it. Jane's brother testified that in Elbert's presence his sister showed him the ring and stated that "Bert gave me" the ring.

Elbert testified that the ring customarily was kept in a shoe bag hanging on the closet door; that his wife seldom wore it; that one day during their marriage, after Jane had been nagging him about his first wife, he got mad and took the ring from the shoe bag and told Jane: "Well, until you are entitled to this ring



you are not going to have it.' And I took it and put it away and she asked me about it afterwards and I told her the same thing over again." He also testified that he hid the ring in a love seat, and that, when he so testified in the divorce proceedings, Jane broke into his then home and removed this article of furniture; that he has not seen the ring since he hid it in the love seat; that when he removed the ring from the shoe bag he had been drinking. Jane admitted removing the love seat, denied breaking into the residence, claimed the love seat was her property, and testified that she, her mother and attorney "tore that love seat apart but it wasn't there." It is too clear to require further comment that the trial court's finding that Jane was not entitled to a judgment against Elbert in reference to the ring is amply supported. Again the evidence would have supported a finding either way, and, that being so, this court has no power to interfere.

No question is raised on this appeal about that portion of the judgment denying recovery to Jane on the claim for salary.

The judgment appealed from is affirmed.

BRAY, J., and SCHOTTKY, J. pro tem., concur.



97 Cal.App.2d 92

PEOPLE v. LAGOMARSINO et al.

Cr. 2612.

District Court of Appeal, First District,  
Division 1, California.

April 21, 1950.

Eugene Lagomarsino, Garland Theus and James Williams were convicted in Superior Court, San Mateo County, Edmund Scott, J., of robbery and defendants appealed. The District Court of Appeal, Peters, P. J., held that the evidence was sufficient to support a finding that criminal design for robbery did

not originate with police decoy and therefore there was no entrapment of defendants.

Affirmed.

#### 1. Criminal law ⚡37

It is only when criminal design is conceived in mind of officer and does not originate with accused, and a decoy is used to ensnare the innocent and law-abiding by persuasion, deceitful representation, inducement or allurement into the commission of crime, that there is "entrapment".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Entrapment".

#### 2. Criminal law ⚡37

Even if a police decoy participated in a holdup under instructions from police department, such fact would not amount to entrapment unless it was shown that criminal design originated with decoy.

#### 3. Criminal law ⚡37

Officers, if they know or suspect that a crime is about to be committed, may through a feigned accomplice, facilitate or even aid in its consummation, and if accused commits or attempts to commit crime, it is no defense that police decoy may have aided or even encouraged accused in criminal design.

#### 4. Criminal law ⚡37

The fact that police acting through decoy actually furnished an automobile used in a holdup did not alone constitute entrapment.

#### 5. Criminal law ⚡569

In robbery prosecution, evidence was sufficient to support finding that criminal design did not originate with police decoy, and therefore there was no entrapment of defendants. Pen.Code, § 211.

#### 6. Criminal law ⚡29

Where a crime is committed against a person, although there may be but one act or intent, there are as many crimes as there are persons affected.

#### 7. Criminal law ⚡200(8)

In robbery prosecution, where four individuals were robbed in the holdup of a bar, four separate offenses were committed, and therefore sentencing two of de-

defendants three times and one defendant twice was proper and did not put defendants in jeopardy twice for same offense. Pen.Code, § 211; Const. art. 1, § 13.

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Nathan C. Coghlan, San Francisco, for appellants.

Fred N. Howser, Attorney General, David K. Lener, Deputy Attorney General, Gilbert D. Ferrell, District Attorney of San Mateo County, Fred M. Wyckoff, Deputy District Attorney, Redwood City, for respondents.

PETERS, Presiding Justice.

Lagomarsino, Theus and Williams were charged in four separate counts, with having robbed, on March 7, 1949, Preffer, Adams, Magana and Ayala, a part owner, and three customers of a bar called the "Silver Saddle" located in San Mateo County. They were jointly tried before the court without a jury. Williams was found guilty on counts 1 and 3; the other two defendants were found guilty on counts 1, 3 and 4; and all three defendants were found not guilty on count 2. From the judgment of conviction and from the order denying their motions for a new trial all three defendants appeal. Their two main contentions are that the evidence, as a matter of law, shows that they were induced to commit the crimes by a police informer, and that the information charges but one offense.

The facts disclosed by the record are as follows: Lieutenant Lee, officer in charge of the robbery detail of the San Francisco police department, testified that about 6 p. m. on March 6, 1949, he received a telephone call from a man who identified himself as "Mac." This person was subsequently identified as Ralph McGurney, an ex-convict, whom Lee had met on one occasion about four or five months prior to March 6, 1949. The trial court properly prohibited Lee from testifying on direct examination as to the conversation had with McGurney, but the defense elected to cross-examine on this conversation at length. Lee then testified that McGurney told him

that three men, whom he named as the three defendants, and who had been, according to McGurney, committing robberies in the Bay area, were planning to hold up the "Silver Saddle" bar that night at about 1:30 or 2:00 o'clock; that the plan was to hold up the owner as he was leaving the bar after it had been closed; that he did not know where the "Silver Saddle" was located, but he promised to call Lee at 10:00 p. m. with further details. Lee ascertained that a tavern of that name was located in San Mateo County, and informed the Daly City and San Mateo County officials. The operators of the bar were also notified that a holdup might be attempted. McGurney telephoned Lee again at 10:00 p. m. and told him that the three men were insisting that McGurney use his car in the holdup. Lee told his informant to use his car if he had to, but not to take any part in the holdup. McGurney also told Lee that the gang would be armed with guns supplied by Theus, one of the defendants.

Lee, together with several San Francisco officers, and with officers from San Mateo County and Daly City, then went to the "Silver Saddle" and surrounded the establishment, hiding in concealed places. Preffer, a part owner of the "Silver Saddle," testified that about 1:00 a. m. McGurney came into the bar, ordered a drink, consumed it, and then left; that about a half an hour later Lagomarsino came in, and sat down at one end of the bar; that he was followed by McGurney who sat at the other end of the bar; that Theus and Williams then came in, whereupon Lagomarsino jumped up and yelled "This is a stick-up"; that in the bar at that time, in addition to Preffer and the robbers, were the janitor and three customers, Adams, Ayala and Magana; that Williams and Lagomarsino had guns, and Theus, who was masked, had a blackjack; that Theus hit all three customers with the blackjack and compelled them to lie on the floor; that various valuables were removed from the persons of the three customers; that Lagomarsino went to the cash register behind the bar and reported to his companions that there was no money in it; that Theus then hit Preffer with the blackjack and ordered him to open

the safe; that Theus removed from the person of the witness his wallet, wrist watch and pen; that Williams stayed at the door of the tavern with a gun in his hand covering the patrons who were lying on the floor; that after the three defendants, whom he identified at the trial, had been on the premises something over ten minutes, an automobile horn sounded outside and they left; that he then heard shots, and two of the defendants, Lagomarsino and Williams, ran back into the bar and tried to hide; that the officers rushed in and found Lagomarsino hiding under a table and Williams hiding in the women's rest room.

Several of the officers testified as to the arrival of the defendants accompanied by McGurney who was driving; that after the holdup started they observed what was going on through several windows; that after the robbery started McGurney came outside and sat in the automobile and then tooted the horn; that the three defendants came running out, led by Theus; that several shots were fired at Theus and he was captured outside; that Lagomarsino and Williams were captured inside the bar as recounted by Preffer. Guns were found where Lagomarsino and Williams had been hiding. McGurney was not arrested and was not produced as a witness. His whereabouts were not disclosed. There was substantial evidence that the three defendants were not drunk.

Each of the defendants testified. They told substantially the same story. They admitted being present at the "Silver Saddle," but all contended that the robbery was conceived and planned by McGurney. Lagomarsino stated that he had known McGurney for seven or eight years; that on the evening of March 6, 1949, he met McGurney in a San Francisco bar about 6:30; that he had a couple of beers, and that McGurney induced him to put some capsules, identified as "goof balls," into his drinks; that he became very "high" as a result, and then had several drinks of whiskey; that about 10:00 p. m. he and McGurney picked up the witness' girl friend at her place of work, and took her to a restaurant where McGurney tele-

phoned some one; that they took his girl friend home about 11:30 p. m.; that he then asked McGurney to take him home as he was feeling "dopey"; that instead McGurney took him to a bar where he had more whiskey and another capsule; that they then went to Theus' home where a party was in progress and where he had more to drink and several more capsules; that he saw McGurney give some of the capsules to Theus and Williams; that they then ran out of drinking material and McGurney suggested taking a ride in his car to get more whiskey; that after the four got into McGurney's car, McGurney drove towards the "Silver Saddle"; that on the way McGurney suggested the holdup and furnished the guns. Lagomarsino admitted his participation in the robbery and his arrest at the scene.

Theus testified that he first met McGurney when he arrived at the Theus home with Lagomarsino about midnight; that McGurney gave him some capsules to put into his drinks, which made him very drunk; that when the four left in McGurney's car he was drunk and fell asleep; that he knew absolutely nothing about the plans to hold up the "Silver Saddle"; that he awakened when the party arrived in front of the bar, and accompanied his companions inside thinking they were going in to get some whiskey; that he knew nothing of any holdup, and that he had no blackjack.

Williams testified substantially as did Theus, except that he admitted learning about the proposed holdup from McGurney while McGurney was driving towards the "Silver Saddle." He testified that the guns were furnished by McGurney and that the whole idea of the robbery originated with McGurney.

Various admissions were made by several of the defendants after their arrests and admitted into evidence against the particular declarant. Lagomarsino, for example, told a police inspector on the afternoon of March 7, 1949, that early on March 6th, Theus had told him about the proposed robbery and furnished the guns, and that he, Lagomarsino, had demanded \$1,500 of the proposed take as his share.



Defendants do not deny that a robbery as defined in section 211 of the Penal Code took place, and that they participated, but they contend that the uncontradicted evidence demonstrates that McGurney, acting under the supervision of the San Francisco police, originated the plan, and that it was McGurney who persuaded and induced them to commit the crime. In support of this defense of entrapment they contend that the uncontradicted evidence shows that it was McGurney who drove and owned the holdup car, and that it was McGurney who entered the bar a half hour before the hold-up apparently to "case" the tavern. Other portions of the record are referred to, and it is many times pointed out that the police made no attempt to prevent the holdup, but waited until it had occurred before interfering.

[1] The rule as to when an entrapment is a defense was stated as follows in *People v. Lindsey*, 91 Cal.App.2d 914, 917, 205 P.2d 1114, 1115: "It is only when the criminal design is conceived in the mind of the officer and does not originate with the accused, and a decoy is used to ensnare the innocent and law-abiding by persuasion, deceitful representation, inducement or allurements into the commission of the crime, that there is entrapment." Among the many cases supporting this rule are *People v. Malone*, 117 Cal.App. 629, 633, 4 P.2d 287; *People v. Kennedy*, 66 Cal.App.2d 522, 523, 152 P.2d 513; *People v. Makovsky*, 3 Cal.2d 366, 369, 44 P.2d 536; *People v. Groszofsky*, 73 Cal.App.2d 15, 18, 165 P.2d 757; *People v. Jackson*, 80 Cal.App.2d 386, 390, 181 P.2d 889; *People v. Cherry*, 39 Cal. App.2d 149, 151, 102 P.2d 546.

[2, 3] Even if it be assumed that the evidence demonstrates, without conflict, that McGurney was a police decoy and participated in the holdup under instructions from the police department, such assumption would not aid appellants unless the evidence also showed, without conflict, that the criminal design originated with the decoy. Officers, if they know or suspect that a crime is about to be committed, may, through a feigned accomplice, facilitate or even aid in its consummation. If the ac-

cused commits or attempts to commit the crime, it is no defense that the police decoy may have aided or even encouraged him in his criminal design. This was well illustrated in the case of *People v. Lanzit*, 70 Cal.App. 498, 233 P. 816. In that case, Lanzit wanted to murder his wife. He told Woodhead that he would like to get rid of her. Woodhead suggested dynamite, made the bomb, showed him how it worked, placed the bomb in the desired location and was arranging the detonator when the police arrived on the scene, having been warned in advance by Woodhead. Lanzit was found guilty of an attempt to commit murder, and the conviction was affirmed. On the defense of entrapment, the court said, 70 Cal.App. at page 509, 233 P. at page 820: "When officers of the law are informed that a person intends to commit a crime against the property or person of another, the law permits them to afford opportunities for its commission and to lay traps which may result in the detection of the offender. To this end a person may be engaged to act with the one who is suspected and to be present with him at the time the crime is to be committed; and if the accused, having himself originally conceived the criminal intent, commits such of the overt acts as are necessary to complete the offense, he will not be protected from punishment by reason of the fact that when the acts were done by him the person who was present with the knowledge and approval of the authorities aided in and encouraged their perpetration."

[4] That the police acting through a decoy actually furnished the automobile used in the holdup is of no assistance to appellants. This was the express holding in *People v. Malone*, 117 Cal.App. 629, 4 P.2d 287, one of the leading cases on entrapment. There the police decoy furnished a truck to the defendants knowing that it was to be used in a burglary. This "was not such an inducement to commit the crime as will relieve the appellants from responsibility. \* \* \* The question whether the intent to commit this crime originated with the officer or with the appellants was a question of fact for the jury, and their verdict finds

ample support in the evidence." 117 Cal. App. at page 634, 4 P.2d at page 289.

[5] Tested by these standards, and resolving all conflicts in the evidence in favor of the People, as we must, and indulging in all reasonable inferences from the evidence in support of the judgment, as the law requires, it is quite clear that defendants' contention that the evidence shows, as a matter of law, that the criminal design originated with McGurney is unsound. While all three defendants so testified, the trial court was not bound by their testimony even had it been uncontradicted, which it was not. The basic story of defendants is that they were drunk as a result of their drinking and consumption of the capsules supposedly administered by McGurney. The witnesses to the holdup testified that the men were not drunk when arrested. Lagomarsino admitted that Theus planned the robbery. Lee's story of how the police learned of the proposed holdup, brought out by the defense on his cross-examination, basically contradicts defendants' story. While the prosecution did not produce McGurney to contradict defendants, and while that is a factor that the trier of the facts was entitled to and undoubtedly did consider, it is not a conclusive factor. It might be pointed out that defendants failed to produce any of the persons who were at the party at Theus' house (other than defendants) to corroborate their story of the capsules or of their condition, and Lagomarsino failed to produce his girl friend to corroborate his story as to his condition. These were all matters to be considered by the trial court. Its implied finding that there was no entrapment finds ample support in the evidence, and cannot be disturbed.

The other major contention of defendants is that the evidence demonstrates that but one robbery was committed and not three, although four separate individuals were robbed. The contention is that there was but one intent, and that the robbery of the four individuals was part of the same offense. It is urged that sentencing two of the defendants three times, and one of the defendants twice, for the same offense, constituted a violation of Art. 1, § 13, of the

state Constitution prohibiting the placing of any person in jeopardy twice for the same offense.

[6] This contention presents a most interesting problem. An examination of the cases, and the pertinent authorities, indicates that on the general question the states of the United States are in hopeless conflict. Notes 20 A.L.R. 341; 113 A.L.R. 222; 18 Cal.L.Rev. 171; 22 C.J.S., Criminal Law, § 298, page 452; 20 Harv.L.Rev. 642; 37 Harv.L.Rev. 912. California, however, has definitely aligned itself with those states that hold that, so far as crimes against the person are concerned (murder, assault, robbery, etc.), although there may be but one act or intent, there are as many crimes as there are persons affected.

In *People v. Majors*, 65 Cal. 138, 3 P. 597, 52 Am.Rep. 295, a defendant killed two persons by the same act. It was held that he had committed two separate and distinct offenses, and that a conviction or acquittal of one did not bar a prosecution for the other. In *People v. Brannon*, 70 Cal.App. 225, 233 P. 88, the evidence showed that the defendant shot at W, but killed X. He was indicted for assault with a deadly weapon and murder. He was tried first on the assault charge and acquitted. He then sought to interpose the defense of once in jeopardy at his murder trial. He was convicted, and his conviction affirmed on the theory that there were separate offenses committed although there had been but one act. The court recognized that a conflict exists on the subject, but elected to follow those states that hold that a separate crime exists as to each person harmed by the act of defendant.

Defendants place their greatest reliance on *People v. Stephens*, 79 Cal. 428, 21 P. 856, 4 L.R.A. 845. There appellant was prosecuted for libel in that he had published a libelous remark in his newspaper concerning one Bell. He pleaded and attempted to show by evidence that he had been previously tried and acquitted of the same charge growing out of the publication of the same article. This evidence was excluded by the trial court. The proffered evidence was to the effect that the instant prosecution was based on the second para-

graph in the same article which had been the basis of the first prosecution, the first one being based on the first paragraph, but both concerning Bell. The court reversed the conviction, holding that there had been but one indivisible libel. This case is somewhat similar to *People v. Puppilo*, 100 Cal. App. 559, 280 P. 545, holding that one in possession of two revolvers is guilty of but one offense under the California Gun Law. Stats. of 1923, p. 695, Chap. 339, Gen. Laws, Act 1970. It is also similar to the many cases mentioned in the above notes holding that where, by an act of taking (larceny) several articles belonging to the same individual are stolen, there is but one offense. But where the property of several individuals is taken in the course of a larceny the states are in hopeless conflict as to whether one crime or several have been committed. On this question we have been referred to no California case, but in *People v. Sheik*, 75 Cal.App. 421, 243 P. 39, the defendant was convicted on six separate counts of obtaining money by false pretenses, although the false representations were made to all of the six people involved at the same time. The court held that there were as many offenses as there were individuals affected.

The federal cases seem to support the separate offense theory. Thus, although in *Robinson v. United States*, 10 Cir., 143 F.2d 276, it was held that when a defendant transports several women across state lines for immoral purposes in one car, he is guilty of but one offense, this case was expressly disapproved in *Crespo v. United States*, 1 Cir., 151 F.2d 44, 46, certiorari denied 327 U.S. 758, 66 S.Ct. 520, 90 L.Ed. 991, and in *United States v. St. Clair*, D. C., 62 F.Supp. 795, it was held that such an act constituted separate offenses. See, also, *Oddo v. United States*, 2 Cir., 171 F.2d 854.

Whatever conflict may exist in the cases involving offenses against property, when we come to offenses against persons, there is more unanimity. Particularly is this true of robbery cases, the offenses here involved. The majority, and certainly the better rule, is that there is a separate offense committed against each person robbed. Obviously, a robbery of several persons, where property

is removed from each person, involves a separate act and a separate intent toward each victim. See *People v. Rodgers*, 184 App.Div. 461, 171 N.Y.S. 451, affirmed in 226 N.Y. 671, 123 N.E. 882; *Orcutt v. State*, 52 Okl.Cr. 217, 3 P.2d 912; *Schoolcraft v. State*, 84 Okl.Cr. 20, 178 P.2d 641; *In re Allison*, 13 Colo. 525, 22 P. 820, 10 L.R.A. 790, 16 Am.St.Rep. 224; *Fox v. State*, 50 Ark 528, 8 S.W. 836; but, see, *People v. Perrello*, 350 Ill. 231, 182 N.E. 748; *State v. Citius*, 331 Mo. 605, 56 S.W.2d 72.

[7] As already pointed out, California, in cases involving assaults, has held that there are as many offenses as there are individuals affected, although but one act has been committed. The robbery cases also involve a crime against the person. But in the robbery case, unlike the assault cases, there are separate acts of robbing, and a separate intent as to each individual robbed. It is clear that if there are separate offenses in the assault cases where but one act and intent is involved (and this is settled in this state), there are separate offenses in the robbery cases where separate acts are necessarily involved.

The judgment and order appealed from are affirmed.

BRAY, J., and SCHOTTKY, J. pro tem., concur.



97 Cal.App.2d 133

ROBERTS v. BANK OF AMERICA NAT.  
TRUST & SAVINGS ASS'N et al.

Civ. 17469.

District Court of Appeal, Second District,  
Division 1, California.

April 24, 1950.

L. L. Roberts brought action against Bank of America National Trust & Savings Association and others to recover for injuries sustained by plaintiff while working as employee of a building contractor performing



carpenter work on premises of defendant bank. A judgment for defendants and an order denying motion for judgment notwithstanding the verdict were entered by the Superior Court of Los Angeles County, Henry M. Willis, J., and the plaintiff appealed. The District Court of Appeal, Doran, J., held that evidence failed to establish as a matter of law, either under *res ipsa loquitur* rule or otherwise, that plaintiff was entitled to recover from defendant bank for injuries sustained when stepladder being used by him on premises of defendant bank collapsed on ground that bank's employee negligently furnished an unsafe ladder.

Judgment and order affirmed.

### 1. Negligence ☞121(2)

To authorize doctrine of "*res ipsa loquitur*", accident must be of a kind which ordinarily does not occur in absence of someone's negligence, it must be caused by agency or instrumentality within exclusive control of defendant, and it must not have been due to any voluntary action or contribution on part of plaintiff.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "*Res Ipsa Loquitur*".

### 2. Negligence ☞136(12, 18)

Evidence failed to establish as matter of law, either under *res ipsa loquitur* rule or otherwise, that employee of building contractor performing carpenter work on premises of defendant bank was entitled to recover from bank for injuries sustained when stepladder being used by him collapsed on ground that bank's employee negligently furnished an unsafe ladder.

### 3. Negligence ☞134(1)

Plaintiff could not assert that evidence failed to support judgment for defendants because of their failure to introduce evidence rebutting inference of negligence arising from application of doctrine of *res ipsa loquitur*, where plaintiff called all available witnesses and hence rendered it unnecessary for defendants to put on any additional evidence after plaintiff had rested, and it appeared that such witnesses had been duly cross-examined by defendants.

William Paul Wood, Franklin W. Peck, Los Angeles, for appellant.

Moss, Lyon & Dunn, Henry F. Walker, Los Angeles, for respondent.

DORAN, Justice.

The facts, as stated in appellants' brief are that "On September 25, 1947, plaintiff (appellant) was working as an employee of Robert A. Crowell, a building contractor \* \* \* performing carpenter work on the premises of the Pasadena Main Branch of defendant bank. The complaint alleged that defendants knowingly, negligently or carelessly furnished or caused to be furnished to plaintiff an unsafe folding step ladder to be used by him in fitting and working upon a transom on the premises of defendant bank. While plaintiff was using the step ladder one of the front legs or sides, at the juncture thereof with the bottom step, collapsed or gave way causing plaintiff to fall against a concrete floor with great force and violence, thereby causing him to suffer serious and permanent injuries."

Issues were joined by the answer of defendants denying the allegations of negligence and those relating to the injuries and damages of plaintiff. At the conclusion of plaintiff's case a motion for non-suit was granted as to certain officials of the defendant bank, but was denied as to the bank and defendant Humphrey, janitor of the Pasadena branch bank. Defendants rested without adducing any evidence, and both parties moved for a directed verdict, which motions were denied. The cause was argued and submitted to a jury which returned a verdict in favor of the defendants. Plaintiff's motions for judgment *non obstante veredicto*, and for a new trial, were denied.

On the present appeal by plaintiff it is contended "(a) that the verdict and judgment are not supported by the evidence; (b) that the court committed error in denying plaintiff's motion for a directed verdict; (c) that the court committed error in denying plaintiff's motion for judgment notwithstanding the verdict; (d) \* \* \*

(and) in denying \* \* \* a new trial; (e) that the court committed error in giving \* \* \* and in failing to give certain instructions \* \* \*".

As mentioned in respondent's brief, "Appellant heavily relies upon the doctrine of *res ipsa loquitur* on appeal and contends that thereunder he was entitled to verdict and judgment as a matter of law". The record discloses evidence that the Capital Company, not a party to this action, apparently acted as caretaker of the bank premises and that such company employed the defendant Humphrey as janitor and caretaker, Humphrey having worked there for about 20 years. The ladder involved herein, described as a 7-foot stepladder, had been on the premises since 1929. The caretaker testified, "Well, I've seen it (the ladder) all over the bank", but stated, "I don't know who owns the ladder". When produced in court on a subpoena duces tecum, the legs of the ladder appeared to have been sawed off and certain wires and braces to have been affixed thereto since plaintiff's accident. Mr. Humphrey denied making any such alterations and denied knowing who, if anyone, did make the changes in question.

Under date of April 11, 1947, respondent bank, through the Capital Company, contracted with Crowell & Company for the making of certain alterations and building work on the bank premises, and work thereon was commenced about 10 days thereafter. Under this contract the Crowell Company agreed to furnish all labor, materials, etc. together with all necessary implements and appliances required to perform the work. Crowell, however, did not provide any ladders; the building superintendent found the 7-foot ladder in the bank basement together with a 6-foot ladder, and made use of the same. Plaintiff testified that "we never question anybody about a ladder when we are working on a job. If the ladder is there, we use it." There was testimony to the effect that prior to the accident the ladder appeared to be in good condition and that it was used by all the workmen until the time of plaintiff's accident.

The accident occurred on September 25, 1947, about 2-4 days after plaintiff came to work on the bank job. The ladder was used by plaintiff Roberts on the day before as well as on the date of the accident, the work in question consisting of chiseling the edge of or the trim around the door jamb above the rear entrance door. Plaintiff testified to first standing on the lower steps of the ladder as it leaned against the wall, while doing some hammering; that the step-ladder was then moved over and opened up; that plaintiff climbed up the ladder and started work with hammer and chisel, working thus only a few minutes before the ladder broke and collapsed. There was testimony that plaintiff weighed 170-175 or 185 pounds at the time of the accident.

Apparently no one saw the accident actually happen. It was plaintiff's testimony, however, that "I had my right foot on here (top platform of the ladder) and left foot on the second—or first step", meaning the "top step of the ladder". The right front leg of the ladder near the junction of the lowest step was broken; it appeared to be a fresh break. As commented upon in respondent's brief, "There was no testimony as to whether plaintiff did or did not tip the ladder while attempting to use the hammer and chisel on the transom".

Arguing that the evidence is insufficient to support the verdict and judgment, appellant insists that "The doctrine of *res ipsa loquitur* is applicable to the facts presented by this case"; that "The un rebutted inference of negligence is fortified and supported by the presumption arising from the failure of defendants to produce the broken part of the ladder, or explain why it was not produced"; and that "The inference of negligence \* \* \* created by the rule *res ipsa loquitur* is in itself evidence which may not be disregarded by the jury and which in the absence of any other evidence as to negligence, necessitates a verdict in favor of the plaintiff". It is also claimed that "Plaintiff made out a *prima facie* case of negligence \* \* \* independent of the inference created by \* \*

res ipsa loquitur, which prima facie case defendants have wholly failed to rebut".

As noted in respondents' brief, "Neither the doctrine (of res ipsa loquitur) nor the evidence herein *compels* any such conclusion" in plaintiff's favor. And, "Under settled principles, the evidence and inferences therefrom must be considered most favorably to respondents". The most that can here be said is that the res ipsa loquitur doctrine was presented to the jury by what appellant's brief denominates "appropriate instructions"; that plaintiff presented all available evidence on the subject of alleged negligence, and that from such evidence the jury found in favor of the defendants.

[1,2] In the language of *Ybarra v. Spangard*, 25 Cal.2d 486, 489, 154 P.2d 687, 689, 162 A.L.R. 1258, "The doctrine of res ipsa loquitur has three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.' Prosser, Torts, p. 295." It was for the jury to determine whether or not the showing made by plaintiff in respect to these elements was sufficient.

The record discloses evidence from which the jury might draw the conclusion that the instrumentality herein, namely the step-ladder, was not "in the exclusive control of the defendants" at the time of the accident, but was actually in the control of the building contractor and his employees of which plaintiff was one. There was, for example, evidence that for more than five months the ladder was being used by such employees in carrying on the work at the bank. As noted in the *Ybarra* case cited above, the matter of "exclusive control" in the defendant is one of the necessary elements of the res ipsa loquitur doctrine. If the jury is not satisfied as to the existence of such element, the doctrine can be of no assistance to the plaintiff.

The same may be said in respect to the third condition to which the res ipsa

loquitur rule is subject, namely, that the accident "must not have been due to any voluntary action or contribution on the part of the plaintiff". As mentioned in respondents' brief, there is evidence that "plaintiff first leaned the ladder against the wall and placed his 170-185 pounds on it while hammering. In doing so he may well have cracked the lower right front leg of the ladder. Thereafter he opened the ladder and climbed to the top where he engaged in using hammer and chisel. He may have tipped the ladder at this time." In this state of the evidence and inferences therefrom, which, under the usual rule must be considered most favorably to respondents, it cannot be said that the jury was "compelled" to find for the plaintiff, either under the res ipsa loquitur rule or otherwise.

The appellant appears to rely heavily on the case of *Biondini v. Amship Corp.*, 81 Cal.App.2d 751, 185 P.2d 94, 103. The action therein was for injuries to an employee of a subcontractor who fell from a scaffold attached to a ship from which plaintiff was removing debris. The appellate court held that a nonsuit was improperly granted as to employees of the general contractor, there being evidence of negligence in reference to inspection of the scaffold. If plaintiff could be deemed an invitee, rather than a licensee, the reviewing court concluded that "the doctrine of res ipsa loquitur is applicable to a factual situation involving injury resulting from the collapse of a scaffold". However, as pointed out in respondents' brief, "It was not held that plaintiff was entitled to any judgment against either defendant as a matter of law". Moreover, the factual situations in the *Biondini* case and in the present litigation were entirely dissimilar. And what the plaintiff was demanding in the *Biondini* case, namely,—a submission of the case to the jury,—was exactly what the trial court did in the instant case.

In support of appellant's contention that the situation "demanded" a verdict for plaintiff, it is argued in appellant's brief that "The un rebutted inference of negligence is fortified and supported by the presumption arising from the failure of de-



defendants to produce the broken part of the ladder, or to explain why it was not produced". As hereinbefore stated, when the ladder was produced at the trial, the legs appeared to have been sawed off and wire and braces affixed to strengthen it. However, the caretaker denied making such alterations and there was no proof as to who had done so. The facts in reference to such matter were laid before the jury which had before it the ladder itself. If inferences were to be drawn from this alleged suppression and alteration of evidence, such were for the jury to consider along with the other evidence presented.

[3] A further point is made in appellant's brief that the respondents did not introduce any evidence whatever but submitted the case at the conclusion of plaintiff's proof; hence, that "the inference of negligence arising from the application of the doctrine of *res ipsa loquitur*, fortified and supported by the presumption adverted to above (suppression of the broken parts of the ladder), is wholly un rebutted and that accordingly the evidence is not sufficient to support the verdict and judgment in favor of defendants".

The respondents suggest, however, that "This argument comes with but poor grace from one who called all available witnesses and hence rendered it unnecessary for respondents to put on any additional evidence after plaintiff had rested". The record indicates that these witnesses were duly cross examined by respondents; the ladder was described as appearing to be in good condition at all times; there was evidence that the break in the leg of the ladder was a fresh break. Obviously it is quite immaterial whether plaintiff or defendants produced the evidence; whoever presented it, the evidence was before the jury whose province it was to determine weight and credibility thereof. This is as true in a case involving the *res ipsa loquitur* doctrine or other inferences, as in any other case.

Plaintiff's motions for a directed verdict, judgment notwithstanding the verdict, and for a new trial, all involve the same proposition and question the sufficiency of the

evidence to sustain the verdict. As hereinbefore indicated, this was a question for the jury. No reversible error has been made apparent either in respect to the jury instructions given or refused, or otherwise.

The judgment and order appealed from are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



97 Cal.App.2d 101

PEOPLE v. COSSEY et al.

Cr. 679.

District Court of Appeal, Fourth District,  
California.

April 21, 1950.

Hearing Denied May 18, 1950.

Ralph Douglas Cossey, also known as Douglas R. Cossey, Gerald F. Burke and John H. Harris were convicted in the Superior Court of Riverside County, O. K. Morton, J., of conspiracies to commit the crime of theft and they appealed. The Court of Appeal, Mussell, J., held that an indictment for conspiracy to commit theft should have been drawn so as to charge but one conspiracy to commit all of acts charged in various counts of indictment.

Judgment modified and orders denying motions for new trial affirmed in part and reversed in part; motion to dismiss appeal as to the first named defendant denied.

#### 1. Conspiracy ⇌ 28

Under statute defining offense of conspiracy to commit any crime, gist of crime is charge of conspiracy, and all of the objects of such conspiracy may be the subject of one charge. Pen.Code, § 182.

#### 2. Conspiracy ⇌ 28

Under statute defining offense of conspiracy to commit any crime, the conspiracy is one offense no matter how diverse its objects. Pen.Code, § 182.

**3. Conspiracy** Ⓒ47

Evidence was sufficient to show conspiracy on part of defendants to operate collection agency in such manner as to violate conspiracy statute by misappropriations of moneys collected for clients. Pen. Code, § 182.

**4. Conspiracy** Ⓒ43(12)

Parties misappropriating moneys collected by them for clients through collection agency could be charged with a separate, unlawful agreement or conspiracy with respect to each account upon which they made collections, but if so charged, prosecution was required to prove separate and distinct agreements with respect to each account so collected. Pen. Code, §§ 182, 182, subd. 1, 484.

**5. Conspiracy** Ⓒ47

Evidence as to operation of collection agency and misappropriation of clients' funds was sufficient as to two defendants but insufficient as to a third, to sustain conviction of conspiracy to commit theft. Pen. Code, §§ 182, 484.

**6. Criminal law** Ⓒ94

Under provision in conspiracy statute imposing punishment by imprisonment in county jail or in state prison, Superior Court did not lack jurisdiction over alleged conspiracy to commit theft because the conspiracies charged were allegedly conspiracies to commit a misdemeanor. Pen. Code, § 182.

**7. Criminal law** Ⓒ94

Superior Court has jurisdiction to try defendants for conspiracy to commit crime of petty theft. Pen. Code, § 182.

**8. Criminal law** Ⓒ404(1)

In prosecution for conspiracy to commit theft through operation of a collection agency, prosecuting attorney during cross-examination of one of defendants was properly permitted to exhibit to jury a number of large, legible charts upon which were written out the transactions contained in the ten counts of indictment.

**9. Criminal law** Ⓒ371(1), 372(6)

In prosecution for conspiracy to commit theft through operation of a collection

agency, testimony as to similar offenses was admissible to show intent, scheme, plan or system. Pen. Code, § 182.

**10. Indictment and information** Ⓒ132(2, 5)

Where two or more offenses are charged in indictment or information as authorized by statute or where series of acts form part of same transaction, election of counts may not be required. Pen. Code, § 954.

**11. Criminal law** Ⓒ1037(1, 2), 1186(4)

In prosecution for conspiracy to commit theft through operation of a collection agency, alleged misconduct of prosecuting attorney in referring to a bank account which defendant at one time had, and to signature card which bore name of his second wife, and to fact that after divorce her name was removed from card, could not be considered on appeal, where defense attorney did not cite the statement as misconduct or call for admonition to jury, but in any event the alleged misconduct was not prejudicial. Pen. Code, §§ 182, 484; Const. art. 6, § 4½.

**12. Criminal law** Ⓒ1037(1, 2)

In prosecution for conspiracy to commit theft through operation of a collection agency, where prosecuting attorney referred to interviews with one of the defendants prior to indictment and compared his compensation with that of the defendant, and prosecutor also commented on another defendant's financial position, but no assignment of misconduct or request for admonition to jury was made, no prejudicial error resulted. Pen. Code, §§ 182, 484; Const. art. 6, § 4½.

**13. Criminal law** Ⓒ783(1)

Where all counts were for conspiracy to commit theft and evidence offered was of transactions similar in nature to those alleged, instruction that jury might consider evidence of similar offenses was proper. Pen. Code, §§ 182, 484.

**14. Criminal law** Ⓒ814(1)

In prosecution for conspiracy to commit theft, instruction respecting law of embezzlement was not improper. Pen. Code, §§ 182, 484, 511.

**15. Indictment and Information**  $\S$ 125(5½)

Indictment charging conspiracy to commit theft through operation of a collection agency should not have been drawn in separate counts, each containing general charge of conspiracy to commit theft and alleging one or more overt acts, but should have been drawn so as to charge one conspiracy to commit all of the acts charged in the various counts. Pen.Code,  $\S\S$  182, 484.

**16. Criminal law**  $\S$ 1184

Where indictment for conspiracy to commit theft should have been drawn so as to charge but one conspiracy to commit all of acts charged in various counts, the court of appeal, under its statutory authority, would modify judgment convicting defendant of 10 conspiracies, to adjudge the defendant to have been found guilty of the crime of conspiracy and to be punished by imprisonment in state's prison as prescribed by law. Pen.Code,  $\S\S$  182, 484, 954, 1260.

**17. Criminal law**  $\S$ 1131(5)

Where defendant escapes from custody and is a fugitive, dismissal of appeal is proper, but custody may be actual or constructive, and where defendant was released on bail pending decision on appeal, defendant was still in constructive custody, though he had allegedly fled to Canada and refused to return, and accordingly his appeal would not be dismissed on motion of the Attorney General, on ground that the defendant was not subject to the court's jurisdiction. Pen.Code,  $\S$  1255.

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Morris Lavine, Los Angeles, for appellants.

Fred N. Howser, Attorney General, Norman H. Sokolow, Deputy Attorney General, for respondent.

Samuel C. Colby, Los Angeles, amicus curiae.

MUSSELL, Justice.

Defendants Ralph Douglas Cossey and Gerald F. Burke, after a lengthy trial by jury, were convicted of ten conspiracies to commit the crime of theft in violation of

Section 182, subdivision 1, of the Penal Code. These offenses were contained in the first ten counts of an indictment and were all alleged to have been committed during the period commencing January 2, 1946, and ending on or about August 25, 1948. Defendant John H. Harris was convicted of the conspiracy charged in count three and acquitted as to the remaining charges. All three defendants applied for probation, which was denied as to defendant Cossey and granted as to defendants Burke and Harris, with a condition, in the case of Burke, that he serve a period of one year in the Riverside Industrial Road Camp, and in the case of Harris, that he serve a period of five months in the same road camp. In addition, a fine of \$500 was imposed upon defendant Burke and \$250 upon defendant Harris. The defendant Cossey was sentenced to the state prison on each of the ten counts and judgments against him were ordered to run concurrently on counts one, two, three and four and on count five to run consecutively to the judgment pronounced on the first four counts. The judgment pronounced on counts six, seven, eight and nine were ordered to run concurrently with that pronounced on count five, and the judgment pronounced on count ten was ordered to run consecutively to the judgment pronounced on counts one to nine, inclusive.

Defendant Cossey appeals from the judgment and the order denying his motion for new trial, and defendants Burke and Harris appeal from the orders denying their motions for new trial.

The principal contention of the defendants on this appeal is, in effect, that the verdicts were contrary to the law and evidence and that the evidence was insufficient to justify a conviction of ten separate and distinct conspiracies.

Each count in the indictment contained a general charge of conspiracy to commit theft and contained an allegation of one or more overt acts, all alleged to have occurred within the period set forth in each of the general charges. In support of count one, two overt acts were alleged. The first count charged the defendants with a conspiracy to commit the crime of theft in vio-



lation of section 182 of the Penal Code in that during the period in question they conspired to violate section 484 of the Penal Code, and did unlawfully take the property of designated persons. Count one involved property taken from Jones and Fisher, a copartnership, in the amount of \$9.76 on October 21, 1947 and \$58.01 on October 27, 1947.

Counts two to ten, inclusive, involved the unlawful taking of property of various persons and firms in varying amounts, all under \$200.00, except that in count five, the sum alleged to have been taken was \$295.00.

Three other offenses were charged in counts eleven, twelve and thirteen of the indictment but the charges contained in these counts are not material to the decision herein as there were no convictions obtained under them.

The essential facts applicable to all counts of the indictment and showing a conspiracy to commit the crime of theft, as set forth in the various counts of the indictment, are as follows: the defendant Ralph Douglas Cossey was the owner and operator of a collection agency in the city of Riverside. On March 10, 1941, he obtained a certificate to do business in the county of Riverside under the fictitious name of the Southern California Collection Company. He also owned an organization known as the National Credit Company. On July 15, 1947, the Medical Dental Associates, Inc. was incorporated to do business as a collection agency in Riverside County. Defendant Cossey was the president of the corporation and defendant Gerald F. Burke was the secretary-treasurer and the managing director. This corporation was inoperative but it did file law suits and had a bank account of \$2,500. The National Credit Company was formed by Cossey to render credit service.

Defendants Cossey and Burke formed a copartnership in January of 1947 to operate a collection agency in the city of Los Angeles. Defendant Burke was the partner actively engaged in the business and obtained the license for the agency. In October, 1947, defendant Cossey incorporated the partnership, which was known as

the Southern California Collection Co., Inc. (of Los Angeles), which was a separate and distinct entity from the Riverside organization.

On September 13, 1947, defendants Cossey and Burke executed a bill of sale to Medical Dental Associates, Inc. of all merchandise, credits, legal actions pending settlement, desks, equipment, office supplies and good will of the corporation.

The Southern California Collection Company, hereinafter designated as the "Agency", had a trust account with the Citizens National Trust and Savings Bank of Riverside. The defendant Cossey and his wife were the only one authorized to draw on that account. The Medical Dental Associates, Inc. had an account with the same bank and the defendant Burke was the only person authorized to draw on that account. The National Credit Company also had an account in the same bank and defendant Burke was the only one authorized to draw checks on it.

Defendant Burke from time to time signed the salary checks for employees of the agency and for rent of the agency's office, which checks were drawn on the National Credit Company. Defendant Burke assisted in the preparation of checks to clients of the agency, drawn on the trust account of the agency and signed by defendant Cossey.

Defendant Burke went to work for the agency in Riverside in January of 1946 and was there employed at the time of the indictment.

There was testimony that defendant Cossey only made periodical visits to the office of the agency, sometimes once a week or once in ten days, and in his absence, defendant Burke was looked upon as the manager of the agency. In this connection, Burke made numerous postings in the agency's ledgers and wrote letters with reference to various accounts.

There was testimony by employees of the agency that virtually every day clients would come into the office and state that they had learned that their debtors had paid the agency and complained that they had not received their shares of collections

which were long overdue. When this occurred, all employees had been instructed by defendants Cossey and Burke not to handle the matter themselves, but to refer these clients to defendants Cossey and Burke. The excuses used by the defendants were that "the bookkeeper was on vacation"; "that there must be a mistake"; "that the check will be sent out the tenth of the month"; that "we overlooked the matter".

Defendant Burke posted the entries in the breakdown pads of various accounts for over a year and from the daily receipts of the agency, he broke the figures down to determine how much went to the clients and how much to the agency.

On December 31, 1947, the agency filed with the Secretary of State the Annual Financial Statement, as required by law, and which requires that the actual amount of money on deposit in a trust account for the benefit of creditors and the total amount owed to clients must be shown and that those to whom the licensee owes over \$5.00 must be listed. The statement showed a balance with the Citizens National Trust and Savings Bank of Riverside of \$1,874.98. No outstanding checks were listed and the amount owed to clients totaled \$900.12. Defendant Cossey admitted that there were various checks outstanding and not listed on this statement, and that there was money due to clients as of December 31, 1947, which was not listed on the statement. The bank stub book of the trust account of the agency with the Citizens National Trust and Savings Bank of Riverside showed that 134 checks were issued on December 30, 1947, which totaled \$4,469.04 and made the agency's adjusted balance show an overdraft of \$2,594.06 as of December 31, 1947.

In this connection it should be noted that under the provisions of Section 625, Chapter 7, Title 16, California Administrative Code of the Rules and Regulations Relating to the Licensing and Regulation of Collection Agencies, the client's share of money collected from debtors, with certain exceptions, must be remitted to him within 60 days.

Defendant Cossey testified that the \$295.00 (involved in count five) which had been collected on behalf of the estate of Lee Clair Martin on February 4, 1947, remained in the agency's trust account until March 22, 1948, and that on February 18, 1948, when the balance of the trust account at the Citizens National Bank was the sum of \$104.87, that "it was possible" he owed the following clients, in addition to the \$124 owed to the estate of Lee Clair Martin: Mr. Bartz, \$40.83; Dr. Swain, \$68.00; Smith's Grocery, \$14.37; Weidel Dairy, \$65.05; said amounts totaling \$312.25.

The evidence as to the overt acts described in the various counts of the indictment may be briefly summarized as follows:

Count 1: Jones and Fisher, oil distributors, turned over the account of debtor L. C. Paris to the agency in the amount of \$73.75. On October 23, 1947, debtor Paris sent a check for \$58.61 to Jones and Fisher, which was forwarded by mail to the agency. Paris had a credit of \$18.14 coming for some returned oil, which made the Jones and Fisher bill \$58.61. On May 14, 1948, seven months after the collection, the agency sent Jones and Fisher \$15.72 on the Paris account, when they were admittedly entitled to \$24.55.

On October 21, 1947, Thomas Miller paid the agency \$9.76. This account had been turned over with the Paris account by Jones and Fisher. On July 19, 1948, in response to a request for an accounting from Jones and Fisher, a letter was written by the agency stating that the Miller account had been paid and a check would be forthcoming on the next regular remittance. This letter was the first information received by Jones and Fisher that Miller had paid the agency on October 21, 1947.

Count 2: Woody Smith, a grocer in San Bernardino, assigned to the agency for collection the accounts of debtors Floyd Lee and R. Simmons. Simmons paid the agency \$29.75 on February 19, 1948, and obtained a receipt showing the payment. Simmons was in Oklahoma and sent the receipt to his mother, who gave it to grocer Smith.

Smith testified that he telephoned the agency three times long distance about getting his share of the Simmons collection and finally received it after he told the agency he was going to see the district attorney unless the money was sent. The check of the agency, dated July 1, 1948, for \$14.37, was not received by Smith until July 28, 1948.

Count 3: Frank Tillie, an undertaker in San Bernardino, assigned to the agency some accounts for collection during 1947, among which was that of a debtor named Navarro. Tillie learned on November 1, 1947, that Navarro had paid the agency in August of that year and immediately went to the office of the agency in Riverside. He spoke to defendant Burke and informed Burke he knew Navarro had paid the money; whereupon Burke asked "How do you know I collected it". Burke told Tillie the manager was not in; whereupon Tillie left and returned the next day, when he again spoke to defendant Burke and said "I found out you are the manager and I would like to have my money". Defendant Burke replied "You so and so, if you don't get out of here, I take and throw you out of here". Defendant Burke told Tillie he had just received the Navarro money. The debt, amounting to \$183.10, had been paid on August 13, 1947, and the agency did not inform Tillie that it had been collected on that date. Tillie testified in this connection that at the time the defendant Burke threatened to throw him out of the office, defendant Harris was present and Harris offered to help throw Tillie out. On November 10, 1947, the agency sent Tillie a check for \$89.88; \$84.69 of this amount being for his share of the Navarro collection.

Count 4: In February, 1948, the Emergency Hospital turned over to the agency the account of Mrs. Ruth Allen amounting to \$15.00 and on April 24, 1948, Mrs. Allen paid the bill, but the Emergency Hospital's first knowledge that it had been paid was when a check therefor came in the mail on August 10, 1948.

Another account, that of Romo, which was assigned to the agency in 1947, was paid by Romo in November of that year,

but the Emergency Hospital's share of the collection, amounting to \$50.89, was not sent to the client until July 12, 1948, and the agency had not informed the client of the collection in the interim.

Count 5: On August 6, 1940, Floyd Dawson, who was in Iowa at the time, executed a promissory note for \$186.00 and upon his default in the payment thereof, his co-signers paid the lender. Dawson came to Riverside in 1941 and in December, 1946, was sued by the agency for \$306.70. Dawson paid \$295 to the agency on February 4, 1947, and received a receipt in full, signed by defendant Cossey. On February 5, 1947, Dawson wrote to Leversee, one of the co-signers, informing him of the payment of the money to the agency.

On May 22, 1947, an attorney of Cedar Falls, representing the estate of Lee Clair Martin, wrote to the agency asking for a report on the status of the claim, and on June 12, 1947, the agency wrote the attorney to the effect that the defendants had nothing and that a settlement in full for \$100 would be appropriated and asked whether or not such a settlement would be acceptable. On March 1, 1948, an attorney, who had taken over the previous attorney's practice in Iowa, requested information relative to the Dawson collection and was informed on March 11, by letter, that the agency was unable to persuade the defendant to do anything more about the claim; "that the present status of their assets is, if anything, considerably worse than it was at that time. At that time they had an old 1930 Ford car, which they no longer have. However, may we suggest that you contact your clients, Mr. Leversee and Mr. Isley, and determine whether or not a settlement of \$100.00 would be acceptable to them".

The attorney then informed the agency that he had a letter from Mr. Dawson in which Dawson stated that he had paid the company the sum of \$295 on the claim about a year previously. After some further correspondence, the agency, on March 25, 1948, sent a check for \$124.00, signed by R. Douglas Cossey, in payment of the account.



Count 6: The testimony as to this count concerns the assignment to the agency for collection of several accounts by Dr. Sargent. These accounts were assigned in October, 1945, and in at least one instance, the doctor did not receive his share of the moneys collected until August, 1948, and had not received his share of three accounts up to the day he testified in the trial.

Count 7: Witness Harry Starr testified that Clarence Miller owed him \$230.00 in 1945; that he assigned the claim to the agency for collection and that at no time thereafter had he collected any money "direct from Miller". One check was sent to Starr for \$2.50 on June 8, 1947, and another in the sum of \$36.50 on September 10, 1947. The ledger sheet on the Harry Starr account showed that Clarence Miller had paid the agency the sum of \$78.00 on December 12, 1946. Defendant Cossey admitted that he had no evidence that Miller had paid Starr "direct" and he did not know why he had paid Starr the sum of \$36.50 and could not give any definite reason why a check for \$2.50 was sent to Starr on June 8th.

Count 8: Witness William Frolich testified that he assigned to the agency accounts against Cox, Chesebro and Weiss. The Cox account was paid to the agency on March 6, 1948 and the witness' share was paid to him by agency check on August 10, 1948. The Weiss account was paid by the debtor on April 23, 1948, by check. Frolich had not received any money on this account at the time he testified before the grand jury but he later received for his share of the Weiss collection a check from the agency dated September 1, 1948.

Count 9: Arthur Bartz, on July 10, 1947, assigned a claim to the agency for collection for \$76.65 against a judgment debtor named Reuben Fox. Fox paid the agency in installments as follows: July 29, 1947, \$15.00; October 16, 1947, \$6.20; November 18, 1947, \$25.00; December 16, 1947, \$25.00; January 10, 1948, \$26.18. At the time the grand jury met on August 25, 1948, the agency had not paid the creditor, Bartz, any money nor had the agency or any member thereof informed Bartz that Fox had paid the debt in full on January 10, 1948.

On September 1, 1948, one week after the indictment, the agency sent Bartz a check for \$40.83.

As to this account, defendant Cossey admitted that Bartz was entitled to his fee within 60 days after each installment collection.

Count 10: In March of 1947, Gladys Weidel, who, with her husband, operated the Weidel Dairy, assigned to the agency for collection a number of accounts and again in the following July assigned another group of 40 or 50 accounts. She testified that beginning with June 8, 1947, and ending August 10, 1948, she received checks for some of the collections made by the agency. She stated that the dairy had not collected money "direct" from any debtor after the accounts had been assigned and that on September 1, 1948, she received a request from the agency to supply it with the names and amounts of money the dairy had collected "direct". Mrs. Weidel replied that no money had been collected "direct" and that payments on five accounts assigned to the agency were long overdue and the sum of \$50.48 was due the dairy as its share of the collections.

On October 13, 1948, the agency sent a check to the dairy in the sum of \$48.36, purporting to be the Weidel's share of "all the collections". In this connection, defendant Cossey admitted that according to his ledger, McManners (one of the debtors) paid the agency on July 9, 1947, but that the agency did not pay the dairy its share until August 10, 1948, and that Parks, another debtor, had paid the agency on August 1, 1947, but that remittance was not made to the client until August 10, 1948. He further testified that from March 17 to August 5, 1947, the agency had collected on a number of accounts and the share due the dairy was \$108.04 but that the agency had only sent the client \$29.72.

Testimony was adduced concerning three other transactions of a similar nature to those set out and described in the foregoing counts, but not charged therein as overt acts.

[1] The prosecution in the case before us is based upon a violation of section

182 of the Penal Code, which defines the offense known as criminal conspiracy and prescribes the punishment therefor. The offense, as therein designated, may be to do a number of things which are specifically set forth in subdivisions 1, 2, 3, 4 and 5 of the section, and, apparently, in the instant case the prosecution was under subdivision 1, which is a conspiracy (to commit any crime). The gist of the charge is conspiracy and all of the objects of such a conspiracy may be the subject of one charge. As was said in *People v. Gilbert*, 26 Cal.App.2d 1, 7, 78 P.2d 770, 774: "The trend of judicial decisions in this state is to the effect that to do all of the things enumerated in the different subdivisions of section 182 of the Penal Code amounts to a single offense only. *People v. Johnson*, 22 Cal.App. [362], 364, 134 P. 339. The language of that section is inclusive and elastic enough to permit the framing of an indictment charging conspiracy to do or commit any or all of the illegal acts referred to therein. *People v. MacPhee*, 26 Cal.App. 218, 220, 146 P. 522."

[2] The conspiracy, that is to say, the unlawful agreement or combination, is one offense, no matter how diverse its objects. *People v. Yant*, 26 Cal.App.2d 725, 731, 80 P.2d 506.

In 15 C.J.S., Conspiracy, § 47, page 1073, it is stated that the gist of the offense of conspiracy is the conspiracy, "which is single, although the object is to commit several crimes".

In *Braverman v. United States*, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23, one of the questions for decision was whether a conviction upon the several counts of an indictment, each charging conspiracy to violate a different provision of the internal revenue laws, where the jury's verdict was supported by evidence of but a single conspiracy, would sustain a sentence of more than two years imprisonment, the maximum penalty of a single violation of the conspiracy statute. It was there held: "When a single agreement to commit one or more substantive crimes is evidenced by an overt act [as the statute requires], the precise nature and extent of conspiracy must be

determined by reference to the agreement which embraces and defines its objects, and whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the 'conspiracy' which the statute punishes, and one agreement cannot be taken to be several agreements and hence several conspiracies, because it envisages the violation of several statutes rather than one."

[3,4] The question before us is not whether several conspiracies are in fact charged in the indictment but rather whether the evidence submitted to the jury proved more than one conspiracy. A careful perusal of the record in this case contained in a reporter's transcript of over 2,600 pages, impels us to conclude that there is sufficient, substantial evidence in the record to show a conspiracy on the part of defendants Cossey and Burke to operate the Southern California Collection Company in such a manner as to violate the provisions of Section 182 of the Penal Code. The record shows the commission of various acts by these two defendants which undoubtedly were misappropriations of the moneys collected by them for their clients. If we assume, as indeed we must, that the defendants could be charged with a separate, unlawful agreement or conspiracy with respect to each act upon which they made collections, it is still essential that the prosecution prove such separate and distinct agreements with respect to each account so collected. As noted, all of the counts contained identical language as to the section of the code alleged to have been violated and as to the time within which the offenses were alleged to have been committed. The evidence shows that each account mentioned was handled by the defendants in a different manner. In some instances the payments of moneys received were made in installments for reasons which are unexplained; in others, the amounts due from the agency to its clients were not paid until after the grand jury indictment, and in still others, the amounts due from the agency to its clients were never paid. In one instance, referring particularly to count five, the evidence shows

a deliberate intent to withhold and appropriate moneys theretofore collected by the defendants. The general course of conduct pursued by the defendants was to offer various excuses of their failure to promptly remit to their clients the moneys due them.

[5] The bank statements reflect a misappropriation by the agency of moneys received which were required by law to be kept in a trust account for payment to clients of the agency. These and many other circumstances shown by the record indicate clearly that there was an agreement by the two defendants Cossey and Burke to operate the agency in violation of sections 182 and 484 of the Penal Code. The evidence as to count five is amply sufficient to support a conviction of a conspiracy to violate these code sections, and while the evidence as to some of the other counts may not be sufficient to establish separate conspiracies, at least one conspiracy, with several different objects, was proved.

Defendant Harris was convicted of the offense charged in the third count of the indictment, but we cannot find substantial, credible evidence in the record to show that he was a party to a conspiracy with reference to the act described in the charge.

[6,7] It is contended that the superior court had no jurisdiction over the offenses charged in the indictment because the conspiracies charged were conspiracies to commit a misdemeanor. This argument is without merit as the punishment prescribed for the commission of any of the acts described in section 182 of the Penal Code other than felonies are punishable by imprisonment in the county jail or in the state prison. The superior court possesses jurisdiction to try the defendants for conspiracy to commit the crime of petty theft. *People v. Van*, 30 Cal.App.2d 663, 665, 666, 87 P. 2d 57. Furthermore, section 182 of the Penal Code, as amended in 1943, specifically provides that all cases of conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect such conspiracy shall be done.

[8] It is next urged that the court erred in permitting the prosecuting attorney to exhibit to the jury large, legible charts upon which were written out the transactions contained in the ten counts of the indictment. These charts were used by the prosecuting attorney in the cross-examination of the defendant Cossey. They were not evidence in the case and were used much as diagrams made on a blackboard are frequently used to illustrate the testimony of witnesses. We see no error in this procedure. *Haase v. Central Union High School Dist.*, 27 Cal.App.2d 319, 322, 325, 80 P.2d 1044.

[9] It is next urged that the court erred in admitting testimony concerning similar offenses. This contention is likewise without merit, as the transactions referred to in the testimony in that connection were similar to the other counts and admissible to show intent, scheme, plan or system. *People v. Henderson*, 79 Cal.App.2d 94, 119, 179 P.2d 406. "

[10] Defendants argue that error was committed in denying their motion to require an election of counts and in this connection cite section 954 of the Penal Code. That section, however, is not applicable where two or more offenses are charged in the indictment or information as authorized by this section or where a series of acts form part of the one and the same transaction. 8 Cal.Jur. 229, 230, Sec. 300.

[11] The defendants complain that the district attorney committed prejudicial misconduct in that the prosecuting attorney referred to a bank account which defendant Cossey at one time had and that the signature card bore the name of his second wife. Also, that after the divorce, her name was removed from the card. The defense attorney did not cite the statement as misconduct, nor did he call for an admonition to the jury. Hence, the matter should not be considered on appeal. *People v. Dye*, 81 Cal.App.2d 952, 960, 185 P.2d 624. At most, it was an irrelevancy and in no wise prejudicial. Art. VI, Sec. 4½, Calif. Const.

[12] The prosecuting attorney referred to interviews with defendant Burke prior



to the indictment and compared his compensation with that of Burke. The prosecutor also commented on Cossey's financial position. No assignment of misconduct was made nor request for admonition to the jury and no prejudicial error resulted.

[13] Complaint is also made of error in the giving of instructions. The first instruction complained of was to the effect that the jury might consider evidence of similar offenses. Under the pleadings in the case, the instruction was proper as all counts were for conspiracy to commit theft and the evidence offered was of transactions similar in nature to those alleged in the indictment.

[14] Defendants find fault with the court's instruction respecting the law of embezzlement, in effect quoting section 511 of the Penal Code. The complaint is that the instruction was not applicable because the defendants were not charged with embezzlement of the property of the debtor. Penal Code section 484 has consolidated the various types of theft, including embezzlement, under one cognomen.

[15] The record indicates that the prosecution should have drawn the indictment herein so as to charge one conspiracy to commit all of the acts charged in the various counts of the indictment. 15 C.J.S., Conspiracy, § 47, p. 1074; *People v. Gilbert*, 6 Cal.App.2d 560, 45 P.2d 240. However, this court is authorized to reverse, affirm or modify the orders appealed from and may reduce the degree of the offense or the punishment imposed. Pen.Code, Sec. 1260.

As was said in *People v. Nasworthy*, 94 Cal.App.2d 85, at page 90, 210 P.2d 83, at page 87: "The evidence is ample to sustain defendants' conviction of a conspiracy to commit a crime, and the only remedy to which defendants are entitled as far as the conspiracy is concerned is that they should be dealt with as having been convicted of but one conspiracy, instead of two."

In *People v. Scott*, 24 Cal.2d 774, 783, 151 P.2d 517, where a defendant had been convicted of three counts of rape, it was determined on appeal that all of his acts con-

stituted but one offense and the judgment was modified to provide for punishment of but one offense.

[16] In the instant case, we deem it appropriate under the authority of Penal Code Section 1260 to modify the judgment herein to adjudge the defendant Cossey to have been found guilty of the crime of conspiracy and to be punished by imprisonment in the State's prison as prescribed by law. *People v. Kynette*, 15 Cal.2d 731, 762, 104 P.2d 794.

[17] A notice of motion to dismiss the appeal herein as to defendant Cossey has been filed by the Attorney General. The motion is based on affidavits in which it is stated that Cossey is now in Canada; that he refuses to return to this state and is a fugitive from justice. The argument is that this court has power to dismiss an appeal where the defendant is not subject to the jurisdiction of the court. It is no doubt true that where a defendant escapes from custody and is a fugitive, a dismissal is proper. *People v. Redinger*, 55 Cal. 290, 36 Am.Rep. 32; *People v. Clark*, 198 Cal. 453, 245 P. 1112; *People v. Fuhr*, 198 Cal. 593, 246 P. 1116; *People v. Clark*, 201 Cal. 474, 259 P. 47. But the custody may be actual or constructive. *People v. Redinger*, supra. In the instant case the defendant was released on \$25,000 bail pending the decision herein on appeal. He need not appear personally in this court. Pen.Code, Sec. 1255. There is no showing that proceedings have been commenced to increase the amount of bail, declare its forfeiture or attack the sufficiency thereof. In the absence of such a showing, the defendant Cossey is in constructive custody in the instant case.

The motion to dismiss as to defendant Cossey is denied. The judgment is modified to read "Whereas, the said Ralph Douglas Cossey, also-known as Douglas R. Cossey, has been found guilty of the crime of conspiracy to commit theft, a violation of sections 182 and 484 of the Penal Code of the State of California. It is therefore ordered, adjudged and decreed that the said Ralph Douglas Cossey, also known as Douglas R. Cossey, be punished by im-

prisonment in the state prison of the State of California at San Quentin for the term prescribed by law." As so modified, the judgment and order denying a new trial as to defendant Ralph Douglas Cossey, also known as Douglas R. Cossey, are affirmed.

No judgment has been entered as against defendant Gerald F. Burke, as he was granted probation. Since we have held that the evidence supports his conviction of but one offense of conspiracy, the order denying his motion for a new trial is affirmed.

The order denying the motion for a new trial as to defendant John H. Harris is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.



97 Cal.App.2d 35

ORCHARD et al. v. CECIL F. WHITE RANCHES, Inc. et al.

CECIL F. WHITE RANCHES, Inc. v. ORCHARD et al.

Civ. No. 4023.

District Court of Appeal  
Fourth District, California.

April 18, 1950.

Rehearing Denied May 2, 1950.

Action by F. Robert Orchard and another against Cecil F. White Ranches, Inc., a California corporation, and others for declaratory and injunctive relief as to percolating ground waters. The Cecil F. White Ranches, Inc., filed a counterclaim. The Superior Court, Kings County, Clark Clement, J., adjudged that plaintiffs and defendants had correlative rights to use underground percolating waters located in McClure Valley and enjoined defendant from taking from underground percolating waters water in excess of a stated amount and reserved jurisdiction to modify its judgment, as to use of underground per-

colating waters on respective lands overlying them in McClure Valley, and both parties appealed. The District Court of Appeal, Mussell, J., held that evidence sustained the trial court's findings but trial court should have retained jurisdiction to modify its judgment and orders as to use of ground water both by overlying owners and those with prescriptive rights to take water for use on nonoverlying lands and modified judgment to so read.

Judgment affirmed as modified.

#### 1. Trial ⇐375

In action to determine respective rights of landowners to percolating waters information obtained by trial court from inspection and view of premises was itself evidence and could be used alone or with other evidence to support court's findings as to parties respective water rights.

#### 2. Waters and water courses ⇐107(3)

In action to determine rights of landowners to underground percolating waters of a basin and to restrain defendants from pumping said underground waters and transporting same to nonoverlying land, trial court having found that a barrier existed in Dagany Gap, conclusion reached that defendant's lands in Kettleman Plains were distant lands to and did not overlie the underground percolating waters in McClure Valley and that underground percolating waters in Kettleman Plains and those percolating in McClure Valley were distinct, separate bodies of underground percolating water was not error.

#### 3. Waters and water courses ⇐101

An owner of land within a basin has right to take water from ground underneath for use on his land within basin or watershed.

#### 4. Waters and water courses ⇐101

Ordinarily, an owner of land within a basin does not have right to take water out of watershed for any purpose if such taking will deprive of water any lands within basin.

#### 5. Waters and water courses ⇐117

An owner or any other person having a legal right to surface or ground water may take only such amount as he reasonably needs for beneficial purposes.

**6. Waters and water courses** ⇨101

As between overlying owners of land in a basin, rights are correlative and are referred to as belonging to all in common and each may use only his reasonable share when water is insufficient to meet needs of all.

**7. Waters and water courses** ⇨101, 107(2), 148

Prescriptive rights are not acquired by taking of surplus or excess water and an appropriation of such water for beneficial purposes may not be enjoined.

**8. Waters and water courses** ⇨107(3)

In action to determine rights of landowners in and to underground percolating waters of a basin and to restrain defendants from pumping underground waters and transporting same to nonoverlying land, evidence sustained finding that during five years next preceding filing of action defendant and its predecessors in interest continued to pump a maximum of 11,040 acre feet at a maximum rate of 7600 gallons per minute water from underground percolating waters in basin and that defendants had a prescriptive right to take and use water not in excess of that amount outside of basin.

**9. Waters and water courses** ⇨107(3)

Where trial court perpetually enjoined defendants from taking underground percolating waters from basin in excess of amount acquired by prescriptive right, and reserved jurisdiction for purpose of modifying its judgment on a proper showing of necessity to extent of prorating between parties their use of underground percolating waters of valley under respective overlying lands, reservation of jurisdiction was too narrow in scope and judgment would be modified so as to retain jurisdiction to modify judgment and orders as to use of ground water both by overlying owners and those with prescriptive right to take water for use on nonoverlying lands.

**MUSSELL, Justice.**

Action for declaratory and injunctive relief as to percolating ground water.

McClure Valley, situated in the southwest corner of Kings and the northwest corner of Kern Counties, embraces a water shed of approximately 93,000 acres or 150 square miles. It is surrounded by ranges and hills, except for an opening in the Pyramid Hills at the southeasterly end of the valley, which opening is known as "Dagany Gap". It is approximately three-fourths of a mile wide and connects McClure Valley and the Kettleman Plains to the east and north.

The elevation of the land in the valley drops from the north and west in the general direction of Dagany Gap, thence on to Kettleman Plains and on down to the Tulare Lake Area in the San Joaquin Valley, a distance of about ten miles. The elevation of the floor of McClure Valley west of Dagany Gap is between 600 and 700 feet. It is 550 feet in the gap, between 400 and 500 feet in Kettleman Plains and 181 feet at Tulare Lake.

Plaintiffs own lands in the McClure Valley beginning about a mile and one-half west of Dagany Gap and extending north and west. The defendants' lands adjoin those of plaintiffs west of the gap in McClure Valley and extend easterly through Dagany Gap and thence north and south on Kettleman Plains. At the time of the trial, the holdings of plaintiffs exceeded 4,600 acres and those of defendants were approximated 1,000 acres in McClure Valley, 320 acres directly in Dagany Gap and 4,000 acres on the Kettleman Plains.

On July 14, 1947, plaintiffs filed the action herein for declaratory relief, alleging, among other things, that all of their lands overlie an enclosed basin of percolating water; that three sides of the basin are surrounded by mountains, which constitute the drainage area which supplies the water to the ground waters of said basin; that across the fourth side, or end of the basin, there is a dike which impounds the waters percolating in said basin; that the defendants, on their land in McClure Valley, have a series of wells by means of which they pump from the percolating waters of said

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Harris, Willey & Harris, Ronald B. Harris, Fresno, for appellants.

Sidney J. W. Sharp; Herbert M. Braden and Lawrence W. Clawson, Hanford, for respondents.



basin and transport the water so pumped through a conduit over said dike for the irrigation of lands outside of said basin and which do not overlie the percolating waters of the basin. It is alleged that the plaintiffs are pumping water from the pool for irrigation of their overlying lands and there exists a controversy as to the extent of the right of defendants to pump water from the underlying basin of percolating waters and transport the same for use on lands not overlying said pool. It is further alleged that plaintiffs are being deprived of their lawful use of said ground waters by the acts of the defendants and a decree is sought determining the rights of the parties in and to the underground percolating waters of the basin and for a permanent injunction restraining the defendants from pumping said underground waters and transporting the same to nonoverlying land.

A motion was made by plaintiffs for a reference of the issues involved to the Department of Public Works, as provided in Division 2, Part 3 of the Water Code of California. The motion was denied. The action was tried by the court without a jury and from the judgment entered, both parties appeal.

The defendant Cecil F. White Ranches, Inc. was adjudged to have a prescriptive right to take from the underground percolating waters in McClure Valley not in excess of the maximum rate of 7,600 gallons per minute nor in excess of 11,040 acre feet per fiscal year and an injunction was issued against the defendants prohibiting them from taking of water in excess of the amounts above set forth and also required defendants to install and maintain measuring devices and to keep records, make reports to plaintiffs and to permit inspection of the measuring devices. It was further adjudged that plaintiffs and defendants had correlative rights to use the underground percolating waters located in McClure Valley and the court reserved jurisdiction to modify its judgment as to the use of the underground percolating waters on the respective lands overlying them in McClure Valley.

From the judgment so entered on May 20, 1949, plaintiffs appeal from the award of a

prescriptive right of defendants to take annually 11,040 acre feet of water at a rate not in excess of 7,600 gallons per minute. Defendants appeal from that part of the judgment describing certain lands as not overlying the underground percolating waters and from the judgment granting an injunction providing for the installing of measuring devices, the furnishing of records and reports and the reservation of jurisdiction of the matter by the court.

The trial court found, among other things:

Finding (2): There is a body of underground percolating waters in a basin of McClure Valley, State of California, with a natural outlet or spillway in the Southeast corner of said valley, which said outlet is about three-quarters ( $\frac{3}{4}$ ) of a mile wide connecting and leading into what is commonly known as Kettleman Plains.

Finding (4): That the material and geological structural formation within Dagany Gap are sufficiently resistant to the movement of underground percolating waters so as to separate the field of underground percolating waters within McClure Valley from the field of underground percolating waters in Kettleman Plains and Kettleman Valley lying East of McClure Valley and East of Dagany Gap.

Finding (6): That the natural flow of the surface water and movement of the underground percolating waters in McClure Valley is from the North and West in a Southeasterly direction and that any surface water or underground percolating waters in excess of the amount necessary to maintain the underground percolating waters in McClure Valley escape through the natural outlet of said valley, Dagany Gap, into the watershed of Kettelman Plains.

Finding (10): That defendant and its predecessors in interest since 1937 have maintained wells, which it has doubled in number since five years prior to the filing of this action, in McClure Valley and have used these wells to pump water from the underground percolating waters in McClure Valley and have transported said waters for use on distant lands in Kettleman Valley,

which lands do not overlie the underground percolating waters in McClure Valley.

Finding (11): That for the year next preceding July 13, 1942, which date is five years before the filing of this action, and for years prior thereto, defendants' predecessors in interest pumped a maximum of 11,040 acre feet at a maximum rate of 7600 gallons per minute water from the underground percolating waters in McClure Valley and transported the same and beneficially used the same on lands in the Kettleman Plains distant from and not overlying the underground percolating water field in McClure Valley.

Finding (12): That during the five years next preceding the filing of this action the defendant and its predecessors in interest continued to so pump and so use said water as aforesaid.

Finding (13): That the waters so pumped and so used by the defendant and its predecessors in interest were at all times done so with the full knowledge of plaintiffs and that such taking and use was open, notorious, continuous, uninterrupted, adverse and under claim of right.

Finding (15): That plaintiffs and defendants have a correlative right to the use of the underground percolating waters in McClure Valley which underlie their respective lands on their respective overlying lands, which lands are those hereinbefore described as overlying said underground percolating waters.

Finding (16): That ever since the installation of irrigation pumps in McClure Valley there has been a constant lowering of the ground water table in McClure Valley.

It is first contended by the defendants that there is no substantial evidence to support the court's finding as to the existence of a barrier which separates the underground percolating waters of McClure Valley and Kettleman Plains and that the findings of fact and judgment in that connection are based on surmise, conjecture and speculation and not on substantial evidence.

There are many pages of testimony of Glenn Charles Ferguson, geologist and paleologist, on behalf of plaintiff, and two defense witnesses, Carl Holley, a civil En-

gineer and hydrologist, and Willard Cutler, Jr., geologist and petroleum engineer, as to whether a barrier exists as found by the court.

Mr. Ferguson testified, among other things, that there is a fault (with a slippage of about 800 feet) lying immediately west of Dagany Gap. It was the opinion of Ferguson that this fault, together with the strata of sedimentary rocks, constituted a barrier and that this barrier was overlaid in the gap by 40 to 50 feet of alluvium. In 1947 Ferguson drilled two core holes in Dagany Gap and made studies of the formations encountered. He made a geological study of McClure Valley and testified that it is a structural basin or a syncline, being separated from the area to the east by the Pyramid Hills anticline and also by a large thrust fault bordering the western portion of the Pyramid Hills anticline; that in his opinion, based upon his studies, there is a barrier near Dagany Gap which prevents the ready flow of underground water from the McClure Valley easterly through Dagany Gap, with the exception of possibly 40 or 50 feet of alluvial in the gap itself.

Mr. Holley testified that he had bored test holes in the gap to a maximum depth of 110 feet and that to the depth of the test holes, there was no barrier; that the water percolated from one valley to the other. He admitted that there was material between the valley and Kettleman Plains which slowed up the velocity of water and that if there were not some material in the Dagany Gap which was sufficiently resistant to the movement of water, there would be no water in McClure Valley which could be pumped. He testified that a large volume of water had been pumped out of the McClure Valley and that there has undoubtedly been a material drawing down of the hydrostatic pressure during the last 10 or 11 years. He testified further that he had noticed the existence of alkali salts at the lower end of McClure Valley in the Dagany Gap and also in the southeasterly part of that basin and upon being asked to account for the presence of the alkali or salts, stated that they were due to high ground water. This indicated, to some extent at least, that wat-

er was caused to rise in that locality by the obstruction in the Dagany Gap.

There was testimony by Mr. White that he drilled two wells in Section 3, which were east of the fault line and did not complete them because the formation did not "look good". He also drilled two wells for experimental purposes in Dagany Gap in Section 2, which were abandoned because of their small yield of water.

Mr. White, who was president of the defendant company, also testified that when he took possession of his property in McClure Valley in November of 1943, there were nine wells on the property west of Dagany Gap. These wells were operated 24 hours a day, 12 months out of the year, and the water therefrom was conducted in an open ditch to defendants' land for irrigation purposes.

Robert Orchard, one of the plaintiffs, who had lived in the vicinity for 54 years, testified as to the history of wells in McClure Valley drilled at various times since 1917 and from the water levels given by him, it appeared that there was a material dropping of the water table between 1936 and 1946.

It was stipulated by the parties that the trial court might view the premises, and in the presence of counsel for both sides, Dagany Gap, the formations surrounding it, McClure Valley and the various properties and wells involved here were shown to and inspected by the court.

[1] The question of whether there was a barrier in Dagany Gap such as to impede the percolation of water from McClure Valley through to Kettleman Plains was a question of fact for the trial court and we cannot say that there was no substantial evidence to support the court's finding with reference thereto. *Dillard v. McKnight*, 34 Cal.2d 209, 209 P.2d 387. Furthermore, the trial court visited the premises and made a complete inspection thereof. The information obtained by him from such inspection and view of the premises is itself evidence and may be used alone or with other evidence to support the court's finding. *Noble v. Kertz & Sons Feed & Fuel Co.*, 72 Cal. App.2d 153, 159, 164 P.2d 257.

Defendants admit that findings numbered (2) and (6), heretofore referred to, are supported by the evidence, but contend that in view of these findings, the court was in error in its fourth and fifth conclusions of law, wherein it was held that the defendants' lands are distant lands to and do not overlie the underground percolating waters in McClure Valley and wherein the court held that the underground waters percolating in Kettleman Plains and those percolating in McClure Valley are distinct, separate bodies of underground percolating waters. The evidence is that Kettleman Plains and McClure Valley are two separate watersheds. This was admitted by Mr. Holley, one of defendants' principal witnesses. It is apparent that there is a spillway through the mountain pass which separates these watersheds and through which waters in excess of the capacity of an upper reservoir discharge into a lower reservoir.

[2] The trial court having found that a barrier existed in Dagany Gap, we see no error in the conclusion reached that the defendants' lands in Kettleman Plains are distant lands to and do not overlie the underground percolating waters in McClure Valley, and in the court's conclusion that the underground percolating waters in Kettleman Plains and those percolating in McClure Valley are distinct, separate bodies of underground percolating water.

[3-5] An owner of land within the McClure basin has the right to take water from the ground underneath for use on his land within the basin or watershed. *City of Pasadena v. City of Alhambra*, 33 Cal.2d 908, 925, 207 P.2d 17. Ordinarily, such an owner does not have the right to take water out of the watershed for any purpose if such taking will deprive of water any lands within the basin. *City of San Bernardino v. City of Riverside*, 186 Cal. 7, 15, 198 P. 784. An owner or any other person having a legal right to surface or ground water may take only such amount as he reasonably needs for beneficial purposes. *Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St.Rep. 35; *Peabody v. City of Vallejo*, 2 Cal.2d 351, 40 P.2d 486; *Calif.Const., Art. XIV, Sec. 3.*



[6] As between overlying owners, the rights are correlative and are referred to as belonging to all in common; each may use only his reasonable share when water is insufficient to meet the needs of all. *City of Pasadena v. City of Alhambra*, supra, 33 Cal.2d at page 926, 207 P.2d at page 28. In that case it is also held, 33 Cal.2d at page 925, 207 P.2d at page 28, that: "Public interest requires that there be the greatest number of beneficial uses which the supply can yield, and water may be appropriated for beneficial uses subject to the rights of those who have a lawful priority. *Peabody v. City of Vallejo*, 2 Cal.2d 351, 368, 40 P.2d 486. Any water not needed for the reasonable beneficial uses of those having prior rights is excess or surplus water. In California surplus water may rightfully be appropriated on privately owned land for nonoverlying uses, such as devotion to a public use or exportation beyond the basin or watershed. *Peabody v. City of Vallejo*, 2 Cal.2d 351, 368-369, 40 P.2d 486; *City of San Bernardino v. City of Riverside*, 186 Cal. 7, 29, 30, 198 P. 784; *Burr v. Maclay Rancho Water Co.*, 154 Cal. 428, 436, 98 P. 260; *Katz v. Walkinshaw*, 141 Cal. 116, 135, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St.Rep. 35; see 26 Cal.Jur. 32 et seq., 273-274."

[7] In the case at bar, the evidence is that the defendants are exporting a large amount of water out of the McClure watershed and basin for use on lands east of the Dagany Gap and it is necessary to determine whether defendants have a right by prescription or appropriation so to do. Prescriptive rights are not acquired by the taking of surplus or excess water (any water not needed for the reasonable beneficial uses of those having prior rights) and an appropriation of such water for beneficial purposes may not be enjoined. *City of Pasadena v. City of Alhambra*, supra.

The evidence before us is that the quantity of water withdrawn from the McClure basin exceeds the average amount contributed thereto by rainfall and the level of underground water is being continuously lowered to such an extent that the underground store will be gradually depleted and

eventually exhausted. The taking of water from McClure Valley for use on nonoverlying lands in excess of the amount required to maintain a safe level of ground water may be enjoined unless the defendants have gained a prescriptive or appropriative right thereto. The rights of plaintiffs to water thus taken may be and they were by the court's finding lost by adverse user which was actual, open and notorious, hostile and adverse to plaintiffs, continuous and uninterrupted for the statutory period of five years under the claim of right.

The trial court found that for the year next preceding July 13, 1942, which date is five years before the filing of this action, and for years prior thereto, defendants' predecessors in interest pumped a maximum of 11,040 acre feet at a maximum rate of 7600 gallons per minute water from the underground percolating waters in McClure Valley and transported the same and beneficially used the same on lands in the Kettleman Plains distant from and not overlying the underground percolating water field in McClure Valley; that during the five years next preceding the filing of this action the defendant and its predecessors in interest continued to so pump and so use said water as aforesaid and concluded that the defendants have a prescriptive right to take and use water not in excess of this amount outside of McClure Valley.

[8] These findings are supported by evidence that by 1937 defendants' predecessors in interest had drilled, or afterwards acquired, nine wells in the McClure Valley and that from that time on they ran all nine of the wells continuously twelve months out of the year, except for such period of time as was necessary to repair the pumps; that the water produced from these wells was run through a common ditch out through Dagany Gap and on to Kettleman Plains, where it was used to irrigate lands; that in 1944 defendants constructed a pipe line 24 inches in diameter and approximately two miles long to carry the water east through Dagany Gap and thus avoid the evaporation of approximately forty per cent incident to transportation of the water in an open ditch. There was testimony that when this pipe line was first built and used it did

not carry all of the water produced by the nine original wells; that the guaranteed capacity of the pipe line was 7600 gallons per minute or 11,048 acre feet per year. The inference which the trial court drew from this evidence is that the defendants had a prescriptive right to water to the capacity of the pipe line. There was a conflict in the evidence as to the amount of water actually produced by the nine wells and transported through the gap and the trial court, having resolved the conflict in favor of the defendants, its finding in this respect will not be here disturbed.

The trial court, in its judgment, perpetually enjoined and restrained the defendants from taking underground percolating waters in McClure Valley in excess of 11,040 acre feet per fiscal year and in excess of the maximum rate of 7600 gallons per minute and reserved jurisdiction of the action for the purpose of modifying its judgment upon a proper showing of the necessity thereof to the extent of prorating between the parties their use of the underground percolating waters of McClure Valley on their respective lands overlying said waters. We conclude that the reservation of jurisdiction was too narrow in its scope. In *City of Pasadena v. City of Alhambra*, supra, the controversy concerned the rights of overlying land owners and others taking ground waters. The principal takers of water were public utility corporations which were exporting water or used it within the basin or for municipal purposes or for sale to the public and the appellant, who exported approximately three-fourths of the water produced by it to customers located outside of the area. The evidence showed that there had been an actual adverse user of water taken from the area and that there was an invasion, to some extent at least, of the rights of both overlying owners and appropriators commencing when the overdraft first occurred. The court held that the taking of water in excess of the safe yield, whether by subsequent appropriators or by increased use by prior appropriators, was wrongful and was an injury to the then existing owners of water rights, because the overdraft, from its very beginning, operated progressively to reduce the total available

supply. And in that case although no owner was immediately prevented from taking the water he needed, the evidence demonstrated that a continuation of the overdraft would eventually result in such a depletion of the supply stored in the underground basin that it would become inadequate. It was further held that prescriptive rights were established by appropriations made in the area subsequent to the commencement of the overdraft; that such rights were acquired against both overlying owners or prior appropriators; that the overlying owners and prior appropriators also obtained, or preserved, rights by reason of the water which they pumped, and that the trial court properly concluded that the production of water in the unit should be limited by a proportionate reduction in the amount which each party had taken throughout the statutory period.

[9] In the instant case there are no findings as to the amount of water which may be taken from McClure Valley without causing an overdraft of ground water in the basin. Plaintiffs are not immediately deprived of water needed, but a continuation of the overdraft may in the future result in exhaustion of the supply. As in the *Pasadena v. Alhambra* case, supra, the court should have retained jurisdiction to modify its judgment and orders as to the use of the ground water, both by overlying owners and those with prescriptive rights to take water for use on nonoverlying lands. Paragraph six of the judgment is, therefore, modified to read as follows: "That this court reserves jurisdiction of this action for the purpose of modifying its judgment and orders, after notice and hearing, as the case may require, to the extent of prorating between the parties hereto their use of the underground percolating waters of McClure Valley, commonly known as Sunflower Valley, on their respective lands overlying said waters and the use of such underground waters for purposes of exportation to nonoverlying lands."

As so modified, the judgment is affirmed

BARNARD, P. J., and GRIFFIN, J.,  
concur.

**FRISCH v. FRISCH et al.**  
Civ. 4021.

District Court of Appeal, Fourth District,  
California.

April 25, 1950.

Rehearing Denied May 17, 1950.

Hearing Denied June 22, 1950.

Robert C. Frisch sued Gottlieb E. Frisch and Marie E. Frisch to establish the existence of a partnership in land purchased by defendants, and in personalty used in farming, dairy and stock raising business conducted thereon, together with mountain property, and for a dissolution of partnership, an accounting, and a sale or partition of partnership property. The Superior Court of Fresno County, Arthur C. Shepard, J., rendered a judgment adverse to plaintiff and plaintiff appealed. The District Court of Appeal, Mussell, J., held that a partnership was not established under the evidence.

Judgment affirmed.

**1. Partnership** ⚭20

Fact that plaintiff was named as a grantee in deed when plaintiff's parents purchased land, did not create a partnership in the land.

**2. Partnership** ⚭53

Evidence did not establish that plaintiff was a partner in land purchased by plaintiff's parents, and in personalty used in farming, dairy and stock raising business conducted thereon, together with mountain property.

**3. Partnership** ⚭44

In action for dissolution of a partnership and for an accounting and a sale or partition of partnership property, plaintiff had burden of proving existence of a partnership by competent evidence.

**4. Partnership** ⚭218(3)

Whether a partnership existed was for determination of trial court.

**5. Appeal and error** ⚭1010(1)

District Court of Appeal would not interfere with judgment and findings of trial court where there was substantial evidence to support the findings and judgments.

Ralph E. Wallace, Fresno, for appellant.  
Martin C. Thuesen, Fresno, for respondents.

MUSSELL, Justice.

Action for dissolution of a partnership and for an accounting.

Plaintiff brought this action against his father and mother in an effort to establish the existence of a partnership in 40 acres of land purchased by his parents and in the personal property used in farming, dairy and stock raising business conducted thereon, together with 640 acres of mountain property. A dissolution of the alleged partnership, an accounting, and a sale or partition of the partnership property was included in the relief sought.

Trial by the court resulted in a judgment for defendants and plaintiff appeals on the sole ground that the evidence is not sufficient to support the findings and judgment.

In 1938 plaintiff was living with his parents on a three acre tract near Fresno. In January of that year defendants traded this property for 40 acres on the southeast corner of Barstow and Leonard near Clovis. Title to the 40 acres was taken in the names of defendants. The family (including plaintiff, then fifteen years old, three brothers and a sister) moved to the new ranch where they lived together from 1938 to 1945. During this period the entire family worked to develop the property and all money which was realized from it, as well as the earnings of all members of the family, was "plowed right back into it". Plaintiff, as well as other members of the family, received board, clothing, spending money and medical and dental care.

Shortly after the acquisition of the 40 acre ranch, plaintiff's father borrowed \$2700 from the Federal Land Bank and with it purchased cattle to stock the premises. In March of 1945, defendants needed additional range for their stock and purchased the 640 acres for that purpose. The purchase price was \$15,000, and in order to obtain it, defendants borrowed \$6,000 on the 40 acres, \$3,900 on the stock and assum-



ed a mortgage on the 640 acres. Title to the range land was taken in the names of G. E. Frisch, Marie E. Frisch and Robert Frisch, all as joint tenants. The mortgaged stock was sold and the mortgage paid with the proceeds.

Plaintiff was married in 1945 and for a few months lived on the ranch and received wages for his work. In 1946 plaintiff and his brother rented the 40 acre place for one year on a fifty-fifty basis. This arrangement was not satisfactory and plaintiff then moved onto the range land and attempted to operate it on a seventy-five per cent basis. In May, 1947, plaintiff advised his father to take over the place and stated that he had no further interest in it and could not make a living there. Plaintiff then left the place and commenced this action in January, 1948.

[1, 2] Plaintiff testified that there was an oral agreement of partnership for the acquisition and operation of the two ranch properties but there is ample evidence to sustain the court's finding that no such agreement was entered into by the parties. The 40 acre property was purchased by the defendants out of their own funds. Plaintiff was then about 15 years old. The purchase price of the 640 acres was arranged for by defendants and at that time there was no agreement from which a partnership could be inferred. Plaintiff's agreement to lease the 40 acres was inconsistent with a partnership relation. Plaintiff did not claim an interest in this property and in 1944, admitted that he had no interest in it. Plaintiff's name was placed on the deed to the 640 acres at his request and for the purpose of keeping him out of the Army. The mere fact that plaintiff was named as grantee in the deed did not create a partnership in the property. (7 Cal.Jur., p. 331, Sec. 2.) The trial court found on substantial evidence that plaintiff and defendants hold title to the 640 acre ranch as joint tenants and that this acreage was not partnership property.

Plaintiff relies on certain admissions contained in letters written by his father to obtain plaintiff's deferment as a farmer during 1942. At the most, these letters create a conflict in the evidence which was

resolved in favor of defendants by the trial court.

[3-5] The burden of proving the existence of a copartnership by competent evidence was on the plaintiff. *Milstein v. Sartain*, 56 Cal.App.2d 924, 932, 133 P.2d 836; *Lyon v. MacQuarrie*, 46 Cal.App.2d 119, 124, 115 P.2d 594. And the question of whether a partnership existed was for the determination of the trial court. *Kadota Fig Assn. v. Case-Swayne Co.*, 73 Cal. App.2d 796, 802, 167 P.2d 518. Where, as here, there is substantial evidence to support the trial court's findings and judgment, the appellate courts will not interfere. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



97 Cal.App.2d 60

**KENNEY v. KENNEY.**

Civ. 17383.

District Court of Appeal, Second District,  
Division 2, California.

April 19, 1950.

Rehearing Denied May 8, 1950.

Action by Esther W. Kenney against Earl Benton Kenney. The Superior Court, Los Angeles County, James M. Allen, Judge of the Superior Court of Siskiyou County presiding under designation of the Chief Justice as Chairman of the Judicial Council, entered a judgment dividing the community property equally between the parties and defendant appealed. The District Court of Appeal, Moore, P. J., held that plaintiff, having satisfied from her separate funds an equitable mortgage on community realty, was entitled to a lien thereon, but that husband's interest in oil drilling partnership acquired before marriage and his shares of stock in drilling company acquired by virtue of assignment of partnership's drilling contract continued to be his separate property.

Judgment reversed with instructions.

McComb, J., dissented in part.

**1. Husband and wife** Ⓒ265**Subrogation** Ⓒ3(2)

Wife, having satisfied out of her separate funds an equitable mortgage on community property in favor of the estate of her deceased father, was entitled to be subrogated to all the rights of decedent's estate and was entitled to a lien on the community property which had been subject to the mortgage. Civ.Code, § 2903.

**2. Tenancy in common** Ⓒ19(4)

Where a tenant in common redeems the common property from a mortgage foreclosure, the redemption has the effect of terminating the sale and by subrogation to the lien of the mortgagee, the tenant redeeming acquires an equitable lien upon the interest of his cotenants for their just proportion of the redemption money.

**3. Subrogation** Ⓒ1

In every case of subrogation there must be a debt for which a party or parties other than the subrogee are primarily liable and which in some capacity as an interested party the subrogee discharged for the protection of his own rights.

**4. Subrogation** Ⓒ1

The right of subrogation extends to those who might suffer loss if the obligation is not discharged, and if he has any substantial interest which will be protected by extinguishment of the debt, upon payment thereof, he may hold and enforce it in like manner as the original payee.

**5. Subrogation** Ⓒ31(4)

Where a party has paid off a mortgage at the request of mortgagor without knowledge of a second lien on the same property, he is entitled to be subrogated to the rights of the original mortgagee and to have the original mortgage revived and foreclosed.

**6. Husband and wife** Ⓒ265

Where wife from her separate funds satisfied an equitable mortgage on community realty and thereby became entitled to a lien on such realty, such lien should be satisfied out of community assets, or if paid out of separate property of husband, his obligation should be to pay only one-

half of the amount for which wife was entitled to a lien. Civ.Code, § 2903.

**7. Husband and wife** Ⓒ265

Husband has the management of community property, but if he fails properly to manage it and subjects community property to be jeopardized by not paying encumbrances against it, wife will be protected if she advances her separate funds in discharge of such indebtedness.

**8. Subrogation** Ⓒ31(4)

Where wife from her separate funds paid a past-due debt of the community secured by an equitable mortgage on community realty, husband could not defeat her right to be subrogated to the rights of mortgagee on the ground that under Code of Civil Procedure the only form of action that can be brought for recovery of a debt secured by mortgage is a suit to foreclose the mortgage, since wife by paying the debt with her own funds had obviated the one form of action for recovery of a debt secured by mortgage. Civ.Code, § 2903; Code Civ.Proc. § 726.

**9. Husband and wife** Ⓒ248½

Husband's interest in oil drilling partnership acquired before marriage and his shares of stock in drilling company acquired by virtue of assignment of partnership's drilling contract, which property became of value after his marriage as a result of fortuitous event of striking oil and not by virtue of his efforts, continued to be his separate property, though he had invested nothing of value therein before marriage and stock issued to him had been placed in escrow. Civ.Code, § 163.

**10. Husband and wife** Ⓒ248½

Whether property held by a man during coverture is his separate property is determined by the time of its acquisition.

**11. Husband and wife** Ⓒ248½

Property held by a man during coverture, which was his separate property at time of its acquisition, continues to remain so with the exception of such increase thereof as may have been due to the contributions of the community by virtue of capital or industry. Civ.Code, § 163

**12. Husband and wife ⇨257**

Where adjudication of the rights of litigants depends upon a determination of whether the property involved is community, upon concluding its investigation, court will determine the extent to which the revenues of separate property have been used to improve or protect the community estate and where money taken from separate property can be definitely ascertained, there is not such a commingling of funds as will require the court to impress all the property as community property.

**13. Husband and wife ⇨263**

In action involving division of community property between husband and wife, evidence offered to trace income earned by corporate shares, which were husband's separate property, into community property was admissible.

**14. Husband and wife ⇨272(4)**

Where income from husband's separate property is definitely traced into property found to be community in character, judgment dividing community property between husband and wife should make such provision as will protect husband from loss by reason of such expenditures.

Company are community property. Appellant contends that this finding is not supported.

The parties were married June 4, 1923. In June, 1925, they purchased a home on Arnaz street in Los Angeles, to finance which the parties borrowed \$6,000 from Mrs. Kenney's father, Mr. Albert Weible. In 1938 they purchased a new home on Hudson street and used the Arnaz property as a part of the purchase price. This transaction necessitated a transfer of Mr. Weible's lien to the Hudson street home. But instead of the customary note and mortgage, they caused a grant deed to be executed conveying the latter property to Mr. Weible as security for his \$6,000. Six years later Mr. Weible deceased, thereafter followed by his widow. Respondent herein qualified as administratrix with will annexed of the Weible estate.

[1-5] After the estate had been distributed respondent herein on January 10, 1946, petitioned the probate court for instructions alleging that the Hudson street property had stood in the name of her father although it belonged to appellant and respondent and that the title was held by Mr. Weible as "security for a loan of \$6,000 to E. B. Kenney and in the nature of a mortgage." Appellant contends that the award of the lien to respondent was erroneous for the following reasons: (1) husband has the management and control of community property; (2) Kenney's promise to repay the \$6,000 was oral and was therefore barred after two years; (3) no action can be brought upon a debt secured by mortgage except in a suit to foreclose it. Appellant is in error in making such contentions. Respondent having paid the \$6,000 from her separate funds to satisfy the equitable mortgage in favor of the estate of her father she was entitled to be subrogated to all the rights of decedent's estate. Being an heir of decedent and entitled to inherit an interest in his property she had the right to redeem it from the lien at any time after the date it became due and upon having paid the sum of the indebtedness she became subrogated to all the benefits of the lien.

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Dee Holder, Los Angeles, for appellant.

Denis Evarts Bowman and Henry O. Wackerbarth, Los Angeles, Henry O. Wackerbarth, Los Angeles, for respondent.

MOORE, Presiding Justice.

Pursuant to its findings the court below divided equally between the parties all the community property, an undivided one-half interest to each of them. On this appeal from the judgment there are only two issues: (1) respondent having discharged a community debt due the estate of her deceased father in the sum of \$6,000, the judgment awarded her a lien against the property which had been under mortgage to her father. Appellant contends that such part of the judgment is error. (2) The court found that appellant's interest in the oil drilling partnership and in the assets of same and also 125 shares of the capital stock of Union Drilling and Petroleum



Civil Code, sec. 2903. It is the rule that when a tenant in common redeems the common property from a mortgage foreclosure the redemption has the effect of terminating the sale and by subrogation to the lien of the mortgagee the tenant redeeming acquires an equitable lien upon the interests of his cotenants for their just proportion of the redemption money. 23 Cal.Jur., p. 926; *Seale v. Balsdon*, 51 Cal. App. 677, 680, 197 P. 971. In every case of subrogation there must be a debt for which a party or parties other than the subrogees are primarily liable and which in some capacity as an interested party the subrogee discharged for the protection of his own rights. 50 Am.Jur., p. 688, sec. 10. The right of subrogation extends to those who might suffer loss if the obligation is not discharged and if he has any substantial interest which will be protected by the extinguishment of the debt upon payment thereof he may hold and enforce it in like manner as the original payee. 50 Am.Jur. p. 669, sec. 23. Where a party has paid off a mortgage at the request of the mortgagor, without knowledge of a second lien on the same property, he is entitled to be subrogated to the rights of the original mortgagee and to have the original mortgage revived and foreclosed. *Simon Newman Co. v. Fink*, 206 Cal. 143, 146, 273 P. 565. In *Boggs v. Boggs*, 63 Cal.App.2d 576, 147 P.2d 116, the husband owned an apartment house at the time of his marriage to plaintiff. By his will he left plaintiff a life estate in that property. While the property was being administered, the wife paid monthly installments on a trust deed out of estate funds. After distribution she paid the accrued installments from her own funds. She was awarded a lien upon the property as security for the sums already paid and for such additional sums as she might thereafter pay on account of the subsisting lien. Also, she was granted the right of foreclosure in the event the moneys she had advanced were not repaid within a reasonable time. She was not even a comaker of the note and trust deed but was only an accommodation surety for the benefit of her husband. Proceeds of the loan were used for the reconstruction of the apartment building.

She had no substantial interest in the property. It was held proper for equity to subrogate her to the rights and remedies of the encumbrancer by giving her a lien on the land for the amount of the payments she had made.

[6] Neither the findings, conclusions nor judgment specifies from what source appellant should obtain the funds with which to discharge the \$6,000 lien. Inasmuch as the debt is one of the community, the judgment should make clear that the \$6,000 is to be taken from community assets, but if paid out of the separate property of appellant, his obligation should be to pay one-half of the \$6,000.

[7] With reference to appellant's contention that a wife has no power to make contracts concerning the community property, it is to be observed that no woman possessing common sense and ordinary prudence should allow a debt secured by a lien against community property to become in default if she has funds with which to avoid such embarrassment. It is true that the husband has the management of community property but if he fails properly to manage it and subjects a community property to be jeopardized by not paying encumbrances against it his wife will be protected if she ventures to advance her separate funds in the discharge of such indebtedness.

[8] With reference to the contention that no action can be brought upon a debt secured by a mortgage except by a suit to foreclose the mortgage, there is no such situation involved here. The community estate owed \$6,000. This it was in honor bound to pay and the appellant should have paid it some years before respondent sought the directions of the court as to what should be done. She paid the debt with her own funds and thereby obviated the "one form of action for the recovery of any debt \* \* \* secured by mortgage upon real \* \* \* property." Code Civ. Proc. sec. 726.

#### Appellant's Separate Ownership of the Corporate Shares

The court's finding that the assets of the drilling partnership as well as the 125

shares of the capital stock of Union Drilling and Petroleum Company are community property is error. More than a month prior to the marriage of the parties appellant obtained his interest in the partnership which was organized about May 1, 1923. Mr. McCaslin, one of the partners, had an interest in the Invader Oil Company which had an oil lease, the lessee of which insisted that the latter company meet the drilling requirements. At that time appellant joined with McCaslin and three other parties for the purpose of organizing a drilling business. Appellant received one-eighth interest in the partnership and was to receive \$200 a month as complete payment for his services as bookkeeper. On May 1, 1923, the partnership contracted to drill a well for the Invader Oil Company. Their compensation was to be 32½ per cent royalty in the leasehold.

Thereafter the partners incorporated the Union Drilling and Petroleum Company on May 24, 1923, and by virtue of the assignment of the partnership's contract appellant became owner of one-eighth of the 1000 shares issued for the contract.

[9] Respondent contends that the 125 shares in the Union Drilling and Petroleum Company are community property by reason of the fact that appellant had not invested anything of value in it prior to his marriage. What was invested prior to the marriage is not material to a determination of the question. If the title to it or right in it was his prior to June 4, 1923, the stock and all revenues derived therefrom continued to be his separate property. Civil Code, sec. 163; *In re Estate of Gold*, 170 Cal. 621, 151 P. 12; *Pereira v. Pereira*, 156 Cal. 1, 7, 103 P. 488, 23 L.R.A., N.S., 880, 134 Am.St.Rep. 107. That appellant owned an interest in the drilling partnership from the date of its organization on May 1, 1923, is clearly established. They commenced drilling on May 15 and incorporated their business under the same name as the partnership and on May 19 having organized they procured a permit for the issuance of the stock on July 24. One hundred twenty five shares were issued to appellant and by order of the commissioner placed in escrow. While

appellant advanced no money to the Union Drilling Company, he did not encumber his corporate shares. Because they had no ascertainable value at the time of their issuance is not sufficient reason for transmutation into community property. Many a fortune is laid in the "shoe strings" of a bold adventurer which may for years appear hopeless as a commercial enterprise. This has been especially true in the petroleum world. The corporate shares awarded appellant for his interest in the drilling partnership became of value subsequent to his marriage but not by virtue of his efforts. He was paid his salary for a period out of moneys advanced by McCaslin but the transformation of his stock into a security of value was due to the fortuitous event of the drill's penetrating oil-bearing sands.

[10, 11] Whether property held by a man during coverture is separate is determined by the time of its acquisition. If it was separate then, it continues to remain so with the exception of such increase thereof as may have been due to the contributions of the community by virtue of capital or industry. *Palen v. Palen*, 28 Cal.App. 602, 604, 83 P.2d 36; *Pereira v. Pereira*, supra; *In re Estate of Pepper*, 158 Cal. 619, 622, 112 P. 62, 31 L.R.A., N.S., 1092; *Boyd v. Oser*, 23 Cal.2d 613, 621, 145 P.2d 312; *Phelps v. Davies*, 126 Cal.App. 419, 426, 14 P.2d 922. In the instant controversy the community contributed nothing to the increment of the value of the corporate shares. Appellant gave no discount on his salary because of the fact that he was a shareholder. There is no merit in the argument that the shares were escrowed on July 24, 1923. The shares belonged to appellant by virtue of the exchange of his interest in the drilling partnership for them and of his having obtained that interest at the time of the partnership's organization and its acquisition of the contract on May 1, 1923. The exchange did not in the slightest tend to transmute the stock from separate to community property. 5 Cal.Jur., p. 294; *In re Estate of Boselly*, 178 Cal. 715, 718, 175 P. 4; *Pabst v. Shearer*, 172 Cal. 239, 243, 156 P. 466.

[12-14] Finally, appellant assigns as error the court's ruling which excluded evidence offered to trace the income earned by the corporate shares into property found to be community in character. Where adjudication of the rights of litigants depends upon a determination of whether the property involved is community, upon concluding its investigation the court will determine the extent to which the revenues of separate property have been used to improve or protect the community estate. Where amounts of money taken from the separate property can be definitely ascertained there is not then such a commingling of funds as will require the court to impress all the property as community. *Huber v. Huber*, 27 Cal.2d 784, 793, 167 P.2d 708. Inasmuch as the corporate shares are the separate property of appellant, it was incumbent upon the court to receive all competent evidence offered by appellant that tended to show the investment of his moneys in the community property and if such funds are definitely traced to make such provision in the judgment as will protect appellant from losses by reason of such expenditures.

It is therefore ordered and adjudged that the judgment is reversed with instructions to ascertain from the evidence (1) the amount of revenues received by appellant from his shares in the Union Drilling and Petroleum Company, (2) the amount thereof invested in the community property of the parties, and (3) whether in the light of such determination appellant should be required to contribute more to respondent for the care of the child than the sum designated in the judgment. If upon concluding that the amount awarded to appellant, if any, requires a modification of the order in respect of the amount awarded for the support of the child such an allowance will be enlarged to such extent as justice and equity may dictate. See *Mergenthaler v. Mergenthaler*, 69 Cal.App. 2d 525, 528, 160 P.2d 121. (4) The judgment will be corrected also to order that the defendant shall out of the community funds pay plaintiff the sum of \$6,000 or out of his separate funds the sum of \$3,000.00.

WILSON, J., concurs.

McCOMB, J., concurs in the order as to points (1), (2) and (4) but dissents from point (3).



97 Cal.App.2d 144

ROBINS v. WEIS.

Civ. 7699.

District Court of Appeal, Third District,  
California.

April 24, 1950.

Action by Nathaniel E. Robins against Charles Jacob Weis for injuries allegedly sustained due to defendant's negligence in operating his automobile. The Superior Court, Sutter County, Arthur Coats, J., entered judgment for the defendant and plaintiff appealed. The District Court of Appeal, Van Dyke, J., held that since plaintiff gave notice of appeal from the verdict against him and from an order denying his motion for a new trial, and did not notice an appeal from the judgment based on the verdict, the notice failed to invoke the jurisdiction of the court.

Appeal dismissed.

**1. Appeal and error**  $\S$  419(1), 422

Where plaintiff gave notice of appeal from verdict against him and from an order denying his motion for a new trial, and did not notice an appeal from the judgment based on the verdict, the notice failed to invoke jurisdiction of the District Court of Appeal and appeal would be dismissed.

**2. Appeal and error**  $\S$  108, 110

An appeal does not lie from a verdict nor from an order denying a new trial in a civil case.

**3. Automobiles**  $\S$  244(2)

In action for injuries sustained as result of defendant's alleged negligence in operating automobile, evidence sustained verdict for defendant.

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Erling S. Norby, Marysville, for appellants.



Russell A. Harris & Leo Fitzwilliam,  
Sacramento, for respondents.

SIMONIAN v. SIMONIAN.

Civ. 14189.

VAN DYKE, Justice.

Plaintiff, claiming to have been injured by defendant's negligence in operating his car, brought action to recover damages. Defendant answered, denying negligence and pleading contributory negligence of plaintiff. Upon the trial a jury brought in a verdict against plaintiff. He moved for a new trial and his motion was denied. The transcript contains neither a copy of the order denying new trial nor a copy of the judgment.

Appellant herein, plaintiff below, gave notice of appeal from the verdict against him and from an order denying his motion for a new trial. He did not notice an appeal from the judgment based upon the verdict. His notice to the clerk that a transcript was desired likewise stated the appeals were from the verdict and from the order.

[1,2] An appeal does not lie from a verdict, *Sawyer v. Sunset Mutual Life Ins. Co.*, 8 Cal.2d 492, 66 P.2d 641; nor from an order denying a new trial in a civil case. 2 McK.Dig., Appeal and Error, sec. 74. Hence the notice failed to invoke the jurisdiction of this court. The appeals must be dismissed.

[3] Notwithstanding the failure to invoke our jurisdiction, we have read the transcript and the briefs. Therefrom it appears that both as to defendant's alleged negligence and as to plaintiff's alleged contributory negligence, the testimony was conflicting. From it the jury might have found negligence or lack of it as to plaintiff and defendant. The jury by their verdict either found defendant to have been free from negligence or found him to have been negligent, but that his negligence was accompanied by contributory negligence of the plaintiff, barring a recovery. The evidence would support either conclusion, and hence an appeal from the judgment, if one had been properly taken, would have been unavailing.

The appeals are dismissed.

ADAMS, P. J., and PEEK, J., concur.

District Court of Appeal, First District,  
Division 2, California.

April 20, 1950.

As Amended on Denial of Rehearing

May 20, 1950.

Hearing Denied June 12, 1950.

Action for partnership dissolution by M. H. Simonian against K. H. Simonian. The defendant filed a cross-complaint. The Superior Court of the state of California in and for the City and County of San Francisco, Milton D. Sapiro, J., entered an order granting a change of place of trial to the County of Los Angeles, and the defendant appealed. The District Court of Appeal, Dooling, J., held that transferring the trial to the county of the residence of the plaintiff who was suffering from a serious heart ailment rendering travel unsafe was not an abuse of discretion.

Order affirmed.

#### 1. Venue ⇐45

Ordinarily, convenience of litigants is not considered on change of venue motion, but serious illness of litigant preventing his traveling to attend trial in another county to give material testimony may justify order changing place of trial to county of such litigant's residence. Code Civ.Proc. § 397, subd. 3.

#### 2. Venue ⇐45

In partnership dissolution action in which issues were such that testimony of both parties would be material and important, changing place of trial to county of residence of plaintiff suffering from serious heart ailment rendering travel unsafe was not abuse of discretion. Code Civ. Proc. § 397, subd. 3.

Albert Picard, San Francisco, for appellant.

Astor Elmassian, Los Angeles, for respondent.

DOOLING, Justice.

Defendant appeals from an order granting a change of place of trial from the City and County of San Francisco to the County of Los Angeles. The action is one for dissolution of a partnership in which there

is a cross-complaint and the issues are such that the testimony of the parties will be material and important.

Plaintiff's affidavit filed in support of his motion, after reciting that he is a resident of Los Angeles, contains the following averments:

"That affiant on or about the month of May, 1948, became sick with an heart attack by reason thereof affiant has been and now is confined in a Sanatorium \* \* \*

"That your affiant is suffering from a serious heart ailment and that if he were compelled to go to San Francisco, a distance of 400 miles from Los Angeles, to prosecute said action and defend same might have a serious consequences to his life, and his doctor has warned him to avoid undue strain and travel."

Ordinarily the convenience of a litigant is not considered on motion for change of venue. *Wrin v. Ohlandt*, 213 Cal. 158, 1 P.2d 991; *Di Giorgio Fruit Corp. v. Zachary*, 60 Cal.App.2d 560, 141 P.2d 8; *Carnation Co. v. El Rey Cheese Co.*, 92 Cal.App.2d 726, 208 P.2d 63. However in two comparatively recent cases it has been held that when the serious illness of a party will prevent his traveling to attend the trial in the other county and his testimony is material such facts may justify an order changing the place of trial to the county of his residence. *Kroesen v. Gordon*, 61 Cal. App.2d 385, 142 P.2d 935; *Borba v. Toste*, 52 Cal.App.2d 591, 126 P.2d 655. The code authorizes the court to consider "the ends of justice" as well as "the convenience of witnesses", Code Civ.Proc. sec. 397, subd. 3, and when one party who is a material witness cannot safely travel to the other county to give his testimony by reason of his physical condition the ends of justice would be promoted by transferring the trial to the county of his residence.

[1, 2] Appellant points out that in its order denying a hearing in *First-Trust Joint Stock Land Bank of Chicago v. Meredith*, 16 Cal.App.2d 504, 510, 60 P.2d 1023, 62 P.2d 369, the Supreme Court withheld its approval of a statement in the opinion of the District Court of Appeal "that the convenience of witnesses who are parties is a factor in determining a motion for change of venue". Although a party was incapacitated for

travel by age and illness the point was not necessary to the decision in that case and the opinion of the Supreme Court wisely left the question open. In the later cases above cited the point had to be decided and we believe the proper rule was there announced that while ordinarily the convenience of parties is not to be considered this is not true where one party's physical condition will make it impossible or dangerous to his health to travel to a distant county to give material evidence. We can find no abuse of discretion in this case.

Order affirmed.

NOURSE, P. J., and GOODELL, J.,  
concur.



97 Cal.App.2d 26

**WHITLOCK v. SUPERIOR COURT IN AND  
FOR SISKIYOU COUNTY et al.**

Civ. 7778.

District Court of Appeal, Third District,  
California.

April 17, 1950.

Original proceeding in the matter of the application of Earl Whitlock against the Superior Court of the State of California in and for the County of Siskiyou and the Honorable James M. Allen, Presiding Judge thereof, for a writ of prohibition to restrain trial court from taking any further steps in action in which plaintiff had been arraigned under information charging violation of Vehicle Code, § 501, and in which plaintiff's motion to set information aside on ground that he had been committed without reasonable or probable cause, was denied. The District Court of Appeal, Adams, P. J., held that in absence of affirmative showing that defendant did anything or neglected to do anything causing collision, or proximately causing injury to any person, he was held to answer without reasonable or probable cause.

Permanent writ of prohibition granted.

Criminal law ⇐238

Mere fact that accused motorist was under influence of intoxicating liquor at

time of collision did not afford reasonable or probable cause for holding him to answer under statute providing that any person who, while driving vehicle under influence of intoxicating liquor, does any act forbidden by law or neglects any duty imposed by law in driving such vehicle, which proximately causes bodily injury to any person, is guilty of a felony. Vehicle Code, §§ 501, 551.

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Barr & Hammond, Yreka, Farrens & Maxwell, Klamath Falls, Or., U. S. Balentine, Klamath Falls, Or., for petitioner.

Fred W. Burton, District Attorney, Siskiyou County, Yreka, for respondents.

ADAMS, Presiding Justice.

On arraignment under an information charging a violation of section 501 of the Vehicle Code, petitioner moved to set the information aside on the ground that he had not been legally committed by a magistrate, and had been committed without reasonable or probable cause. The motion was denied and petitioner applied to this court for a writ of prohibition to restrain the trial court from taking any further steps in said action. A copy of the transcript of the proceedings in the magistrate's court was made a part of the petition. We issued an alternative writ to which respondent made no reply, nor any appearance on the hearing.

The charge before the committing magistrate was that petitioner had committed "the crime of 501 C.V.C. (and 551 A C.V. C.)" and that he "did willfully and unlawfully drive a veh. upon the public highway while under the influence of intoxicating liquor and was then and there involved in an accident causing bodily injury to persons other than himself"; and that he "did also willfully and unlawfully fail to yield right of way to approaching car."

Section 501 of the Vehicle Code under which it is conceded the complaint was based, provides: "Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such

vehicle, which act or neglect proximately causes bodily injury to any person, is guilty of a felony \* \* \*."

Petitioner's contention is that the evidence adduced in support of this complaint, which complaint was made by a traffic officer, is insufficient to show that he was under the influence of intoxicating liquor at the time of the accident, and that it entirely fails to show that he did any act forbidden by law or neglected any duty imposed by law in the driving of his vehicle.

The accident occurred at a place called Calor, in front of the Calor Tavern, in Siskiyou County, about 2:00 a.m. on July 2, 1949. Petitioner was driving a Cadillac car, bound southward. A Mr. Bergeson was driving a Pontiac coupe, bound northward, accompanied by his wife and daughter. All three of the Bergesons were injured when the two cars collided. The *right* front fender and the grill of the radiator of Whitlock's car were damaged, as was the *left* front of Bergeson's coupe.

Officer Daniel, who was called to the scene of the accident and arrived there some twenty minutes after the accident, testified that on his arrival he saw the Bergeson car on the right side of the road, partly on the shoulder and partly on the pavement. Whitlock's car was in the parking lot of Calor Tavern. Fifteen or twenty other cars were parked there. Daniel testified that Whitlock said he had several drinks during the evening, that he had two at Calor Tavern after the accident. Daniel also said he could smell alcohol on Whitlock's breath, that his speech was somewhat slurred, he didn't seem able to stand up, did not walk straight, and more or less staggered, and in his opinion he was definitely under the influence of intoxicating liquor.

Daniel arrested Whitlock and took him to a Doctor Drader, in Dorris. The latter was the only other witness called. He testified that Whitlock's speech was a little slurred, but coherent, and that he had a fairly strong odor of alcohol; that he seemed to be under the influence of intoxicating liquor, but that he did not "wobble," and he would not say he was intoxicated.



There was no testimony as to how the accident occurred, and the arresting officer apparently drew inferences solely from the condition of the two cars, and from skid marks on the road which were photographed about 7:00 o'clock in the morning of July 2nd. From these he concluded that Whitlock turned eastward across the road toward the Calor Tavern and collided with the Bergeson car in the east lane of the highway. There is no evidence whatever as to the conduct of the driver of the Bergeson car or of its speed. There is no evidence of what was the conduct of Whitlock prior to the collision or that he did anything or neglected to do anything that caused the collision. There is no evidence determinative of who had the right of way, or the location of either car upon the highway when Whitlock began to turn left. Whether or not the accident was at an intersection is not entirely clear, though since the district attorney relied upon sections 550 and 551 of the Vehicle Code which have to do with the obligation of the driver of a car at an intersection, it may be assumed that it was. He called attention to those sections as applicable. Also, in a hypothetical question he asked the prosecuting officer to assume that there was an "intersecting road leading from a business place coming in from the westerly side."

Under section 551 of the Vehicle Code the driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, but said driver having so yielded and having given a signal when and as required by said code may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right of way to the driver making the left turn.

The prosecuting attorney said at the hearing that defendant's conduct was a "matter of neglect of duty," and the charge in the complaint was that he failed to yield right of way to an approaching car; but for all that appears, he may have done all that was required of him under the foregoing section, and it may have been Bergeson's

failure to yield the right of way to Whitlock which caused the accident. And the fact that the collision apparently occurred in the east lane of the highway indicates that Whitlock, having already crossed into that lane, had the right of way.

In *People v. Levens*, 28 Cal.App.2d 455, 459, 82 P.2d 698 (hearing in Supreme Court denied), a judgment of conviction of a violation of section 501 of the Vehicle Code was reversed, the court saying that the evidence was entirely lacking in the legal requirement that appellant, in addition to being under the influence of intoxicating liquor, either committed any act forbidden by law or neglected to perform any duty imposed by law and that such act or neglect proximately caused the injury of the injured party. And in *Ex parte Ryan*, 61 Cal.App.2d 310, 142 P.2d 769, this court rendered a similar opinion. In the latter case, as in this one, skid marks upon the pavement were relied upon; but, as was said in *Hawthorne v. Gunn*, 123 Cal.App. 452, 455, 11 P.2d 411, 412, "Perhaps there is nothing more certain about an automobile accident than the fact that the visible results afterward are not an infallible guide in determining what occurred."

The conclusion of the arresting and prosecuting officer that Whitlock failed to do something which he should have done is based solely upon inferences; but opposed to such inferences are the presumptions that petitioner took ordinary care of his own affairs, that he obeyed the law, and that he is innocent of crime. See *Ex parte Whitlach*, 60 Cal.App.2d 189, 140 P.2d 457.

Assuming, but not deciding, that the evidence was sufficient to show that Whitlock was under the influence of intoxicating liquor, there was no affirmative showing that he did anything or neglected to do anything that caused the collision, or which act or neglect proximately caused injury to any person. In the absence of such a showing we conclude that he was held to answer without reasonable or probable cause. Let a permanent writ of prohibition issue as prayed.

PEEK, J., concurs.

35 Cal.2d 259

**CLARKE v. CLARKE.****L. A. 21201.**

Supreme Court of California, in Bank.

April 28, 1950.

Action by Robert E. Clarke against Dorothy P. Clarke for divorce, wherein plaintiff was granted an interlocutory decree. Thereafter plaintiff applied for an order modifying the decree, and the defendant filed a petition for a writ of habeas corpus to determine rights to the custody of a minor child of the parties. The Superior Court for Los Angeles County, Joe Raycraft, Judge pro tem., assigned by the Chairman of the Judicial Council, made an adverse order, and the plaintiff appealed. The Supreme Court, Shenk, J., held that an order awarding custody of the child to the father for a period of six months and to the mother thereafter was not an abuse of discretion.

Order affirmed.

Prior opinion 212 P.2d 68.

**1. Divorce**  $\Rightarrow$  296, 298(1), 312.6(5)

In a divorce action, abuse of discretion must be clearly established before reviewing court will interfere with award of custody of a minor child; and trial court is given a wide latitude of discretion in determining whether other things are equal so as to justify giving custody of a child of tender years to the mother; and it is welfare of the child and not shortcomings of the respective parties which is determinative. Civ.Code, § 138.

**2. Divorce**  $\Rightarrow$  296

Where divorced wife admittedly had an affair with another man whom she intended to marry as soon as decree became final, and who was willing and able to make a home for infant child of the wife, and father had an uncertain and inadequate income and was studying for a musical or theatrical career, an order awarding custody to father for six months and thereafter to mother was not an abuse of discretion. Civ.Code, § 138.

**3. Divorce**  $\Rightarrow$  303(3)

Where father's right to visit minor child was not raised at hearing for modification of interlocutory decree which itself did not include a right of visitation, but

property settlement agreement between the parties recognized such rights, and there was no express prohibition, father was entitled to rights of visitation by right of parenthood, and failure of court expressly to reserve such rights was not an abuse of discretion. Civ.Code, § 138.

Clarence Hansen, Los Angeles, for appellant.

Vaughan, Brandlin & Wehrle and Warren J. Lane, Los Angeles, for respondent.

**SHENK, Justice.**

The plaintiff has appealed from an order modifying the provisions of an interlocutory divorce decree with respect to custody of the minor daughter of the parties.

On March 29, 1948, the plaintiff husband filed a complaint for divorce on the ground of extreme cruelty. At that time the child was twenty months old. In the complaint it was alleged that the defendant wife was a fit and proper person to have the care, custody and control of the child. A property settlement agreement provided that the defendant should have custody of the child except for the months of July, August and the first two weeks of September of each year, when the plaintiff should have custody, with reasonable rights of visitation by both parties, and that neither party should remove the child from the state without the written consent of the other. The interlocutory decree, entered May 10, 1948, without reference to the agreement, provided only that the defendant should have the custody of the child with the exception of the period stated when the plaintiff should have custody.

The parties had formerly lived in New York. After the decree they continued to reside in California until July, 1948, when the wife returned to New York to find employment. She obtained employment and established a home with her sister in the latter's apartment in New York City. In October 1948 with the plaintiff's consent the defendant's mother took the child to New York, joined the family group, and assisted the defendant in the care of the

child. During this time the defendant admittedly had a questionable love affair with one Alfred Korf. The plaintiff received information of the affair, went to New York, and on March 10, 1949, while the defendant and Korf were at a theatre, took the child from the apartment without the defendant's consent and brought her to California.

The defendant's petition for a writ of habeas corpus and the plaintiff's application for an order modifying the interlocutory decree to award custody to him, came on for hearing on April 7, 1949. Both parties, their counsel, and the child were present. At the termination of the hearing the court made the following order: "The order made on May 10, 1948, is modified as follows: Custody of the minor child is awarded to the plaintiff, for a period of six months from this date subject to defendant's right of reasonable visitation. Thereafter the defendant shall have custody of the child. Until further order of the Court, both parties are ordered not to remove the child from the State of California for a period of six months."

The principal contention on the appeal is that the court abused its discretion in not modifying the interlocutory decree by awarding unlimited custody of the child to the plaintiff. It is argued that the defendant's conduct required the requested modification.

The rules for the guidance of the trial court in awarding custody are stated in section 138 of the Civil Code, viz.: (1) by what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and (2) as between parents adversely claiming custody, neither is entitled to it as of right, but other things being equal, if the child is of tender years it should be given to the mother.

The court had before it evidence of the conduct of both parties. The defendant admitted the affair with Korf and testified that they had plans to marry as soon as the divorce decree should become final which would be in about a month's time from the date of the hearing. There is also testimony that she and her intended

husband, who was then a dental student, were able to take care of and would make a home for the child, who at that time was not yet three years of age. On the other hand the evidence showed that the plaintiff was studying for a musical or theatrical career; that his income to the time of the hearing was indefinite and inadequate, but that at the time of the hearing he was employed. The admitted questionable character of his companions is also shown by the record. The plaintiff testified that the child's maternal grandmother was willing to assist him in the care of the child. The grandmother, however, on cross-examination by defendant's counsel testified: "Q. You would like to have the child with you, would you not? A. Not particularly. I can not answer that truthfully."

[1,2] An abuse of discretion must be clearly established before the reviewing court will interfere with an award of custody. *Wolfe v. Wolfe*, 30 Cal.2d 1, 5, 180 P.2d 345; *Munson v. Munson*, 27 Cal.2d 659, 666, 166 P.2d 268; *Prouty v. Prouty*, 16 Cal.2d 190, 191, 105 P.2d 295. The trial court is given a wide latitude of discretion in determining whether other things are equal within the meaning of the Code section. *Taber v. Taber*, 209 Cal. 755, 756, 290 P. 36. It is the welfare of the child and not the shortcomings of the respective parties which is determinative. *Washburn v. Washburn*, 49 Cal.App.2d 581, 588, 122 P.2d 96. The court exercised a reasonable discretion in concluding in effect that "other things" were at least "equal", and that no cause existed for depriving the mother of the child's custody except for the six month period deemed necessary for adjustment as to her future plans and for the preparation of a home for the child. The argument that the court was considering factors other than those bearing on the welfare of the child is not justified. The plaintiff has not shown an abuse of discretion in the modification order by which he was given custody for six months. No good reason appeared why the defendant at the end of that period should not be permitted to remove the child to her new home wherever it might be established.



White v. White, 68 Cal.App.2d 650, 157 P.2d 415.

[3] The plaintiff also contends that the court abused its discretion in failing to reserve to the plaintiff a right of reasonable visitation. The question of the plaintiff's right to visit the child was not raised at the hearing. Furthermore his right of visitation was not included in the interlocutory decree. In the absence of express prohibition, rights in that regard ensue from parenthood, *Wand v. Wand*, 14 Cal. 512, 513, 518, and were recognized in the property settlement agreement between the parties. It was probably not deemed necessary to include the specific requirement in the decree or the modification order. As the trial court indicated at the hearing, if at the end of the six month period or at any other time conditions changed so as to warrant a further modification, application to that end could be made.

The order is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



35 Cal.2d 328

RIVERSIDE CEMENT CO. et al. v. PUBLIC UTILITIES COMMISSION OF CALIFORNIA et al.

L. A. 21085.

Supreme Court of California, in Bank.  
May 2, 1950.

Rehearing Denied June 1, 1950.

The Riverside Cement Company, a corporation, and the Southwestern Portland Cement Company, a corporation, petitioners, brought proceedings to review an order of the Public Utilities Commission of the State of California dismissing complaints for reparations to the petitioners from the California Electric Power Company, a corporation, of charges for electricity. The Supreme Court, Shenk, J., held that the petitioners

were entitled to such reparations under their contracts with the California Electric Power Company, a corporation.

Portions of order annulled and cases remanded.

Traynor and Edmonds, JJ., dissented.

#### Electricity ☞

Where contracts between electric power company and cement companies and approved by Public Utilities Commission provided in escalator clause that whenever market price of fuel oil should exceed a certain amount per barrel, charge for electricity should automatically increase a certain amount, and that in event that power company "shall" at any time, either voluntarily or by order of legal authority, place in effect any lower or more advantageous rates, power company should likewise make the same rate effective for cement companies, and thereafter because of rise in fuel oil market charge for electricity under escalator clause was greater than that made by power company under tariffs, cement companies were entitled to lower rate under tariffs.

O'Melveny & Myers, Lauren M. Wright, Overton, Lyman, Plumb, Prince & Vermille and Wayne H. Knight, Los Angeles, for petitioners.

Everett C. McKeage, Roderick B. Cassidy, Boris H. Lakusta, Hal F. Wiggins, J. Thomason Phelps, Harold J. McCarthy, San Francisco, Henry W. Coil, H. M. Hammack, and Donald J. Carman, Riverside, for respondents.

SHENK, Justice.

This is a proceeding to review an order of the Public Utilities Commission which dismissed three complaints for reparations filed by Riverside Cement Company and Southwestern Portland Cement Company. Only two of the cases are involved, and the pertinent facts as to them will be noted.

In the Fall of 1942, at the request of the United States War Production Board, Riverside Cement Company (referred to as Riverside), re-opened its plant near Oro Grande. Power was furnished by California Electric Power Company (referred to as

the utility) and Riverside commenced negotiations to obtain a rate lower than the filed tariff schedules and on a par with rates afforded under existing special contracts. A contract approved and authorized by the Commission was executed by which the utility was to supply electric energy for a five year term commencing October 14, 1942, at a minimum charge of \$1.00 per month per horsepower of Maximum Demand but not less than \$4000 per month, or a total minimum of \$240,000 for the five-year period. Paragraph 10(e), designated as the escalator clause, provided that whenever during the contract the market price of fuel oil should exceed \$1.30 per barrel, the energy charge should be automatically increased one-fourth mill per kwh for each full ten cent increase above the basic oil price. Elsewhere the contract provided for written notice of the increase to Riverside which had the option to rescind within ninety days, the increased rate to become effective if the option was not exercised. Paragraph 14 of the contract stated: "That in the event the [utility] Company shall at any time, either voluntarily or by order of any legal authority place in effect any lower or more advantageous rates than those at any time in effect hereunder or to any other cement manufacturing plant or consumer having a load similar to that of Consumer and in the same territory, the Company shall likewise make the same rate effective for the Consumer hereunder." By agreement the contract was extended to March 31, 1948.

On March 19, 1947, the market price of fuel oil increased to \$1.50 per barrel, and pursuant to notice the service charge was raised 5 mills per kwh effective July 1, 1947. Notice of rescission of the contract was not given. In the same manner an additional identical increase became effective on October 23, 1947, reflecting the rise in the fuel oil market price to \$1.70 per barrel. Pursuant to a third notice following the upward fluctuation in the fuel oil price to \$2.15 per barrel, a further increase of one cent per kwh might have been charged commencing April 12, 1948, except for the expiration of the contract on March 31, 1948. After the latter date the Riverside service

charge was governed by the tariff schedules on file with the Commission.

A similar contract was executed between the utility and Southwestern Portland Cement Company (herein referred to as Southwestern), except that the contract period was from May 1, 1944, to April 30, 1949. The same increases were noticed and charged under the escalator clause, but as in the case of Riverside after March 31, 1948, service was billed according to the filed schedules.

Riverside filed a complaint with the Commission invoking the application of paragraph 14 of the contract, alleging overcharges after July 1, 1947, and seeking reparations in the sum of \$21,739.91. Similarly Southwestern sought reparations to the extent of \$16,535.72. The commission found that increases in the fuel oil market price above \$1.41 per barrel would and did from July 1, 1947, result in charged rates higher than rates computed under the filed schedules or than rates under contracts of four other consumers alleged to have similar loads and to be operating in the same territory. During the existence of these contracts none of the filed schedules or other existing contract rates was revised in any manner bearing on the issues presented.

The question of which rate was chargeable from July 1, 1947, to March 31, 1948,—the successive increased rates under the escalator clause or the rate under the filed schedules or other contracts of similar consumers in the same territory—depended on the effect to be accorded the language of paragraph 14. The Commission rejected the contention of the petitioners that it was the parties' expressed intention that if at any time there was available a schedule or other rate lower than the contract rate the lower rate was to be made available to the petitioners. On the contrary the commission adopted the utility's contention that by the use of the word "shall" in paragraph 14 the intention was to make available to the petitioners only such lower or more advantageous rate as should in the future be placed in effect either by the utility or the commission; that is, that since the lower rates from

July 1, 1947, were under schedules or contracts which were in effect at the time of the execution of the petitioners' contracts, they were not rates which the utility thereafter placed in effect; that the oil escalator clause rather than paragraph 14 applied; that petitioners' remedy was rescission after notice of the increase; that that remedy was not pursued and the petitioners were not entitled to reparations.

The petitioners urge that the position of the Commission is contrary to the applicable policy announced in other cases. In *City of Vernon v. Southern California Gas Co.*, Dec. #21860, 34 C.R.C. 46 (Dec.1929) and *Batchelder-Wilson Co. v. Southern California Gas Co.*, Dec. #22806, 35 C.R.C. 132 (Aug. 1930), several complainants were held entitled to reparations because of the defendant's failure to comply with a rule, designated as Rule 19, making it the duty of the defendant where two or more rate schedules were applicable to any class of service to call attention to the different rates at the time application was made for the service, and whenever new schedules should be adopted to call the consumer's attention to the new rates.

A similar rule 19 applicable to the utility was in effect when the consumer selected a rate under tariff schedules in existence at the time service was requested, and placing upon the utility the duty to advise those of its customers affected in the event of adoption of new or optional schedules or rates. This rule and the foregoing decisions of the Commission indicate a required utility policy of affording to the consumer the opportunity to select the lowest rate suited to its needs at the commencement of service and the consumer's right to be kept apprised of new lower rates when such should become effective.

Apparently none of the existing schedule rates was deemed suitable to the needs of these petitioners, who sought a lower rate to be based on guaranteed length of service and specified minimum payments. The executed contract providing such a rate was based on those considerations. Since Rule 19 was inapplicable to the special case, paragraph 14 was added to the contract for the obvious purpose of complying with the re-

quired policy, thus preserving to the petitioners the right to a lower or more advantageous rate should such be placed in effect during the life of the contract.

As the provisions both of Rule 19 and paragraph 14 indicate, it was not the purpose to place on the consumer the onus of seeking and acquiring information as to the probable lowest available tariff. The utility thereby undertook to perform the office of supplying the information and opportunity of selection when occasion demanded. The general policy required the utility to afford to the consumer the lowest or most advantageous rate. Since the purpose of the contracts was to obtain a rate lower than the filed tariffs and on a par with other special rates, it is unreasonable to assume that the petitioners agreed to pay any rate higher than such existing rates. The contrary intention expressed in paragraph 14 indicates that if, at any time during the contract, rates lower than the contract rates should become available the petitioners should have the advantage thereof. It follows that the purpose of the escalator clause was to protect the utility's cost differential between the lower contract rate and available existing tariffs. And it is likewise unreasonable to assume that the utility might with impunity employ that clause to raise charges above existing schedules. The utility itself recognized the appropriate remedy and procedure when the price of fuel oil no longer justified the filed tariff schedules and in 1948 applied to the Commission for increases in those tariffs. It was during the progress of that application that the petitioners discovered they had been paying charges higher than the existing tariffs.

The utility's attempt to rest upon the future tense of the verb in paragraph 14 cannot avail it under the facts. Obviously the language would apply in the event tariffs were reduced below the contract rate. But that is not the exclusive application. A similar situation in effect obtained here when the company gave notice increasing the contract charge above the existing tariff. That act was the equivalent of placing in effect a rate or schedule lower or more advantageous than the contract



rate. As the commission found, the price of fuel oil could go to \$1.41 without increasing the contract rate above the filed tariff. When, however, the utility raised the contract rate above the filed tariff, to all the intents and purposes of paragraph 14 it was placing in effect a rate lower or more advantageous than the increased contract rate.

It may not be questioned that if the language of paragraph 14 applied it took precedence over the provisions of the escalator clause and afforded a lower rate to the petitioners from July 1, 1947, overcharges resulted, and the petitioners were entitled to recover reparations. That result is determinative here and it becomes unnecessary to discuss other matters, none of which may be deemed to override the controlling intent and policy. Nor is it proper on this review to consider which of the lower rates applies, whether that under the filed tariffs or the contract rate of other consumers in the same territory. Those are factual issues bearing on the amount of the reparations and are for the Commission to resolve.

From the foregoing it follows that the portions of the Commission's order dismissing the two complaints should be annulled and the cases remanded for computation of the amount of reparations due to the petitioners respectively.

It is so ordered.

GIBSON, C. J., and CARTER, SCHAUER and SPENCE, JJ., concur.

TRAYNOR, Justice (dissenting).

The annulment of the Commission's order is based on the premise that the utility placed in effect lower rates to another consumer having a load similar to that of petitioners within the meaning of paragraph 14 of the contract. The rates allegedly

placed in effect are the tariff rates that were in effect when the contract was signed. In 1942, when Riverside asked the Commission's approval of a special contract deviating from PW-1 and PW-2, the existing tariffs Riverside stated in a letter to the Commission on October 7, 1942: "With reference to the Power Company's published schedules PW-1 and PW-2, our belief is that neither of these schedules is reasonably adapted to the conditions of cement plant operation. So far as we are advised, no cement company has ever operated under either of these schedules." Yet we are now asked to interpret the contract as having incorporated a schedule not "reasonably adapted to the conditions of cement plant operation."

It is contended that the original tariff of rates in effect in 1942 when the special contract was signed by the parties and approved by the Commission was "placed in effect" on July 1, 1947, when the utility raised the contract price of electricity (above the level of the tariff prices) by virtue of the fuel oil escalator clause, Paragraph 10(e). The words "shall place in effect" would ordinarily lead one to interpret Paragraph 14 as applying only to tariffs approved after the signing of the contract. It is urged that Paragraph 14 be construed to limit possible increases under the "escalator" clause to the level of rates already in existence because "the purpose of the escalator clause was to protect the utility's cost differential between the lower contract rate and available existing tariffs." Testimony in the record bearing on the meaning of the fuel oil escalator clause runs counter to this interpretation, and leads to the conclusion that the purpose of the clause was to preserve for the utility a margin of profit over its operating costs.<sup>1</sup>

1. One of the two witnesses heard by the Examiner was the chief rate engineer of the defendant utility, called as a witness by the complainant. He testified:

"Q. Didn't you, in general, try to establish your rates so that companies like the Cement Companies, with large volumes of power or using large volumes would pay less per kilowatt hour than the companies using a smaller volume of

power? A. Yes, as long as we had large volumes of cheap power available.

"Q. And you tried, in general, to keep the relationship between the Cement Companies and other large volume users versus the smaller users on that basis as best you could? A. Except that where a margin of profit was extremely small we have incorporated hedging clauses like the fuel oil clause so that we

If this testimony is disregarded and the existing rates are accepted as a ceiling on the rates under the contract,<sup>2</sup> Paragraph 12 thereof is rendered meaningless. That paragraph specifically gives the consumer power to terminate the contract after an increase in price under Paragraph 10(e), the "escalator" provision. The protection afforded the consumer by this power of termination and the protection afforded the utility by the escalator clause are both rendered superfluous if the contract rates no longer apply after the price of fuel oil rises to \$1.41 per barrel, the point at which the price of fuel oil causes the price of power under the contract to rise to the level of the tariff prices. In my opinion the contract permits the consumer either to continue the contract in the hope of a drop in fuel oil prices or to terminate the contract and accept the potential advantages or disadvantages of the tariff rates. To order reparations to the petitioners now that the contract has expired permits the consumer to accept all the benefits of the contract, with prices set retroactively as though their power to terminate had been exercised.

We turn now to the four special contracts with other consumers that allegedly

"placed in effect" lower rates. Two of the contracts, those with Sierra Talc Company and Natural Soda Products Company, merely extended the rates of Schedule P-2, a schedule of limited applicability, to companies that had been served on that basis for years. After the Commission authorized the utility to cancel the schedule of limited applicability, the same rates were continued by special contracts. The contract with West End Chemical Company provided the same rates as those set forth in the filed schedule No. PW, discussed above. It cannot be said that lower rates were "placed in effect" by these three contracts, since they merely continued rate schedules available to and refused by petitioners at the time their contract was signed. The conclusion that Paragraph 14 did not refer to the PW schedules in effect when the contract was signed applies with equal force to contracts that provided rates equivalent to the tariff rates.

Finally, petitioners complain that the contract between the utility and the United States Navy for service to the Naval Ordnance Station at Inyokern "placed in effect" lower rates. The Commission apparently agrees: "that contract contained

would not be caught selling power at a loss when prices went up.

"Q. Coming back to my question again, the policy was, apart from the earnings of the Company, the policy was, as between rates for consumers, that the larger volume consumer would normally have a lower rate than the smaller volume consumer? A. Generally, yes; when you got into very large volumes other factors entered.

"Q. Do you have any instance in your Company, or did you have in 1947, where you considered large volume users should pay a higher rate for their electricity than lower volume users? A. Yes, we did. You have to consider, if you are thinking of the Southwestern and Riverside Cement, you have to consider the period of the contract as a whole, and if we were selling on a very thin margin of profit there, which was evidently contemplated in the contract, this eventuality was contemplated in the contract so that when our costs went up this thin margin was preserved to a degree."

2. Had the parties so intended the provision could have been drafted simply and directly. In a recent case before the

Commission, (Re Pacific Gas and Electric Co., Decision No. 42234, Application No. 27459) a utility was permitted to modify a special contract containing an escalator clause. The modification conformed to an oral understanding between the utility and the consumer-lumber company that: "In the event, during the term of said agreement, application of rates and conditions of an applicable filed electric tariff of Pacific to the account of lumber company would result in lower cost for electric service than the rates set out in said agreement, lumber company would be accorded the benefit thereof." Both parties in that case agreed that this sentence embodied the understanding of the parties. In the present case there was no testimony by Cement Company officials concerning the original negotiations; petitioners have sought merely to make Paragraph 14 applicable.

For another example of a contract containing a fuel oil escalator clause subject to stated maximum and minimum rates, see *City of Vernon et al. v. Southern Calif. Gas. Co.*, 34 C.R.C. 46 [1929].

rates which were identical with those in Option B of rate Schedule No. PW. Since the Navy received service at 33,000 volts, a discount of 5% was incorporated in the contract. The inclusion of this high voltage discount, coupled with the provisions of Schedule No. PW, in the Commission's opinion constituted placing in effect a lower and more advantageous rate than Schedule No. PW." The Commission concluded, however, that even "if the Cement Companies had facilities available to take delivery at this voltage, and could have qualified for the high voltage discount, it is not apparent that the rates of the special contract with the Navy Department would have produced a lower bill throughout the period of the contracts than was actually billed to the Cement Companies." The failure to grant reparations despite the finding that the rate to the Navy was lower than the contract rate to Riverside and Southwestern indicates that the Cement Companies failed to sustain their burden under § 71 of proving to the Commission that they were injured because the utility "deprived them of any rate to which they were entitled." (*Batchelder-Wilson Company et al. v. Southern Calif. Gas Co.*, 35 C.R.C. 132, 134; *City of Vernon et al. v. Southern Calif. Gas Co.*, 34 C.R.C. 46, 48.)

We are referred to Rule and Regulation No. 19, the "policy" of which was allegedly violated by the utility in this case. The applicable portions of the Rule provide: "(b) Where there are two or more rate schedules applicable to any class of service, the Company or its authorized employees will call applicant's attention, at the time application is made, to the several schedules, and the customer must designate which rate or schedule he desires. (c) In the event of the

adoption by the Company of new or optional schedules or rates, the Company will take such measures as may be practicable to advise those of its customers who may be affected that such new or optional rates are effective." It is conceded that Rule 19 applies only to consumers given service under tariff schedules and not to consumers with special contracts. This fact alone distinguishes the cases relied upon by petitioners, since all the consumers granted reparations in those cases were operating under rate tariffs. (*Batchelder-Wilson Company et al. v. Southern Calif. Gas Co.*, 35 C.R.C. 132; *City of Vernon et al. v. Southern Calif. Gas Co.*, 34 C.R.C. 46.) Furthermore, Rule 19 applies by its terms only where two or more rate schedules are available at the time application for service is made, or "in the event of the adoption by the [utility] of new or optional schedules or rates." In the latter case, the utility is bound only to take such measures to advise consumers "as may be practicable."

Even if it is assumed that Paragraph 14 gives the consumer the protection of Rule 19, it does not follow that the utility undertook "to perform the office of supplying the information and opportunity of selection [of more advantageous rates] when occasion demanded." Under the Commission's view, this would be a promise to perform the impossible. "Since any such determination depends upon the future operations of this customer, the final decision with respect to whether or not any other rates are lower or more advantageous is the ultimate responsibility of the customer. Neither the utility nor this Commission can anticipate future customer usage which is entirely within the discretion of the customer as to its future volume."<sup>3</sup>

3. The rate schedule of the contract indicates that the monthly charge for electricity fluctuates with the intensity and volume of customer usage. Paragraph 10 provides:

"*Energy Charge*—First 200 kilowatt-hours per month per horsepower of maximum demand ..... 1.04 cents per kwh  
All over 200 kilowatt-hours  
per month per horsepower of  
maximum demand ..... .416 " " "

"*Minimum Charge*—\$1.00 per month per horsepower of  
Maximum Demand, but not less than \$4,000.00 per month.

"*Special Conditions*—(a) The maximum demand in any month shall be the average horsepower input, (746 watts equivalent), indicated or recorded by instru-



Rule 19 requires notification, as may be practicable, about newly promulgated tariff schedules or novel special contracts. Neither the letter nor the spirit of Rule 19 requires utilities to prognosticate the future nature and extent of the consumer's use of power and then advise the consumer if there is a possible advantage under pre-existing tariff rates. It is sensible to require notice to consumers of newly-adopted schedules or contracts, because the consumer probably would not have knowledge of them. It is a different matter when the utility is placed under a duty to give notice of tariffs that had been in effect at least five years and from which the consumer had specifically asked to be excepted.

Since the rise in power prices under the "escalator" clause did not "place in effect" lower rates within the meaning of Paragraph 14, and since Rule 19 does not apply to this case, the order should be affirmed.

EDMONDS, J., concurs.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.



35 Cal.2d 268

BEEKS v. STATE BAR OF CALIFORNIA.

S. F. 17886.

Supreme Court of California, in Bank.

April 28, 1950.

Lewis K. Beeks applied for reinstatement as a member of the State Bar of California. The Board of Governors of the State Bar refused to give his application favorable recommendation, and petitioner applied for

a writ of review. The Supreme Court, *Per Curiam*, held that showing made by petitioner did not indicate that he was so rehabilitated that he should again occupy position of trust and confidence that is held by an attorney at law, and that he failed to sustain burden of proof that effort he made toward rehabilitation of his character was successful.

Application denied.

Carter, J., dissented.

#### 1. Attorney and client ⇐61

In proceedings instituted by a disbarred attorney for reinstatement, burden of proof is upon attorney to show by positive evidence that effort he has made toward rehabilitation of his character has been successful. Rules on Appeal, rule 59(b).

#### 2. Attorney and client ⇐61

Where attorney was disbarred for nine separate items of misconduct, including misappropriation of client's funds on at least four occasions, and none of seven witnesses who personally testified as to attorney's present character in his action for reinstatement had knowledge of grounds upon which he was disbarred, but all were from city other than that in which attorney was employed, attorney failed to produce clear and convincing proof sufficient to justify his reinstatement or acceptance as an applicant for examination upon his technical qualifications. Rules on Appeal, rule 59(b).

Lewis K. Beeks, in pro per, John Adams, Jr., and R. J. Reynolds, San Francisco, for petitioner.

Jerold E. Weil, Los Angeles, for respondent.

ments to be furnished and installed by the Company upon Consumer's premises adjacent to or integral with watt-hour meter or meters, in the 15-minute interval in which the consumption of energy is greater than in any other 15-minute interval in such month, or, at the option of the Company the maximum demand may be determined by test.

(b) The maximum demand for monthly billing purposes for any given month shall be the horsepower of measured maximum demand occurring during such month but in no case less than 75% of the maximum demand occurring during the eleven next preceding months.

(c) In case notice of contemplated curtailment of operations on the part of Consumer is given to the Company and such curtailed operations occur over a period of at least six consecutive calendar months, the provisions of paragraph

(b) hereinbefore shall not apply. \* \* \*

## PER CURIAM.

Petitioner seeks reinstatement as a member of The State Bar of California. His application has been refused favorable recommendation by the Board of Governors of The State Bar. Rules on Appeal, rule 59(b). We have concluded that for the reasons which hereinafter appear reinstatement should be denied.

Petitioner is now 58 years of age and has a dependent wife and two daughters, as well as an adult daughter who is self-supporting. He holds a Bachelor of Arts and a Bachelor of Laws degree from Howard University in Washington, D. C. In 1923 he was admitted to practice law in California. Thereafter he practiced continuously in Los Angeles until his disbarment in July, 1934, following conviction in the municipal court in Los Angeles of the crime of petty theft of \$25 and recommendation of disbarment from the Board of Governors based upon the conviction record and upon the records in disciplinary proceedings hereinafter more fully discussed. For the misdemeanor offense petitioner received a sentence of six months in jail, upon which he was granted probation provided he served thirty days in jail and make restitution. He complied with both conditions.

The various transactions upon which were based the disciplinary proceedings leading to the disbarment of petitioner, together with the evidence concerning his subsequent efforts to make restitution, adduced at reinstatement hearings in November and December of 1947 and January of 1948, are as follows:

1. *The Spotts Matter.* Petitioner misappropriated the sum of \$127.98 which he had received as attorney for Mr. Knox, the executor of the estate of Ella B. Spotts, deceased, to be used in paying certain charges against the estate. He falsely told the executor the money had been used to redeem certain stocks. Thereafter Sam Spotts, substituted as executor, secured judgment against petitioner for the \$127.98, against which petitioner was entitled to a credit of \$50 as attorney fees allowed him for services to the estate,

leaving \$77.98 owing from him to the estate at the time he was disbarred (1934).

Petitioner testified at the reinstatement hearings that in the summer of 1946 he wrote Mr. Spotts, after first securing his supposed address from the widow of Mr. Knox, but received no reply. Petitioner stated, however, that thereafter he inspected the court records of the judgment and "found that \* \* \* the judgment had been assigned to some S. A. Shepard, but who S. A. Shepard is or where he is, I don't know, I have never heard anything from him nor received any information \* \* \* I asked Mrs. Knox and I never could get in touch with Mr. Spotts to find out from him whether he knew, or what, who Mr. Shepard was \* \* \* I wanted to see \* \* \* to whom I was to pay it since Mr. Spotts didn't answer my letter, and Mrs. Knox said she didn't know what to do about it \* \* \* I never received any information whatever from Mr. Spotts \* \* \* I wouldn't have gone to that trouble if I hadn't intended to pay it." Petitioner further testified that he learned from the court records the name of a Los Angeles attorney who represented Shepard, but instead of communicating with the attorney in an effort to pay the judgment, petitioner referred the matter to another Los Angeles attorney in an effort to work out a set-off against Shepard. The record indicates no other attempts by petitioner to locate either Spotts or Shepard, or to pay the \$77.98. He stated that he is nevertheless ready to pay the money to whom ever it is due.

2. *The Brice Matter.* Mr. Brice, petitioner's client, delivered \$30 to petitioner for the purpose of procuring an appeal bond in an action wherein Brice was plaintiff and had failed to recover judgment. Petitioner filed notice of appeal after the time therefor had expired, but nevertheless told Brice an appeal had been taken and the bond filed. Thereafter, without Brice's knowledge petitioner filed a new action in Brice's name, caused such name to be signed to the verification of the complaint, and as notary public purported to authenticate Brice's pretended signature and oath. Petitioner failed to appear in court when

the second action was called for trial, and it was dismissed for lack of prosecution. Petitioner paid the \$30 secured from Brice to two sureties on an appeal bond. They failed to qualify, but petitioner allowed them to retain the money for their time and trouble. Although petitioner has not offered to repay the \$30 to Brice, he points out that the record does not indicate that Brice ever accused him of misusing the money or ever demanded its return. Petitioner testified that Brice stated he would do nothing to hinder petitioner's efforts to be reinstated to practice.

3. *The Harper Matter.* Petitioner received certain sums of money (the aggregate amount is uncertain but apparently the total was somewhere between \$75 and \$200) to be applied upon an indebtedness of his client, Mrs. Harper. He failed to so apply \$25 of such sums, and the municipal court conviction of petty theft resulted. As stated hereinabove, petitioner made restitution of the \$25 as a condition of probation. A deed of trust which secured Mrs. Harper's indebtedness was foreclosed,<sup>1</sup> an unlawful detainer suit was brought against her, and a writ of possession was secured and delivered to a constable for service. Before such service was made, petitioner knowingly and wilfully caused to be served upon the constable a copy of a purported order to show cause and restraining order halting the proceedings, although petitioner knew that the court had refused to sign the original of such order. The copy bore the name of a judge, written in longhand, on the signature line. Petitioner failed to appear at the time and place set for the hearing on the purported order to show cause.

4. *The United Brothers of Friendship Foreclosure Matter.* Petitioner, as attorney for The United Brothers of Friendship, was paid by that organization the sum of \$50 to be used as expenses in the foreclosure of a deed of trust. Petitioner failed to prosecute the foreclosure, but

falsely informed the members of the organization that the trust deed had been foreclosed, that he would produce the trustee's deed, and had paid the \$50 into escrow therefor. Subsequent to disbarment, petitioner (in 1935) sued the organization for certain sums as professional fees, and credited the \$50 against the settlement.

5. *The United Brothers of Friendship Interpleader Matter.* Petitioner advised the organization to file an interpleader action against two adverse claimants to the proceeds of a life insurance policy (or benefit certificate). The committee before whom the disbarment hearings were held found that he was instructed to file the suit but failed to do so, with the result that by reason of the negligence each claimant recovered judgment against the organization for the full amount of the policy, which appears to have been \$300. Petitioner represented the organization as attorney in each of the two actions and was paid for his services. Petitioner denies that he was instructed to file an interpleader action and has made no effort to reimburse the client on account of the double payment.

6. *The Lizzie Jones Loan Matter.* Petitioner told Lizzie Jones that he needed to borrow money because of difficulties with The State Bar. She executed and delivered to petitioner a note for \$700, secured by a trust deed on her home, and petitioner promised to give her a deed to certain land in Watts, California, but failed to do so. The note was payable to petitioner's wife. At the reinstatement hearings petitioner testified that he had succeeded in raising \$352 on the \$700 note which Mrs. Jones had executed, that he considered this amount to be a loan which he should repay, and that the difference between the \$700 face of the note and the \$352 represented compensation to him for legal services he had rendered Mrs. Jones. He further stated that at one time Mrs. Jones had demanded \$1,000 from him, but that he was willing to pay only \$352, plus

1. The administrative committee, before whom the hearings in the disciplinary proceedings on this matter were held, was not certain from the record that the foreclo-

sure resulted from any failure of petitioner to properly apply the monies entrusted to him.



interest from the date of the loan; and that although he could pay the total, he would prefer paying at the rate of \$50 down and \$25 a month. He also placed in evidence a letter from Mrs. Jones' present attorney stating that the latter had advised her that \$350 was a just settlement of her claim, and a letter from Mrs. Jones stating that "if Mr. Beeks will make us his own terms and live up to his agreement I will not stand in the way of his being reinstated."

7. *The Lizzie Jones Guardianship Matter.* Mrs. Jones, as guardian of two minors, delivered to petitioner stock certificates of the guardianship estate, with instructions to sell them to raise support money for the minors. At the time of the disbarment petitioner had delivered no money to Mrs. Jones on account of the stock, and the record is not clear as to whether he had then returned the certificates to her. However, evidence at the reinstatement hearings indicates that petitioner delivered all of the stock to Mrs. Jones either prior to or shortly after disbarment.

8. *The Will J. Mallard Matter.* Petitioner misappropriated the sum of \$90 which had been delivered to him by his client, Mallard, defendant in a divorce matter, to be applied to attorney's fees and costs awarded to the plaintiff wife. At the reinstatement hearings petitioner testified that Mallard, before his death in 1940, had agreed that petitioner might set off the \$90 against sums owed him by Mallard for legal services; that petitioner had made a written record of the settlement but could not locate it.

9. *The Annie Rose Matter.* Annie Rose employed petitioner to handle new trial proceedings in an action in which judgment had gone against her, and paid him \$10 for services in connection therewith. He was substituted as her attorney and led her to believe new trial proceedings were about to be heard, although the time therefor had expired.

*Evidence pertaining to rehabilitation.* Following disbarment, petitioner was employed from the fall of 1934 until Novem-

ber, 1935, as assistant to the Adult Probation Officer of Los Angeles County. His duties consisted of making periodic checks upon the reports of probationers, investigating those who failed to report, and other office duties as assigned. From February, 1936, until the fall of that year petitioner was employed by the Bureau of Census of the United States Department of Commerce as a field, or outdoor, worker. From January to November, 1937, he worked as a clerk with a governmental survey unit, doing "research work, contact work, reading, library work." From January to November, 1938, petitioner was a clerk on another government survey project and was engaged in "checking houses \* \* \* to see what was needed in the way of repairing and making a report." From December, 1938, to June, 1942, he was employed as a research attorney on a survey of laws relating to trade barriers, which was sponsored by the U. S. Department of Commerce. During the same period he was also associated with Loggins Food Products, a catering firm in Los Angeles, and was entrusted with collections (which occasionally reached the sum of \$1,000 per day), banking, and other duties, which he fulfilled honestly, efficiently, and to the satisfaction of the proprietors. Whether the collections were in cash or in checks does not appear. During the Christmas holiday periods of 1935 through 1939 petitioner also acted as substitute clerk in the Los Angeles post office. Since August, 1942, he has been employed in various shipyards in the San Francisco-Bay area.

Petitioner states that from 1934 to 1942 his average income was \$100 a month, and since 1942 he has averaged \$200 a month. At the time he petitioned for reinstatement his only financial obligation, aside from the matters involved in the disbarment proceedings, was a balance of \$2,300, payable at the rate of \$30 monthly, on the purchase price of a home occupied by petitioner's wife and daughters in Los Angeles. Petitioner had purchased the home for \$7,000 in 1932, and was making the payments regularly. He also contributed an additional \$10 to \$25 weekly to the support of his wife and daughters.

Seven friends and acquaintances of petitioner testified that during the preceding several years he had attended church regularly and had conducted himself as a man of good moral character. Among these witnesses were petitioner's landlady in San Francisco, whose rents in an unspecified amount he had satisfactorily collected and accounted for during a period of six to eight months, the owner of a restaurant where he ate regularly, and the business representative of the union to which he belonged in connection with his shipyard work. Petitioner also introduced some twenty letters affirming his present good moral character and recommending his reinstatement, including letters from a judge of the superior court in Los Angeles, and from five Los Angeles attorneys. The judge wrote of petitioner, "I believe that, if reinstated, he would make a worthy member of the Bar."

None of the seven witnesses who personally testified as to petitioner's present character had knowledge of the grounds upon which he was disbarred. Prior to 1933 he had handled a divorce matter for one of the witnesses, but her association with him had been only of a social nature since 1942. The union representative testified that petitioner was a steady, responsible worker, but that he had had no money transactions with petitioner. The landlady for whom petitioner had handled rents stated that he was quiet, well-behaved, a gentleman, and attended church. The restaurant proprietor testified that she thought petitioner was a gentleman, but that "I know nothing of Mr. Beeks." The other three witnesses had had no business transactions with petitioner, but testified that from social contacts they felt he was rehabilitated and could be trusted.

In a letter addressed to the Special Administrative Committee before whom the reinstatement hearings were held, the proprietors of the Los Angeles catering firm with whom petitioner was associated in 1938 to 1942 state that their business now "grosses at times four (4) and five (5) thousand dollars per week. And irrespective of the expansiveness of our business

and of his disbarment, we offer him at any time a place in our establishment.

"We firmly believe in his honesty and integrity and feel that his conduct since disbarment has been that of a loyal father, a constant, faithful and efficient worker and the conduct of one who merits any and every consideration that can be given for a person who has honestly tried.

"If reinstated he will be without question our legal advisor and counsellor."

All except one of the other letters introduced by petitioner to establish his present good character were likewise from persons residing in Los Angeles, whereas petitioner has lived and worked in the San Francisco area since August, 1942.

Concerning petitioner's present learning and ability in the law, he testified that during the year 1947 he visited the law library in San Francisco at least once a week, where he read advance sheets and checked the law on various matters of current interest; that from December, 1938, to June, 1942, as a law abstractor for a survey sponsored by the U. S. Department of Commerce he abstracted laws and reviewed the codes of various states, including California, on trade barrier matters. He also placed in evidence two briefs he had prepared in 1946 as an accommodation to another attorney in an appeal before the Appellate Department of the San Francisco superior court; that attorney testified that when the briefs were prepared he was not aware of petitioner's disbarment, but that "I think he [petitioner] is capable of practicing law."

The local administrative committee concluded that "petitioner has rehabilitated himself \* \* \* and that his present moral qualifications are such as warrant his readmission to the practice of the law. Based upon its observation of petitioner during the hearing and upon its consideration of the evidence submitted by petitioner on the issue of his present ability and learning in the law, the Committee seriously doubts whether such ability and learning qualifies petitioner for the practice of the law. The Committee considers this issue to be a particularly im-



portant one in petitioner's case since it is of the opinion that petitioner's original difficulties, which led to his disbarment, were primarily attributable to his inability and lack of learning as an attorney and that if petitioner is readmitted without adequate proof of his present ability and learning in law the risk that he may again be subjected to temptations which would lead to violations of professional ethics and require new disbarment proceedings would be substantial. It believes that petitioner should not be reinstated \* \* \* unless he successfully passes the written examination required of general applicants for admission to the Bar." The committee unanimously recommended that "petitioner be permitted to take the regular written examination required of all general applicants for admission \* \* \* and that if he successfully passes \* \* \* he be reinstated \* \* \*." Thereafter, petitioner filed with the Board of Governors of The State Bar a statement that he "has no aversion to taking the regular written examination required of all general applicants for admission to practice law in California \* \* \* [and] supports the recommendation of the Special Administrative Committee \* \* \*." By a vote of thirteen to one, the Board of Governors after considering the record found "(1) The petitioner has not the high moral qualifications required of a member of the Bar \* \* \* [and] is not sufficiently rehabilitated to warrant his reinstatement; (2) The petitioner is not fit for readmission to the practice of law in this state," and declined to recommend his readmission subject to taking the bar examination or at all.

[1] In *McArthur v. State Bar* (1946), 28 Cal.2d 779, 788, 172 P.2d 55, 60, we reaffirmed the principle that "Upon an application by a disbarred attorney for reinstatement, the object of the court, as observed in *Kepler v. State Bar*, 216 Cal. 52, 55, 13 P.2d 509, 510, 'is to determine whether or not the character of the applicant is such that he should be admitted to an office of trust, and recommended to the public as a trustworthy person, fit to be consulted by others in matters of con-

fidence. [Citations.] In such proceeding the burden of proof is upon the one who seeks, after disbarment, to accomplish a restoration to the ranks of the legal profession, and, before the court may grant the petition for reinstatement, it must be satisfied and fully convinced by positive evidence that the effort he has made toward rehabilitation of his character has been successful. [Citations.] It is only reasonable that the person seeking reinstatement, after disbarment, should be required to present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question. \* \* \* The proof presented must be sufficient to overcome the court's former adverse judgment of applicant's character. [Citations.]" See, also, *Wettlin v. State Bar*, 24 Cal.2d 862, 869, 151 P.2d 255."

[2] Here, as in the *McArthur* case, the showing made by petitioner does not persuade us that he is so rehabilitated that he should again occupy the position of trust and confidence that is held by an attorney at law. As appears hereinabove, the disciplinary proceedings prior to petitioner's disbarment involved nine separate items of misconduct, including misappropriation of clients' funds on at least four occasions (the *Spotts* case, the *Harper* case, the *United Brothers of Friendship Foreclosure* case, and the *Mallard* case). In the *Spotts* matter petitioner has not repaid the principal sum of \$77.98 owed to the *Spotts* estate when he was disbarred in 1934, and he has failed to convincingly show that he has made a diligent and sincere effort to learn to whom the money should now be paid and to pay it. Such effort as he has made apparently has been directed toward seeking to arrange a settlement of the claim against him by the same method he employed in the foreclosure case and, according to his testimony, in the *Mallard* case; i. e., by set off against other claims. Restitution in the *Harper* case was made under compulsion, as a condition of probation. In the *Brice* matter petitioner has made no offer to repay the \$30 received from his client. In the *United Brothers of Friendship Interpleader* case petitioner



denies responsibility for his client's loss of \$300 and has made no effort at reimbursement. In the Lizzie Jones Loan matter he was able to repay the full amount he claimed was owing, but stated he would prefer installment payments.

On several occasions this court has observed that "We do not mean to hold that it is necessary for a disbarred attorney in all cases to make full restoration in order for him to show that he has sufficiently rehabilitated himself to be entitled to be reinstated as a member of the bar. As stated in the case of *In re Andreani* [1939, 14 Cal.2d 736, 750, 97 P.2d 456, 463] \* \* \* 'The importance of making restitution, and a conclusion respecting the weight which should be attached thereto, should be determined largely by the financial or other ability of the attorney to restore that which he has misappropriated, as well as by his attitude of mind regarding the matter.' In that case no restitution whatever was made, yet the applicant was reinstated. In other cases only partial restitution has been required, but in all cases even when full restoration is made, the applicant must show a proper attitude of mind regarding his offense before he can hope for reinstatement. In other words he must produce satisfactory and convincing proof that in his efforts to reform his ways he has been reasonably successful. The evidence in petitioner's behalf does not meet this test \* \* \*." See *Wettlin v. State Bar*, 24 Cal.2d 862, 869, 151 P.2d 255; *McArthur v. State Bar*, supra, 28 Cal.2d 779, 789-790, 172 P.2d 55.

Taking into consideration the entire record, including the recommendation of the Special Administrative Committee as well as the action of the Board of Governors, we are of the view that petitioner has failed to produce such clear and convincing proof that he possesses an acceptable appreciation of the duties and responsibilities of an attorney at law in relation to his clients and the courts, and the making of restitution to those whose trust and confidence he heretofore violated, as would justify our ordering either immediate reinstatement or acceptance of petitioner as an

applicant for examination upon his technical qualifications.

The application of petitioner is denied.

CARTER, Justice.

I dissent.

I am disposed to agree with the conclusion reached by the Special Administrative Committee which heard petitioner's application for reinstatement that petitioner had rehabilitated himself and that his present moral qualifications are such as to warrant his readmission to the practice of the law, and that he should be permitted to take the written examination required of general applicants for admission to the bar and, if he passes such examination, he should be reinstated as a member of the bar.

Approximately 14 years elapsed between the time of petitioner's disbarment and the hearing before the Special Administrative Committee which recommended his reinstatement. This is certainly a sufficient period of time for a disbarred attorney to show by his conduct that he has accomplished rehabilitation. The Special Administrative Committee had the advantage of hearing the testimony of witnesses produced by petitioner, and the testimony of petitioner himself, and the members of that committee were in a better position to pass upon the factual issues than either the members of the Board of Governors of the bar, or the members of this Court, who have gained whatever knowledge they have of the case from the written record.

It is well settled that the one and only issue on an application of this character is whether the applicant has been rehabilitated. In *re Andreani*, 14 Cal.2d 736, 97 P.2d 456. If satisfactory proof of rehabilitation is presented to the local administrative committee, and that committee finds that rehabilitation has been accomplished, it may, as a condition for reinstatement, require that petitioner show that he possesses the requisite learning in the law to entitle him to resume practice. In view of the length of time which had elapsed since the petitioner was disbarred, the committee was clearly justified in recommending

that petitioner submit to an examination for the purpose of determining whether he now possesses the ability and learning necessary to qualify him to again engage in the practice of the law.

In my opinion the recommendation of the local administrative committee affords an ample safeguard against the reinstatement to the practice of the law of one who is lacking in either moral character or learning in the law. I would, therefore, follow the recommendation of the local administrative committee and permit petitioner to take an examination required of general applicants for admission to the bar, and if he passes such examination, that he be reinstated.



35 Cal.2d 232

**LITTLE et al. v. MOUNTAIN VIEW  
DAIRIES, Inc.  
L. A. 20462.**

Supreme Court of California, in Bank.  
April 28, 1950.

R. C. Little and Blanche L. Little brought action against Mountain View Dairies, Inc., for a declaratory judgment as to proportions in which parties should share royalty payable under oil and gas lease, wherein the defendant filed a cross-complaint. A judgment for defendant on the pleadings, and a minute order granting defendant's motion for judgment on pleading and denying plaintiffs' motion was entered by the Superior Court, Orange County, Franklin G. West, J., and the plaintiffs appealed. The Supreme Court, Traynor, J., held that in absence of extrinsic evidence or other controlling language in the deed, a grant of a fraction of all the oil in, under and that may be produced and sold from the land created an expense-bearing mineral fee interest, and not an expense-free royalty interest.

Appeal from order dismissed, and judgment reversed.

Schauer and Carter, JJ., dissented.

Prior opinion, 208 P.2d 261.

**1. Appeal and error ☞78(3)**

An order granting motion for judgment on the pleadings was not final or appealable, and an appeal would lie only from a judgment subsequently entered. Code Civ.Proc. § 963.

**2. Tenancy in common ☞3**

Where defendant was granted eight and one-third per cent of all oil, gas, etc., in, under, or which might thereafter be produced and saved from certain lands, and subsequently the land with the exception of such percentage was conveyed to plaintiffs, plaintiffs and defendants were "tenants in common" in the exclusive right to drill for and produce oil from the land.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Tenant in Common".

**3. Tenancy in common ☞32**

If one cotenant produces oil, he is entitled to charge interests of nonproducing cotenants for their proportionate share of drilling and operating expenses.

**4. Tenancy in common ☞33**

Where expense incurred by cotenants of mineral rights in producing oil from land was represented by the five-sixths of oil that lessee retained from total production under oil and gas lease in which one of the cotenants did not sign, nonconsenting cotenant, by ratifying the lease, agreed that amount of oil retained by lessee from total production represented a fair charge for expense of bringing the oil to the surface.

**5. Tenancy in common ☞49**

If oil and gas lease is executed by cotenant, the nonconsenting cotenants may recognize the lease and receive their fractional interest in the royalty, or they may reject the lease, and receive their fractional part of the oil produced, less their proportionate part of the cost of discovery and production.

**6. Mines and minerals ☞55(4)**

Generally, the grant of a fraction of all "of the oil, gas and other minerals in and under, and that may be produced" from the land creates an expense bearing

mineral fee interest rather than an expense-free royalty interest.

#### 7. Mines and minerals ⇨74

Where there is an existing oil lease at time lessor executes mineral deed, it is not uncommon for the deed to grant not only a given fraction of all the oil in, under, and that may be produced on the land, but also the same fractional interest in the royalties payable under the lease.

#### 8. Mines and minerals ⇨74

Where mineral deed grants not only a given fraction of all the oil in, under, and that may be produced from the land, but also the same fractional interest in the royalties payable under an existing lease, the grant of the stated fraction of the royalties under the existing lease is merely a statement of the legal effect of granting the same fraction of all the oil in, under and that may be produced from the land.

#### 9. Mines and minerals ⇨47

California does not recognize the theory of ownership of oil and gas in place.

#### 10. Mines and minerals ⇨55(4)

In absence of extrinsic evidence or other controlling language in deed, a grant of a fraction of all the oil in, under, and that might be produced and saved from certain land created an expense-bearing mineral fee interest, and not an expense-free royalty interest.

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Dolley, Knight, Woods & Hightower and Arthur B. Knight, Los Angeles, for appellants.

Richard A. Grant, Warren S. Pallette, Paul A. Lower, S. E. Cavanaugh, L. R. Seaman, Rush M. Blodget, Alfred W. Mitchem and Gordon A. Goodwin, Los Angeles, amici curiæ on behalf of appellants.

Joseph A. Ball and E. P. Mulholland, Long Beach, for respondent.

TRAYNOR, Justice.

In 1935 plaintiffs' predecessors in interest in certain real property granted to defendant a limited interest in that property described as "Eight and one-third per cent

(8 $\frac{1}{3}$ %) of all oil, gas and other hydrocarbon substances, and minerals, in, under and/or which may be hereafter produced and save from" the property. In 1945 plaintiffs leased the property to Loren L. Hillman, Inc., for the purpose of producing oil and gas. The lease reserved to plaintiffs as lessors a royalty of one-sixth of all oil produced and saved from the premises. The lease also provided in part as follows:

"10. In case said Lessor owns a less interest in the above described lands than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided for shall be paid the said Lessor only in the proportion which his interest bears to the whole undivided fee.

"10-a. Lessor agrees that in no event shall Lessee be required to pay greater rents or royalties than provided in this lease and Lessor further agrees that Lessor will fully satisfy and discharge any and all of the obligations and requirements under [the deed to defendant] insofar as the above described land and the production therefrom is concerned. And Lessor further agrees to protect Lessee against any expense, loss or damage arising as a result of claims or rights asserted by others in or under said deed above referred to."

Defendant did not sign the lease but executed a separate document attached thereto, which reads as follows: "The within Oil and Gas Lease is hereby ratified, approved and confirmed."

[1] The present controversy is over the proportions in which plaintiffs and defendant shall share the one-sixth (16 $\frac{2}{3}$ %) royalty payable by the lessee under the lease. Plaintiffs by their complaint for declaratory relief claimed that they were entitled to eleven-twelfths of the royalty. Defendant answered and cross-complained, claiming one-twelfth of all the oil produced or 50% of the royalty. Each party moved for judgment on the pleadings, and the court decided in favor of defendant and entered its judgment accordingly. Plaintiffs have appealed from the minute order granting defendant's motion and denying theirs, and from the judgment. It is settled that an order granting a motion for judgment on the pleadings is not final



or appealable, and that it is only from the subsequently entered judgment that an appeal will lie. *Holton v. Noble*, 83 Cal. 7, 9, 23 P. 58; *Montgomery Ward & Co. v. Welch*, 17 Cal.App.2d 127, 129, 61 P.2d 790; *Overton v. White*, 18 Cal.App.2d 567, 568-569, 64 P.2d 758, 65 P.2d 99; Code Civ.Proc. § 963. Accordingly, the appeal from the order must be dismissed.

[2] Before the oil and gas lease was executed, plaintiffs and defendant were tenants in common in the exclusive right to drill for and produce oil from the land. See, *Dabney-Johnston Oil Corp. v. Walden*, 4 Cal.2d 637, 649, 52 P.2d 237. Their respective interests were defined by the grant deed from plaintiffs' predecessors in interest to defendant. If, as plaintiffs contend, the deed conveyed no more than a one-twelfth interest in the grantors' mineral rights, their interests were in the ratio of eleven to one.

[3-5] It is settled that if one cotenant produces oil, he is entitled to charge the interests of nonproducing cotenants for their proportionate share of drilling and operating expenses. *Dabney-Johnston Oil Corp. v. Walden*, 4 Cal.2d 637, 657, 52 P.2d 237; see also, *McCord v. Oakland Q. M. Co.*, 64 Cal. 134, 148-149, 27 P. 863, 49 Am.Rep. 686; anno., 5 A.L.R.2d 1368, 1380. In this case the expense incurred by the owners of the mineral rights in producing the oil from the land is represented by the five-sixths of the oil that the lessee retains from the total production. By ratifying the lease defendant agreed that this is a fair charge for the expense of bringing the oil to the surface. *Gill v. Bennett*, Tex.Civ.App., 59 S.W.2d 473, 475; *Texas & Pacific Coal & Oil Co. v. Kirtley*, Tex. Civ.App., 288 S.W. 619, 622. "If a lease be executed by a cotenant, the nonconsenting cotenants may recognize the lease and receive their fractional interest in the royalty, or they may reject the lease, and receive their fractional part of the oil produced, less their proportionate part of the cost of discovery and production." *Davis v. Atlantic Oil Producing So.*, 5 Cir., 87 F. 2d 75, 77.

Section 10 of the lease provides for the payment to plaintiffs of that proportion of

rentals and royalties that their interest bears to the whole undivided fee in the real property. Section 10-a of the lease does not increase the share of the royalties to which defendant would otherwise be entitled. That section merely binds plaintiffs to "satisfy and discharge any and all obligations and requirements under" the deed to defendant. It does not purport to state what those obligations are. Accordingly, it is necessary to determine whether the deed conveyed only one-twelfth of the mineral rights, or on the contrary, as defendant contends, it conveyed an expense-free or royalty interest that would entitle defendant to one-twelfth of the oil produced free of any cost of production.

[6-8] Defendant contends that the addition of the words "and which may hereafter be produced and saved" to a grant of a fraction of all the oil in and under the land clearly evidence an intent that the interest granted should be expense free. It has been generally held, however, that a grant of a fraction of all "of the oil, gas and other minerals in and under, and that may be produced" from the land creates an expense-bearing mineral fee interest rather than an expense-free royalty interest. *Richardson v. Hart*, 143 Tex. 392, 185 S.W. 2d 563, 564-565; *Watkins v. Slaughter*, 144 Tex. 179, 189 S.W.2d 699, 700; *Jones v. Bedford*, Tex.Civ.App., 56 S.W.2d 305; *Gill v. Bennett*, Tex.Civ.App., 59 S.W.2d 473, 475; *Hinkle v. Gauntt*, Okl., 206 P. 2d 1001, 1005; *Manley v. Boling*, 186 Okl. 59, 96 P.2d 30, 31-32; *Shinn v. Buxton*, 10 Cir., 154 F.2d 629, 631-635; see also, *Brooks v. Mull*, 147 Kan. 740, 78 P.2d 879, 883. When there is an existing oil lease at the time the lessor executes a mineral deed, it is not uncommon for the deed to grant not only a given fraction of all the oil in, under, and that may be produced from the land, but also the same fractional interest in the royalties payable under the lease. See, 3 Summers, *Oil and Gas*, Perm.Ed., § 606, p. 502. If the first clause of such a deed were construed as creating an expense-free royalty interest, it would grant the stated fraction of the total production rather than the stated fraction of the landowner's royalty reserved under the

lease, and would therefore be inconsistent with the second clause. It has been held, however, that such deeds are not internally inconsistent and that the grant of the stated fraction of the royalties under the existing lease is merely a statement of the legal effect of granting the same fraction of all the oil in, under and that may be produced from the land. *Shinn v. Buxton*, 10 Cir., 154 F.2d 629, 631-635; *Richardson v. Hart*, 143 Tex. 392, 185 S.W.2d 563, 564-565.

[9] It is contended that because of differences in the applicable theories of oil and gas rights, authorities from other jurisdictions are of no value in interpreting the language of a grant of mineral rights in California land. There is nothing, however, in the theory of oil and gas rights in California to cause this court to reject the interpretation that has been adopted by the courts of other states in construing language similar to that in the deed in this case. California has rejected the theory of ownership of oil and gas in place, *Callahan v. Martin*, 3 Cal.2d 110, 118, 43 P.2d 788, 101 A.L.R. 871, and language in a grant referring to oil to be produced would therefore have less significance in determining the expense-free or expense-bearing nature of the interest created than similar language in a deed dealing with land in a state, such as Texas, where the theory of title to oil and gas in place has been retained. *Richardson v. Hart*, 143 Tex. 392, 185 S.W.2d 563, 564. In California the parties might well doubt the effectiveness of a conveyance limited to a fraction of all the oil and gas in and under the land and therefore add a reference to oil to be produced, without in any way intending to convey more than the stated fraction of all the oil rights appurtenant to the land. See, *Dabney-Johnston Oil Corp. v. Walden*, 4 Cal.2d 637, 648-648, 52 P.2d 237.

[10] Furthermore, the decision in *Dabney-Johnston Oil Corp. v. Walden*, 4 Cal. 2d 637, 52 P.2d 237, 240, indicates that the addition of the words "which may be hereafter produced and saved" after a grant of a fraction of all of the oil in and under

the land does not have the effect of creating an expense-free interest. In that case there was a grant of "a two per cent. in said land owners royalty of all gas, oil and other hydrocarbon substances to be produced and saved and sold from said described land \* \* \*." The interest was described as a royalty interest, and in holding it expense-free, the court reasoned that since the two per cent. interest had been carved from the landowner's 27½ per cent. expense-free royalty under an existing lease, it would necessarily be implied that after the termination of the lease, the two per cent. interest remained expense-free. It placed no reliance on the words "to be produced and saved and sold from said described land," pointing out that the quoted language was inserted for another purpose than to indicate how the expenses were to be allocated. It was contended that under the deed the grantee was entitled to royalties only if a lessee was producing oil, not if another cotenant was producing it. In answering this contention the court said, "That the parties in the instant case did not contemplate that a single producing tenant should retain the entire output is indicated by the stipulation of facts and the reforming clause added to the assignment, which expressly provide that the rights of the assignees extend not only to oil within and beneath the land, but to all oil and other hydrocarbon substances produced and saved from said land, however said substances should be produced." 4 Cal.2d at 657, 52 P.2d at page 247. It is clear, therefore, that in California as in other jurisdictions, in the absence of extrinsic evidence or other controlling language in the deed, a grant of a fraction of all the oil in, under and that may be produced and saved from the land creates an expense-bearing mineral fee interest.

*Barnard v. Jamison*, 78 Cal.App.2d 136, 177 P.2d 341, does not support a contrary result. In that case the grant deed contained a clause that specifically provided what expenses the fractional interests conveyed should bear, and the court properly held that this clause was determinative of the issue.

The appeal from the order granting the motion for judgment on the pleadings is dismissed. The judgment is reversed.

SHENK, EDMONDS, and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

In December, 1935, the then owners of the involved land executed and delivered to defendant an instrument entitled "Grant Deed," in which it is declared that such owners "do hereby grant to [defendant] \* \* \* Eight and one-third per cent. (8 $\frac{1}{3}$ %) of all oil, gas and other hydrocarbon substances, and minerals, in, under/or which may be hereafter produced and saved from" such land. In August, 1936, the land was conveyed to plaintiffs, with the express exception of the percentage interest in the oil, gas and other minerals which had theretofore been transferred to defendant. By reason of the earlier conveyance and the express exception it is obvious that plaintiffs never acquired more than 91 $\frac{2}{3}$ % of the oil and mineral rights. In February, 1945, plaintiffs, as lessors, entered into an oil lease covering the property. The lease provides for a  $\frac{1}{6}$  (16 $\frac{2}{3}$ %) landowner's royalty, payable to plaintiffs and expressly requires of plaintiffs that (Par. 10-a) "in no event shall Lessee be required to pay greater rents or royalties than provided in this lease and Lessor [plaintiffs] further agrees that Lessor will fully satisfy and discharge any and all of the obligations and requirements under that certain Deed [to defendant, of its percentage interest in the oil, gas and other minerals] \* \* \* insofar as the above described land and the production therefrom is concerned." Defendant did not sign the lease as a lessor and is not named as such. Its character or relationship, as being distinct from that of cotenant lessor, is indicated by the provision above quoted and by the fact that under date of March 1, 1945, it executed a writing attached to the lease which reads: "The within Oil and Gas Lease is hereby ratified, approved and confirmed." Obviously, the defendant, by the terms of the lease, by the substance of its endorsement thereon, and by the language of the original conveyance to it, is

not a mere cotenant lessor. It is the owner of what heretofore in California has been termed a royalty interest—of 8 $\frac{1}{3}$ % of "all" oil and gas which may be "produced and saved" from the land. The lessee has "produced and saved" oil and gas from the demised premises and the sole question is: Is defendant entitled to 8 $\frac{1}{3}$ % of *all* the "produced and saved" oil and gas or only to 8 $\frac{1}{3}$ % of that share of the oil and gas ( $\frac{1}{6}$ ) which plaintiffs as lessors reserved in their lease agreement with the producers?

The trial court accepted the language of the conveyance to defendant and adjudged that the defendant owns 8 $\frac{1}{3}$ % of *all* "oil, gas and other hydrocarbon substances and minerals in, under and/or which have heretofore or may hereafter be produced and saved" from the land; that defendant is entitled to receive that percentage of the total production; and that plaintiffs "shall account to and pay over to the defendant \* \* \* the proceeds from the sale of 8 $\frac{1}{3}$ % of 100% of" the total production. Plaintiffs urge, however, and the majority now hold, that defendant is entitled not to 8 $\frac{1}{3}$ % of *all* the oil and gas "produced and saved" from the premises, but only to 8 $\frac{1}{3}$ % of *one-sixth* of the oil and gas so produced and saved. This startling result is accomplished by holding that the conveyance to defendant did not give it a royalty interest in the oil but that it is a tenant in common of land or mineral rights in fee with plaintiffs and is entitled merely to a share of their lessors' royalty.

In support of the majority position it is argued that the language of the conveyance to defendant creates a fee interest in minerals, rather than a royalty interest; that, therefore, under the holdings of certain cases from other states, construing various contracts and conveyances, defendant should be held entitled to no more than 8 $\frac{1}{3}$ % of the plaintiffs'  $\frac{1}{6}$  lease royalty; and, further, that as a cotenant holder of a "fee interest" in the oil and gas rights to the land, as well as by reason of defendant's ratification of the lease, defendant should pay its "proportion of drilling and operation expenses" (see *Dabney-Johnston Oil Corp. v. Walden* (1935), 4 Cal.2d 637,



657, 52 P.2d 237) and should share in royalties under the lease on the property in the same proportion that its "fee interest bears to the total fee interest." I am satisfied that upon the law as heretofore established in California such position is untenable. This court has definitely rejected the theory that the transfer of fractional oil rights in land constitutes a transfer of a fee interest in the oil, and has held that in this state the transferee of such rights receives a royalty interest; i. e., an interest in real property in the nature of an incorporeal hereditament, which he holds as a cotenant with the other owners of oil rights in the same land. (see Callahan v. Martin (1935), 3 Cal.2d 110, 125, 126, 43 P.2d 788, 101 A.L.R. 871; Dabney-Johnston Oil Corp. v. Walden (1935), supra, 4 Cal.2d 637, 649, 650, 654, 52 P.2d 237; Schiffman v. Richfield Oil Co. (1937), 8 Cal.2d 211, 223-224, 64 P.2d 1081; La Laguna Ranch Co. v. Dodge (1941), 18 Cal.2d 132, 135, 114 P.2d 351, 135 A.L.R. 546; Tanner v. Title Ins. and Trust Co. (1942), 20 Cal.2d 814, 819-820, 129 P.2d 383; Tanner v. Olds (1946), 29 Cal.2d 110, 116, 173 P.2d 6, 167 A.L.R. 1219.

Plaintiffs concede that if the parties to a conveyance "intended the conveyance to be of a royalty interest, it is generally held that the grantee takes what may be termed a non-expense bearing interest, or a net interest in the royalty reserved in any lease on the land." As pointed out in the Dabney-Johnston case, 4 Cal.2d at page 653, 52 P.2d 237, the "language of a grant is to be construed most strongly against the grantor," (see also Civ.Code, § 1069; Beam v. Duggan (1933), 132 Cal.App. 546, 550, 23 P.2d 58) and (4 Cal.2d at page 657, 52 P.2d 237), "where cotenancy interests have been sold with the understanding and agreement that they shall not be subject to such charge [for a proportion of drilling and operation expense], but that other units shall bear the full expense of production \* \* \* such agreement of the parties, express or necessarily implied [is

controlling]." Here the grant to defendant unequivocally specifies that defendant is to receive  $8\frac{1}{3}\%$  of "all oil, gas \* \* \* which may be hereafter produced and save from" the land involved, and no mention or provision is made of a requirement that defendant pay, or be charged with, a share of the cost of production, or any other debit against his interest, under a lease for oil development which might subsequently be executed by the grantor or his successors in title. It would seem that, as commented by the court in Barnard v. Jamison (1947), 78 Cal.App.2d 136, 141, 177 P.2d 341, "the words of conveyance \* \* \* could not be plainer."

Moreover, it does not appear that by "ratifying, approving and confirming" the lease, defendant agreed to be charged with any part of the lessee's share in the production. By paragraph 10-a of the lease, quoted in material part hereinabove, plaintiffs expressly agreed to fully satisfy and discharge the obligation to pay over to defendant the latter's royalty share in the oil and gas produced. Consequently, it seems only reasonable to conclude that, as impliedly found by the trial court, defendant's ratification of the lease constituted no more than a consent that the lessee named therein should proceed with oil development upon the condition, explicitly set forth in the lease, that defendant's rights be fully satisfied and discharged. Defendant's royalty interest comes not from the lease but was created and is measured by the original landowner's conveyance.

Plaintiffs rely upon cases from other states<sup>1</sup> in which it was held that the landowner's royalty to be paid under an oil and gas lease should be divided between cotenants in proportion to their interests in the land or the minerals. However, those cases differ from ours in language of the conveyances involved, in circumstances under which the leases were made, and in the accepted legal theories of oil and gas rights which were applied, and consequently they are of doubtful assistance here.

1. See Manley v. Boling, 1939, 186 Okl. 59, 96 P.2d 30, 31-32; Swearingen v. Oldham, 1945, 195 Okl. 532, 159 P.2d 247, 250; Murphy v. Dilworth, 1941, 137

Tex. 32, 151 S.W.2d 1004, 1006; Richardson v. Hart, 1945, 143 Tex. 392, 185 S.W.2d 563, 564-565; Shinn v. Buxton, 10 Cir., 1946, 154 F.2d 629, 632-633.

Plaintiffs argue that judgment on the pleadings was improper because "the complaint for declaratory relief in this instance clearly stated a cause of action" (see *Seeger v. Odell* (1941), 18 Cal.2d 409, 412, 115 P.2d 977, 136 A.L.R. 1291; *Ran-nard v. Lockheed Aircraft Corp.* (1945), 26 Cal.2d 149, 151, 157 P.2d 1; *Columbia Pictures Corp. v. De Toth* (1945), 26 Cal.2d 753, 760, 161 P.2d 217, 162 A.L.R. 747), and plaintiffs "have not had an opportunity to prove the allegations in their complaint. They should not be denied their day in court unless the deed to Mountain View Dairies, Inc. so clearly constitutes an assignment of landowner's royalty that no other construction upon such deed is possible." It is to be noted, however, that the deed to defendant, as well as the oil lease here involved, were relied on by both parties and were pleaded in full by defendant in its cross-complaint. In their opening brief plaintiffs assert that "The primary question for determination \* \* \* is whether, under the pleadings, the deed and the lease here involved, Mountain View Dairies, Inc., is entitled to 8⅓% or 50% of the landowner's royalty \* \* \*." In their notice of motion for judgment on the pleadings plaintiffs solemnly declare that "Said motion will be made as to said cross complaint upon the ground that no material issue of fact is presented by the cross complaint and answer thereto but on the contrary that *the only issue presented is one at law, to-wit, the legal interpretations of the* deed and the lease. (Italics added.) The declaratory judgment sought by each of the parties hereto involved the interpretation of the same instruments upon the same pleadings, and was rendered by the court. Under such circumstances plaintiffs are not entitled, when the judgment went against them, to now assert that interpretation of either the deed or the lease presents a question of fact, rather than of law, and that the judgment should not have been rendered on the pleadings alone.

For the reasons above stated, I would affirm the judgment appealed from.

CARTER, J., concurs.

# VALDEZ v. PERCY et al.

L. A. 21356.

Supreme Court of California, in Bank.

May 2, 1950.

Rehearing Denied June 1, 1950.

Josephine Valdez sued James F. Percy, Chief Surgeon of the Los Angeles County Hospital, Franklin D. Hankins, a resident physician thereof, and others, for malpractice. From a judgment of the Superior Court, Los Angeles County, Henry M. Willis, J., for plaintiff after the death of defendant Percy, defendant Hankins appealed. The Supreme Court, Shenk, J., held that the evidence supported the trial court's findings of defendant Hankins' negligence in diagnosis of plaintiff's condition and removal of her breast.

Judgment affirmed.

Prior opinion, Cal.App., 211 P.2d 6.

## 1. Physicians and surgeons ⇨16

A surgeon negligently performing operation under direction and with assistance of another surgeon was a co-actor and hence a joint tortfeasor liable to person operated on for entire ensuing damage.

## 2. Physicians and surgeons ⇨18(8)

Evidence supported trial court's findings of surgeon's negligence in diagnosing patient's condition as breast cancer and removing one of her breasts, so as to render surgeon liable to patient in damages for malpractice.

## 3. Evidence ⇨546, 570

In action against surgeon for malpractice in negligently diagnosing patient's condition as breast cancer and removing one of her breasts, trial court had reasonable discretion in determining a physician's qualifications, by experience and practice in tumor surgery and treatment, to testify for plaintiff as expert witness, and disclosure of limited extent of his recent practice went to weight, rather than competency, of his testimony.

## 4. Evidence ⇨536

In action against surgeon for malpractice in diagnosing plaintiff's condition as breast cancer and removing one of her breasts, a physician having experience in

tumor surgery and treatment, though to limited extent in recent years, was qualified to testify for plaintiff as expert on question of exercise of care in diagnosis and necessity for or desirability of operation, though he did not use cautery method used by defendant.

#### 5. Physicians and surgeons $\S$ 18(1 1/4)

A patient's consent to removal of one of her breasts did not foreclose inquiry as to surgeon's negligence in determining advisability or necessity for such operation in action against him for malpractice.

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Gibson, Dunn & Crutcher and Philip C. Sterry, Los Angeles, for appellants.

David C. Marcus, Los Angeles, for respondent.

SHENK, Justice.

The defendant has appealed from a judgment for the plaintiff in an action for damages for alleged malpractice in amputating the plaintiff's right breast.

The action was commenced in December, 1934, against the County of Los Angeles, James F. Percy, Chief Surgeon of the County Hospital, Franklin D. Hankins, one of the resident physicians of the hospital, and various employees of the hospital. The complaint was drawn to tender issues on the theory of assault and battery, that is, that the amputation was without the plaintiff's consent, and on the theory of negligence. The plaintiff dismissed the action as against some of the defendants. A former trial resulted in the granting of motions for nonsuit and directed verdicts, which were sustained on appeal as to all defendants except Doctors Percy and Hankins. *Valdez v. Percy*, 35 Cal.App.2d 485, 96 P.2d 142. As to them the judgment was reversed. Doctor Percy died before the second trial which took place about fifteen years after the alleged malpractice, with Doctor Hankins as the sole defendant. This trial was before the Court without a jury.

The defendant contends that the evidence is insufficient to support the findings and

judgment. The record discloses the following:

Doctor Percy was a specialist in cancer surgery and treatment. The defendant Hankins had received his license to practice surgery and medicine in 1932, and as a resident physician of the hospital was assigned to assist Doctor Percy.

On January 30, 1934, the plaintiff with her husband, Dr. Valdez, consulted Dr. Percy for an examination of an enlarged lymph gland in the right axilla (armpit). She was about thirty-eight years of age, five feet five inches in height, weighed 170 pounds, and was in good health. She was examined in the clinic by Doctors Percy and Hankins. The clinical examination revealed the enlarged lymph gland about the size of a large olive and several smaller lymph nodes in the axilla, but did not reveal any lumps or lymph nodes in the breasts which were large and pendulous. A report of the clinical examination was sent to the Malignancy Board of the Hospital for recommendation. On suspicion of carcinoma (cancer) of the breast the board suggested a biopsy (surgical removal and microscopical examination of a rapid-frozen section of the enlarged lymph node in the axilla), on the theory that the gland might be aberrant (wandering) breast tissue and for removal of the breast if necessary.

Pursuant to the board's recommendation the plaintiff reported to the hospital for surgery on March 1, 1934. She and her husband signed a consent to the contemplated biopsy and other surgery deemed advisable or necessary. At 8:30 of that morning the plaintiff was under anesthesia in surgery on the tenth floor of the hospital. Dr. Percy opened the skin under the right axilla and removed the growth. That operation consumed about twenty minutes. The removed tissue was immediately sent to the surgical laboratory on the fifteenth floor. After rapid freezing, a frozen section on a slide was sent by dumb waiter to the main laboratory on the second floor where it was subjected to microscopical examination. The hospital records do not clearly show that the report which ac-



accompanied the gross specimen indicated the source of the tissue. The technician in the surgical laboratory testified that it said "breast tissue" and that she so reported to the main laboratory. In ten or fifteen minutes an oral report was received in surgery, stating "carcinoma" or "carcinoma of the breast." After consultation with Dr. Valdez who was sitting in the gallery or amphitheatre, Doctors Percy and Hankins proceeded to remove the breast. Doctor Hankins performed the operation, Dr. Percy assisting and addressing the audience of students. Following the carcinoma report the field of operation was outlined by incising the skin around the breast and other portions to be removed. Throughout the operation, including the preliminary incising, the so-called Percy cautery was employed which involved the use of a thermal instrument or knife attached to an electrical heating element and heated to approximately 1500 degrees fahrenheit. The theory of the cautery method was that cancerous and other cells coming in contact with the instrument were destroyed by the heat, whereas under the cold knife method the destruction did not take place. The preliminary incising of the skin occupied between ten and twenty minutes.

Immediately after the oral report of "carcinoma" had been sent to surgery by the main laboratory technician, he telephoned the operator in the surgical laboratory, questioned the nature of the frozen section as breast tissue, and requested that the gross specimen be sent to him. In about twenty minutes after the incising was started a corrected written report was received in surgery stating, "Lymphoma, possibly Hodgkin's Disease." Lymphoma is an enlargement of a lymph gland. Hodgkin's Disease is malignant lymphoma for which there is no known cure. The record clearly indicates that the corrected report cancelled the implications of carcinoma of the breast contained in the first report and neither required nor justified the removal of the breast and other tissues.

The plaintiff's witnesses testified that when the correct report was received surgery had progressed to the completion of the outline of the field of operation, and

that incising to separate the skin from the breast tissue had only begun. It was unquestioned that at that point it was possible and feasible to stop the operation and close and suture the skin. Dr. Hankins testified that when the corrected report was received the skin had been incised and separated over the entire area of operation; that the right breast tissue, pectoral muscles, most of the intercostal muscles, and the lymph glands had been removed, and that the operation was complete except for placing a few more stitches in the skin. Dr. Percy's testimony on the first trial, which was read into the record, was to the same effect. The hospital records show that the operation closed at 10:56 a. m.

The plaintiff remained in the hospital for more than two months. After her removal to her home she was in bed for four additional months. The area healed slowly, there was profuse drainage, and the sloughing of the skin over the operative field. Treatment continued for one and one-half years after the operation. Scar tissue formed over the breast and the under-arm area which contracted and caused swelling and pain and partial limitation of movement of the right arm.

The court found against the plaintiff on the alleged cause of action based on assault and battery; but found that the defendant was negligent in the diagnosis of the plaintiff's condition as carcinoma; that in fact the plaintiff was not and the exercise of ordinary care would have disclosed that she was not afflicted with any disease at all; that the defendant negligently and without right personally removed the plaintiff's right breast, muscles and glands, greatly mutilating and disfiguring her and causing her great mental and physical anguish, pain, loss of movement of the right arm, permanent scars, disfigurement, and severe shock to the nervous system, to the plaintiff's damage in the sum of \$7500.00.

[1,2] The defendant contends that if there was negligence it was not attributable to him, since the evidence shows that he was assigned by the hospital authorities to assist during the operation under the direction and control of Dr. Percy, and that it

was his duty to follow the directions given to him by Dr. Percy during the course of the operation. The defendant testified that he operated under the direction and with the assistance of Dr. Percy who did some of the more difficult sections. But the fact that the defendant performed the operation, with or without assistance or direction, stands uncontradicted. Since he was a co-actor he was a joint tortfeasor and liable to the plaintiff for the entire damage ensuing from the negligent act. *Summers v. Tice*, 33 Cal.2d 80, 85, 199 P.2d 1, 5 A.L.R.2d 91, quoting from Restatement Torts, sec. 876(b) (c), and *Wigmore Select Cases on the Law of Torts*, sec. 153; *Lawless v. Calaway*, 24 Cal.2d 81, reversing judgment of nonsuit as to defendant assistant in a surgery malpractice case. The evidence is sufficient to support the findings of negligence.

[3,4] The defendant contends that the plaintiff's witness, Dr. Webb, was not qualified as an expert because he was shown to have practiced only to a limited extent in recent years and that such practice did not include tumor surgery. The court permitted full exploration of the witness's experience and practice in tumor surgery and treatment, both as to extent and point of time. The court had a reasonable discretion in determining the witness' qualifications, and the disclosures of limitations went to weight rather than competency. *Moore v. Belt*, 34 Cal.2d 525, 212 P.2d 509; *Sinz v. Owens*, 33 Cal.2d 749, 753, 205 P.2d 3, 8 A.L.R. 757. The fact that Dr. Webb had not himself used the Percy cautery did not disqualify him. His testimony was relevant on the question of the exercise of care in the diagnostic field and in the matter of the necessity for or desirability of the main operation. No abuse of discretion in the court's ruling is indicated.

[5] The court found against the plaintiff on the issue of assault and battery because she consented to the operation. It also found that the removal of the plaintiff's breast was "without right." The defendant therefore argues that the findings are incurably conflicting. The fact that there was a prior consent did not relieve the defendant from liability. *Valdez v.*

*Percy*, supra, 35 Cal.App.2d at page 491, 96 P.2d at page 144. The consent did not foreclose inquiry into negligent conduct in determining the advisability or necessity for the operation. The defendant also argues that a finding that the main operation was completed before the second report was received is inconsistent with the findings of negligence. As indicated, the evidence on the time element was conflicting. But the exact time of the completion of the main operation was immaterial in view of the supported findings of negligence in the diagnosis and removal of the plaintiff's breast.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



35 Cal.2d 205

LOCKE v. YORBA IRR. CO. et al.

L. A. 20863.

Supreme Court of California, in Bank.

April 25, 1950.

Rehearing Denied May 22, 1950.

Rosa Yorba Locke sued Yorba Irrigation Company, a corporation, and others, to quiet title to certain shares of named defendant's stock. The Superior Court of Orange County, Kenneth E. Morrison, J., rendered judgment for defendants and plaintiff appealed. The Supreme Court, Shenk, J., held that reservation by plaintiff in a conveyance of part of land of water rights appurtenant to land was effective, where not prohibited by by-laws of irrigation company in which plaintiff owned stock, representing water rights.

Reversed.

Prior opinion, 212 P.2d 617.

#### 1. Waters and water courses ⇨238

Where transfer of riparian water right by owner of land to which it was appurtenant, to mutual irrigation company, organized to take over distribution of water, and the issuance of stock by company rep-

representing the quantum of right was nothing more than a change in the formal evidence of title, water rights and stock were one and the same, the latter being merely the representation of the former.

## 2. Waters and water courses ⇨238

Where stock in irrigation company was mere evidence of ownership of water rights, the fact that owner in deed conveying part of land to which water right was appurtenant reserved water right without mentioning the stock would not affect validity of reservation.

## 3. Waters and water courses ⇨156(4)

Owner of land to which water right is appurtenant may convey a portion of the land with reservations of water right for use on the land retained, unless by mutual plan or agreement or basis of organization such water right becomes inseparably attached to the whole of a parcel.

## 4. Waters and water courses ⇨238

Under by-laws of mutual irrigation company merely providing that stocks representing the water rights could be transferred only with the land and that a conveyance of land should constitute a transfer of stock appurtenant thereto, owner was entitled to convey part of the land without the stock as long as he retained land to which stock could be appurtenant. Civ. Code, § 330.24.

## 5. Waters and water courses ⇨253

Reservation by owner of all her water rights appurtenant to land, in conveyance of part of land was effective, where at all times prior to the conveyance owner had used entire allotment on portion she retained and by-laws of mutual irrigation company did not prohibit such reservation if owner retained land to which water rights could be appurtenant. Civ. Code, § 330.24.

## 6. Waters and water courses ⇨127

Water rights are species of real property capable of acquisition by adverse user. Civ. Code, § 1007.

## 7. Waters and water courses ⇨247(1)

In action to quiet title to irrigation company stock representing water rights

reserved by owner in conveyance of part of land to which rights were appurtenant, evidence established plaintiff's claim to water rights and stock by adverse possession, where user was adverse, open, hostile and exclusive under claim of stock ownership for period for more than 25 years. Civ. Code, §§ 330.24, 1007.

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Launer, Chaffee & Launer, Albert Launer and Walter B. Chaffee, Fullerton, for appellant.

Head, Wellington & Jacobs, Santa Ana, Friis & Schutz, McFadden, Turner & Owens and Claude M. Owens, Anaheim, for respondents.

SHENK, Justice.

The plaintiff appealed from a judgment for the defendants in an action to quiet her title to seven shares of stock of the defendant Yorba Irrigation Company.

The history of the acquisition of the stock is not disputed. Prior to 1919 the plaintiff was the owner of 118 acres of land in Orange County which formerly had been a portion of the Rancho Canon de Santa Ana, an original Spanish grant to an ancestor, Jose Antonio Yorba. The original rancho was riparian to the Santa Ana River. By various decrees in probate and partition actions it was divided into smaller parcels with retention of riparian rights. The parcels were served water for domestic and irrigation use from the Santa Ana River through the Yorba ditch. By custom and agreement depending upon the extent of cultivation and need each parcel became entitled to a specified number of hours run of 200 miner's inches of water every ten and one half days. Apportionment was not on an acreage basis. Some larger parcels received less than smaller parcels having greater acreage under cultivation. The plaintiff became entitled to seven hours run every ten and one half days.

In 1913 the owners of the various parcels served by the Yorba ditch organized the defendant Yorba Irrigation Company as a mutual water company. They con-



vayed their water rights to the company and received in exchange one share of stock for each hour of flow to which they had become entitled. The certificates of stock designated the parcels to which the water rights pertained. The plaintiff received a certificate of seven shares of stock stated to be appurtenant to her 118 acre parcel.

The by-laws of the company provided that the stock should not be transferable except with the land for which it was issued, and that a conveyance of the land should constitute a transfer of the stock appurtenant thereto. The provisions in this respect were substantially those permitted by section 330.24 of the Civil Code, and it may be assumed were binding on the parties although a certified copy of the articles of incorporation and by-laws was not recorded until 1945.

During the period of her ownership of the 118 acre parcel the plaintiff had utilized substantially the entire flow of water to which she was entitled on the easterly 56 acres which, with the possible exception of five acres, constituted the only portion under cultivation. There was also maintained on the parcel a well and pump for additional water when needed. In 1919 the plaintiff conveyed the westerly 62 acres to Mary E. Rhorer by a deed which recited that the grantor reserved "all right to water from the Santa Ana River, as conveyed to the Yorba Irrigation Company." Shortly thereafter the grantee conveyed the parcel to her agents in the transaction, Charles O. Goodwin and Harry F. Dierker and their respective wives in joint tenancy. That parcel thereupon became known as the Goodwin-Dierker Tract. It was subsequently subdivided and numerous parcels sold to persons who organized the Goodwin Mutual Water Company for the purpose of developing water from wells to serve their needs.

In 1923 in order to utilize her land and water stock as security for a loan, the plaintiff requested the issuance to her of a certificate showing the seven shares as appurtenant to her 56 acre parcel. For this purpose and at the secretary's request, she obtained and filed with the company a let-

ter signed by Harry F. Dierker and Chas. O. Goodwin stating that they were aware of the fact that ownership of the seven shares of stock had been retained by the plaintiff and that they, the present owners of the 62 acre tract, disclaimed any right or ownership in the seven shares of stock or any right to the use of water represented by the stock. Thereupon the old certificate was cancelled and a new certificate representing seven shares as appurtenant to the 56 acres was issued to the plaintiff. She remained the owner of the seven shares on the books of the company, voted the shares, paid any assessments thereon, and utilized all of her water rights pursuant thereto until November 1945. Admittedly prior to that time none of the individual defendants voted any of the stock or used any of the water. But before that time it had become apparent that the owners in the Goodwin-Dierker tract could use more water and that the irrigation company had some surplus water which could be utilized by additional customers, but only through stock ownership. In the latter part of 1945 one Fickle, owner of ten acres in the Goodwin-Dierker tract, demanded of the irrigation company that it transfer to him 10/118ths of the plaintiff's seven shares. Over the plaintiff's protests a certificate was issued representing the proportion demanded by Fickle and a like amount was cancelled from the plaintiff's certificate. The plaintiff thereupon filed the present action to quiet title to the full seven shares, basing her claim on ownership by the reservation in the 1919 deed and on a prescriptive right by adverse possession continuously since 1919.

The trial court found in substance that the plaintiff did not reserve any portion of the stock by the 1919 deed; that the seven shares of stock were appurtenant to the 118 acre tract; that after conveyance in 1919 they remained appurtenant thereto, and that the individual defendants became the owners of the proportion represented by the amount of land conveyed to them. The court also found that the plaintiff acquired no rights by adverse possession.

The findings and judgment indicate the court's acceptance of the defendants' theor-

ies that there is a distinction to be made between a reservation of the stock and a reservation of the water rights; that since the plaintiff in 1919 already had conveyed her water rights to the irrigation company, she could not reserve them, and she made no express reservation of the stock; and that in any event under the by-laws the water rights or stock remained unalterably appurtenant to the land to which originally they applied.

[1,2] The misconceptions upon which these theories are based will readily become apparent. It is true that the plaintiff's deed reserved the right to the water without mention of the stock. But since the right and the stock were one and the same, the latter being merely the representation of the former, the invoked distinction may not be drawn. The transfer of the water right to the mutual irrigation company organized to take over the distribution of water from the maintenance of the Yorba ditch and the issuance of stock representing the quantum of the right, was nothing more than a change in the formal evidence of title or ownership of the water right. At no time was there other than a change in the form of the ownership of the right, which in substance remained in the plaintiff by virtue of the issuance to her of the certificate of stock. *In re Estate of Thomas*, 147 Cal. 236, 81 P. 539; *Arroyo Ditch and Water Co. v. Baldwin*, 155 Cal. 280, 100 P. 874; *Copeland v. Fairview Land, etc., Co.*, 165 Cal. 148, 161, 131 P. 119; 2 *Wiel Water Rights*, 3rd Ed. sec. 1269.) Therefore it became immaterial whether in the deed the plaintiff designated the reservation as of the water right or the stock. The right was one which she could reserve and the reservation was sufficient to preserve to her the use of the ditch water to the extent designated by the stock certificate, *Alhambra Addition Water Co. v. Mayberry*, 88 Cal. 68, 25 P. 1101; *Painter v. Pasadena L. & W. Co.*, 91 Cal. 74, 27 P. 539; *San Rafael Ranch Co. v. Ralph Rogers Co.*, 154 Cal. 76, 96 P. 1092, unless the by-laws prevented.

[3] The by-laws constituted an agreement that the stock should be transferable only with the land and that at least in the

absence of reservation of water rights or stock the right would pass with a conveyance of the land. Had the conveyance been made by the plaintiff without mention of the water rights unquestionably those rights would pass with the conveyance. *Riverside Land Co. v. Jarvis*, 174 Cal. 316, 163 P. 54. A similar conclusion might follow if the plan of the land owners in organizing the irrigation company had shown an intention that every portion of the land in ownership should receive water and that the right of every portion of the land to receive water was perpetual and could not be severed. This is a familiar plan in the organization of irrigation districts or water companies where distribution of water is measured by the quantity of land, whether or not stock is issued as evidence of the quantum of the right. See *Franscioni v. Soledad Land & Water Co.*, 170 Cal. 221, 149 P. 161. In all such plans ownership of land is the basis of the right to water for irrigation. But unless by the mutual plan or agreement or basis of organization such water right becomes inseparably attached to the whole of a parcel, there is no doctrine which would prevent a grantor from conveying a portion of the land with a reservation of the right for use on the land retained. In this case the plan of organization does not, nor does the custom of use on which it was based, the by-laws, or the conduct of the parties evidence an intention that no parcel of land could be conveyed expressly without a water right appurtenance.

[4,5] There was no evidence of use of water on all of the land. The distribution of water was on a use and not on an acreage basis, and this was so both before and after the organization of the irrigation company. At all times the plaintiff's entire allotment was used on less than half of her parcel, which was the portion which she retained. The by-laws provided that stock could be transferred only with land; and that a conveyance of land "shall constitute a transfer of the stock appurtenant thereto", or that shares of stock "shall pass as an appurtenance thereto." There is neither plan nor provision which prevented a conveyance of land without the stock where,

as here, an express reservation precluded its passing as an appurtenance thereto so long as there was land retained by the grantor to which the stock could be appurtenant. That this is the proper interpretation of the by-laws and agreement is plainly indicated by the conduct of the parties who acted in accordance therewith. In fact it is difficult to see how the irrigation company or the plaintiff's grantees and their successors could deprive her of the reserved right to water, in view of the foregoing facts and conduct, unless the intention was clear that the water was distributable to all of the land on an acreage basis, and that the right to distribution of water thereto was perpetual to the whole thereof. The foregoing facts indicate that the parties contracted in the sale transaction on the basis of a consideration for the 62 acres without the water rights. It was in evidence that if the acreage had been sold with the water rights it would have been worth \$150 to \$200 more per acre. On the facts disclosed by this record an interpretation which does not prohibit the plaintiff's express reservation of the water right is the only reasonable and therefore the only acceptable construction of the by-laws.

[6, 7] The contention that the evidence does not support the finding that the plaintiff had not established her claim to the stock and water rights by adverse possession must be sustained. Water rights are a species of real property capable of acquisition by adverse user. Civ.Code sec. 1007; Northern California Power Co. v. Flood, 186 Cal. 301, 199 P. 315; Lee v. Pacific Gas & Electric Co., 7 Cal.2d 114, 59 P.2d 1005. All of the elements of adverse, open, hostile and exclusive user of the quantum of water and uninterrupted exercise of rights under claim of stock ownership for a period of more than twenty-five years are present. There was no showing that the additional water for which the irrigation company sought other users was due to any non-user of rights by the plaintiff. There is no conflict in the testimony to the effect that during the irrigation season the plaintiff used all the ditch water to which she was entitled and that she supplemented the supply by the use of well water when

her right to ditch water was insufficient to meet her needs.

Other contentions need not be discussed.

The judgment is reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



# KELLIHER v. KELLIHER (two cases).

Civ. 7679, 7696.

District Court of Appeal, Third District,  
California.

April 25, 1950.

Rehearing Granted May 25, 1950.\*

Unlawful detainer action filed in the Justice's Court of O'Neil Township, San Joaquin County, by A. E. Kelliher against Bessie L. Kelliher. From the judgment of the Justice's Court in favor of the plaintiff, the defendant appealed on questions of both law and fact to the Superior Court of San Joaquin County, and filed a motion for a hearing on the question whether the Justice's Court had jurisdiction and whether the Superior Court had jurisdiction to try the case de novo. The Superior Court, George F. Buck, J., reversed the judgment of the Justice's Court and ordered the case transferred to the Superior Court and entered judgment granting plaintiff's motion for summary judgment, and the defendant appealed. The plaintiff appealed from the order retaxing costs. The District Court of Appeal, Peek, J., held that the defendant was compelled to prove the deraignment of his title and that by reason of defendant's denial thereof it necessarily followed that a question of fact was thereby presented and it therefore was error for the trial court to grant plaintiff's motion for summary judgment.

Summary judgment reversed, appeal from order retaxing costs dismissed and cause remanded.

## I. Appeal and error ¶32

After appeal to Superior Court from judgment in Justice's Court, no further ap-

\* Subsequent opinion 225 P.2d 554.



peal to higher courts of the state exists, and litigant desiring to attack decision of Superior Court following her appeal can only do so by a petition for a writ of review.

## 2. Forcible entry and detainer §43(6)

Where defendant appealed on questions of both law and fact to Superior Court from judgment of Justice's Court in favor of plaintiff in unlawful detainer action and moved for hearing on question whether Justice's Court had jurisdiction and whether Superior Court had jurisdiction to try the cause de novo, and Superior Court reversed judgment of Justice's Court and ordered case transferred to Superior Court, Superior Court was not required to dismiss action, but could proceed to hear the cause as an original proceeding. Code Civ.Proc. §§ 112, 396.

## 3. Forcible entry and detainer §6(2)

While general rule is that right to possession alone is involved in unlawful detainer proceeding and that broad question of title cannot be raised or litigated, nevertheless, to limited extent of proving deprivation of title in manner expressly provided for in unlawful detainer statutes, question of title may be tried in unlawful detainer actions. Code Civ.Proc. § 1161a.

## 4. Judgment §185

The granting of plaintiff's motion for summary judgment in unlawful detainer action was error where defendant's affidavit in opposition to motion raised questions relative to title of the parties. Code Civ.Proc. § 1161a.

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Lafayette J. Smallpage and Harold J. Willis, Stockton, for Bessie L. Kelliher.

Forrest E. Macomber, Stockton, for A. E. Kelliher.

PEEK, Justice.

The present controversy had its inception in an unlawful detainer action filed in the Justice's Court of O'Neal Township, San Joaquin County, by plaintiff, the divorced husband of the defendant.

By his complaint plaintiff alleged that on July 9, 1947, the defendant was the owner and occupant of certain described real property; that on said date she conveyed all of her right, title and interest in the said property to Raymond E. Kelliher [a son of plaintiff and defendant] who agreed to permit the defendant to remain in possession as a "tenant in sufferance" without the payment of rent; that on April 13, 1948, Raymond E. Kelliher and his wife conveyed the property to the plaintiff; that on June 2, 1948, the plaintiff served the defendant with a three day notice to surrender possession of the premises; that defendant refused to comply with said demand and that the monthly value of the rents and profits of the premises was the sum of \$100. The complaint prayed for restitution of the premises and damages for the rents and profits of the premises. Defendant's general and special demurrer was over-ruled, whereupon she answered denying that she had conveyed all of her right, title and interest in the property to Raymond E. Kelliher, that he agreed to permit her to remain in possession as a tenant in sufferance without the payment of rent or that he was the owner of the property or entitled to the possession thereof and alleged that the monthly rental value of the rents and profits were in excess of \$100. The remaining allegations of the complaint were admitted. In addition to the foregoing denials and admissions the answer alleged as an affirmative defense that on July 9, 1947, the defendant conveyed her interest in the property to Raymond E. Kelliher for the sole and specific purpose of enabling him to borrow funds by mortgaging the premises; that he allegedly agreed to re-convey the property immediately after the execution of the mortgage but that he breached the agreement by conveying the property on April 13, 1948 to the plaintiff herein, who allegedly had notice of the agreement and that plaintiff gave no consideration therefor.

The case was tried in the Justice's Court and resulted in plaintiff obtaining a judgment for the possession of the property,

damages, and costs. Said court immediately thereafter issued a writ of restitution under which the defendant was evicted from the premises. Thereafter defendant filed her notice of appeal from said judgment to the Superior Court in San Joaquin County specifying therein that the appeal was taken on questions of both law and fact. Following the setting in the Superior Court, but prior to the determination on the merits, the defendant moved for a hearing on the question as whether or not on the facts the Justice's Court had jurisdiction to try the case in the first instance and whether or not the Superior Court had jurisdiction to try the case de novo. The motion was based upon the ground that the jurisdiction of the Justice's Court was limited by section 112 of the Code of Civil Procedure to actions wherein the rental value of the property is \$100 per month or less and that while the complaint alleged that the rental value was \$100 per month or less the defendant's answer denied the allegation. Said motion in addition stated that if the court should decide that the Justice's Court lacked jurisdiction defendant would move that the case be dismissed upon the ground that the lack of jurisdiction precluded said court from trying the case on the merits, that the judgment of the Justice's Court be vacated and set aside and that a writ of restitution issue to restore defendant to possession.

At the conclusion of the hearing on the aforesaid motion the Superior Court reversed the judgment of the Justice's Court and directed the Clerk of the Superior Court to remit the papers and documents in connection with the appeal to the Justice's Court. The order further directed the Justice's Court to suspend all proceedings in connection with the case and to transfer the case to the Superior Court together with all papers, documents, etc., in connection therewith, which was done.

The Superior Court thereafter granted permission to defendant to file an amended answer and cross-complaint and defendant did so. The amended answer in general contained the same admissions and denials as the previous answer, except that it alleged defendant's eviction from the premises under the writ of restitution issued by

the Justice's Court, and as additional affirmative defenses alleged that the plaintiff failed to comply with Section 209 of the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1948, 62 Stat. 98, 50 U.S.C.A. Appendix, § 1899, and that a tenancy at will rather than a tenancy in sufferance was created by the parties which had not been terminated by the three day notice.

Prior to the trial in the Superior Court upon the issues raised by the complaint and amended answer, the plaintiff moved said court for a summary judgment on the grounds that there was no defense to said action and there was no issue of fact involved. Defendant's affidavit in opposition thereto alleged that there were various issues of fact. The matter came on for a hearing before the court and at the conclusion thereof judgment was entered for plaintiff decreeing that he was entitled to the possession of the property plus damages and costs. Defendant has appealed from the order re-taxing costs which was thereafter made.

Defendant's first contention is based upon the proposition that since the Justice's Court had no jurisdiction the Superior Court on an appeal on questions of both law and fact was likewise without jurisdiction and therefore the latter court had no alternative but to dismiss the action.

[1] In so contending defendant fails to distinguish the hearing on her appeal in the Superior Court and the subsequent hearing which was an original proceeding in that court. In other words, while the jurisdiction of the Superior Court on appeal from the Justice's Court was properly raised on appeal in the higher court the rule contended for by defendant has no applicability to the present proceeding since it is an appeal from an original proceeding in the Superior Court. Had defendant desired to attack the decision of the Superior Court following her appeal she could only have done so by a petition for a writ of review, for, as stated in *Redlands High School District v. Superior Court*, 20 Cal.2d 348, 125 P.2d 490, 492: "After an appeal to the superior court from a judgment in a justice's court as provided in Code of Civil

Procedure, sections 973-982, no further appeal to the higher courts of the state exists in cases such as the present one under our constitutional and statutory provisions. Const. art. VI, §§ 4, 4b, 5; Code Civ.Proc., §§ 973-982; 6 Cal.Jur. 10 Yr.Supp. 699-701."

[2] Even if such were not the well established rule we cannot agree with defendant's contention that following the determination by the Superior Court of the jurisdictional question raised in her appeal from the Justice's Court that the Superior Court could only dismiss the proceeding. Such a contention is no less "circuitous, dilatory and vain" to-day than it was more than fifty years ago when the Supreme Court in the case of *Hart v. Carnall-Hopkins Co.*, 103 Cal. 132, 141, 37 P. 196, aptly applied those adjectives to a similar contention of the defendant and appellant therein. It may be added that the basis for the refusal of the court in the *Hart* case, as in the earlier case of *City of Santa Barbara v. Eldred*, 95 Cal. 378, 30 P. 562, to follow such an interpretation of section 838 [now section 396] of the Code of Civil Procedure, under which those cases were decided, is more controlling now than it was then. Especially is this true since that section has been supplemented by section 396 of the Code of Civil Procedure, and as the Code Commissioner's notes state, one of the principal reasons therefore was the elimination of any vestige of the excessively technical rule as contended for by defendant herein.

Since it is our conclusion that following the transfer back to the Superior Court that court could proceed to hear the cause as an original proceeding, it only remains to be seen whether or not the granting of plaintiff's motion for a summary judgment was proper under the circumstances.

[3] The record before us shows that defendant's affidavit in opposition to plaintiff's motion for summary judgment, which included by reference her answer to plaintiff's complaint, raises various questions relative to the title of the respective parties. Irrespective of the merits of those

matters contained in the equitable defenses alleged therein, it is the general rule that in a lawful detainer proceeding the right to possession alone is involved and that the broad question of title cannot be raised or litigated. *Cheney v. Trauzettel*, 9 Cal.2d 158, 69 P.2d 832. Although such is the rule nevertheless "to the limited extent of proving deraignment of title in the manner expressly provided for in the unlawful detainer statutes themselves the question of title not only may, but must, be tried in such actions if the provisions of the statutes extending the remedy beyond the cases where the conventional relation of landlord and tenant exists are not to be judicially nullified." *Hewitt v. Justice's Court*, 131 Cal. App. 439, 443, 21 P.2d 641, 643. See also *Higgin v. Coyne*, 75 Cal.App.2d 69, 170 P.2d 25; Subsection 4, section 1161a, C.C.P.

[4] Hence by reason of such statutory modification of the old common rule applicable to such proceedings (see *Reay v. Cotter*, 29 Cal. 168, 169) and the interpretation thereof by the courts of this state plaintiff, of necessity, was compelled to prove the deraignment of his title and by reason of defendant's denial thereof, it necessarily follows that a question of fact was thereby presented and it therefore was error for the trial court to grant plaintiff's motion for summary judgment. *Higgins v. Coyne*, supra, 75 Cal.App.2d pages 74-75, 170 P.2d 25.

Since it is our conclusion that under the circumstances the summary judgment was improper and that the cause must be remanded for further proceedings, it is unnecessary to discuss the questions raised by the defendant's remaining contention relative to the question of damages as being unauthorized and by plaintiff's appeal from the order re-taxing costs.

For the foregoing reasons the summary judgment in favor of plaintiff is reversed, plaintiff's appeal from the order re-taxing costs is dismissed, and the cause is remanded for further proceedings in accordance with the views herein expressed.

ADAMS, P. J., concurs.



**McKENNA v. McCARDLE et al.**  
**Civ. 17559.**

**District Court of Appeal, Second District,  
Division 2, California.**  
**May 1, 1950.**

**Rehearing Denied May 16, 1950.**

Proceeding for writ of prohibition by Catherine A. McKenna against L. V. McCardle, as Treasurer of the City of Los Angeles, a municipal corporation, and another, to prevent defendants from conducting proceedings for sale of property for nonpayment of street improvement bonds. The Superior Court, Los Angeles County, Arnold Praeger, J., sustained a demurrer to the petition and dismissed the action, and plaintiff appealed. Defendant filed a motion to dismiss the appeal for failure of plaintiff to file an amended petition after the demurrer had been sustained. The District Court of Appeal, Wilson, J., held that since defendant was acting in a ministerial capacity a writ of prohibition would not lie against him, and plaintiff's appeal from the order dismissing such unauthorized proceeding was frivolous.

Appeal dismissed.

**1. Prohibition ☞6(2)**

Where city treasurer in conducting proceedings for sale of property for nonpayment of street improvement bonds was acting in a ministerial capacity, a writ of prohibition would not lie against him.

**2. Appeal and error ☞786**

An appeal will be dismissed when it appears from a mere examination of the judgment roll that appellant has no cause of action or that the appeal is frivolous.

**3. Appeal and error ☞786**

In proceeding for writ of prohibition to prevent city treasurer from conducting proceedings for sale of property for nonpayment of street improvement bonds, appeal from order sustaining demurrer to petition was frivolous. Code Civ.Proc. § 1102.

**4. Appeal and error ☞781(1)**

An appeal will be dismissed when the question sought to be litigated has become moot.

**5. Appeal and error ☞781(4)**

In proceeding for writ of prohibition to prevent city treasurer from conducting

proceedings for sale of property for nonpayment of street improvement bonds, where affidavit was filed in the District Court of Appeal setting forth that act sought to be prohibited had already been performed, question raised concerning treasurer's proceedings was moot and appeal would be dismissed.

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Catherine A. McKenna, petitioner and appellant, in pro. per.

Ray L. Chesebro, City Attorney, Spencer L. Halverson, Deputy City Attorney, Los Angeles, for defendant and respondent L. V. McCardle, as Treasurer of City of Los Angeles.

WILSON, Justice.

Motion to dismiss appeal from order dismissing, pursuant to subdivision 3 of section 581 of the Code of Civil Procedure, a petition for writ of prohibition for failure to file an amended petition after demurrer to the petition had been sustained. The motion must be granted on two grounds.

[1-3] 1. A writ of prohibition lies only to arrest the proceedings of a tribunal, board or officer exercising judicial functions when such proceedings are without or in excess of its or his jurisdiction. Code Civ.Proc., sec. 1102; Whitten v. California State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296, 115 A.L.R. 1. The petition is directed to the City Treasurer to prevent him from conducting proceedings for the sale of property for nonpayment of street improvement bonds. In so doing he was not exercising judicial functions but was acting in a ministerial capacity. Hence a writ of prohibition would not lie against him. An appeal will be dismissed when it appears from a mere examination of the judgment roll that appellant has no cause of action or that the appeal is frivolous. Sonoma Magnesite Co. v. National Magnesite Products Corp., 189 Cal. 433, 208 P. 962; Scarpel v. East Bay Street Railways, Ltd., 42 Cal.App.2d 32, 115 P.2d 862. Since such examination demonstrates that appellant, in seeking a writ of prohibition, has attempted to pursue a remedy not al-

lowed by law, she has not stated and cannot state a cause of action and therefore her appeal from the order dismissing the unauthorized proceeding is frivolous.

[4,5] 2. An appeal will be dismissed when the question sought to be litigated has become moot. *Snelling v. Civil Service Board*, 90 Cal.App.2d 865, 866, 204 P.2d 358; *Stockwell v. McAlvay*, 117 Cal. App. 583, 4 P.2d 167. An affidavit has been filed in this court setting forth that the act sought to be prohibited has already been performed. The question raised concerning the treasurer's proceedings for the sale of the property is therefore moot.

Appeal dismissed.

MOORE, P. J., and McCOMB, J., concur.



97 Cal.App.2d 317

**MOVSESIAN et al. v. CHERNABAEFF et al.**

Civ. 4032.

District Court of Appeal, Fourth District, California.

May 1, 1950.

Rehearing Denied May 19, 1950.

Hearing Denied June 29, 1950.

Action by Albert Movsesian and Walter E. Parks against Sam W. Chernabaeff, William Chernabaeff, and J. E. Siemens for damages arising out of a lease. The Superior Court of Kern County, Robert B. Lambert, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Griffin, J., held that evidence supported finding that plaintiffs suffered no damage.

Judgment affirmed.

**Landlord and tenant** ⚡86(1)

In action by lessees arising out of a lease, evidence that lessees informed lessors they did not intend to exercise their option to renew lease prior to renewal date, because they lost money on operations of realty, had not even made wages, and were unable to secure a sub-lessee of realty for following year, and that lessees made no

preparations to farm leased realty, but voluntarily surrendered and abandoned possession of realty after serving notice to renew before renewal date, but after lessors leased realty to another, supported finding that lessees suffered no damage.

Harvey, Johnston, Baker & Palmer, Bakersfield, for appellants.

Siemon, Maas & Siemon, Bakersfield, for respondents.

GRIFFIN, Justice.

This action for damages arose out of a lease covering 160 acres of property in Kern County. Defendants, as owners, leased the property to plaintiffs on November 12, 1942, which lease contained an option to renew it for the calendar year 1944, upon the same terms. It provided that "A written notice handed to or mailed to the lessors \* \* \* on or before November 1, 1943, shall be sufficient expression on the part of the lessees that they have elected to exercise said option."

Although the evidence is conflicting on the point, defendants testified and the court found that on two occasions, one in July and the other in August, 1943, plaintiffs informed defendants that they did not intend to exercise their optional right to the acreage for the year 1944, and that thereafter, and prior to November 1, 1943, defendants, relying upon such information, made a lease of that property to another. That lease was dated September 22, 1943, acknowledged and recorded October 2, 1943. Plaintiffs, on seeing the notice of such recordation, prepared a notice of exercise of their optional rights and dated it September 30, 1943. Upon the evidence produced, the court, in addition to other findings, found that plaintiffs were estopped to claim the optional rights. Judgment was entered for defendants. The question presented on this appeal is the sufficiency of the evidence to support the findings.

Plaintiffs went into possession of the property on January 1, 1943, added gypsum to the soil, and planted it to potatoes. The

crop was taken off in July. Thereafter, according to plaintiffs, the land was scraped, plowed and disced in preparation for the 1944 planting. The defendants, under the obligations of the new lease, went on the 160 acres in September, 1943, and cultivated the land for tenancy by the new lessee. It was testified that about September 22nd plaintiffs asked defendants if they had already leased the property because "they read it in the legal news" and that defendant William Chernabaeff said he had leased the property and if plaintiffs had any complaints they should "register them with Sam". Plaintiffs had acquired, just before that time, 297 acres adjoining these premises on which they planted potatoes and alfalfa. They testified that after Sam asked them for \$500 advance payment on next year's rent, which they refused, they told him in August, 1943, they were spending considerable money on the land and would pay him on January 1, 1944. Plaintiffs admitted trying to sub-lease the 160 acre tract for 1944, at \$25 per acre, by running an advertisement in the paper on September 16, 1943, and testified that they moved off of the property and onto the adjoining property by November, 1943.

A witness for defendants testified that in July, 1943, he and defendant Sam Chernabaeff went to the ranch occupied by plaintiffs and that they asked them if they were going to take up the option for 1944; that plaintiffs said they did not want to because "they had lost so much money on it" and had "not made wages". The plaintiffs testified that they never saw this witness before the time of trial. Sam corroborated the testimony of his witness and in addition said that he talked with plaintiffs again in August as to whether they were going to take up the option; that plaintiffs said "No" and that at that meeting Sam told them that he needed a little money and asked for an advance of \$500 if plaintiffs intended to take up the option; that plaintiffs said that they would not give him a dime because they were not figuring on taking it up; that plaintiffs never told him of any different arrangement until he received a notice that was served on him;

that right after the second conversation he started discing the property and on October 11, 1943, he was arrested for trespass; that at that time plaintiffs had no equipment on the property and the "weeds were growing"; that he put the new lessee in possession on January 1, 1944, but under that lease defendants were obligated to disc the property before the new lessee took possession. However, on cross-examination he was asked if he knew, at the time the lease to the third party was made, that plaintiffs were trying to hold the land for another year and trying to lease it out. He answered: "I guess so." A witness was produced who testified that in response to an advertisement inserted in the newspaper by plaintiffs he talked to plaintiffs in the fall of 1943, around September 16, and plaintiffs offered to sub-lease this particular property to him for 1944 at \$25 per acre, which offer he rejected.

The trial court found that the written notice of election to exercise the option, although dated September 30, 1943, was not served until after October 2nd. It specifically found that neither at the time of its delivery nor at any time thereafter did plaintiffs pay or offer to pay or tender any payment of rent for the year 1944, and found that such payment or tender was required by the terms of the option and lease; that plaintiffs made no preparations to, and did not intend to farm the leased land in 1944; that defendants did not take possession thereof until October 11, 1943, at which time they commenced discing the land after plaintiffs had notified defendants that they did not intend to claim their option, and that such limited possession did not, in any way, interfere with plaintiffs' possession nor did it damage them in any way. It then specifically found the allegation of plaintiffs' complaint, alleging damages by reason of the refusal of defendants to renew their lease of said premises, to be untrue, and found that plaintiffs were not damaged in any sum. It found that defendants did not dispossess plaintiffs but that plaintiffs voluntarily surrendered and abandoned possession of the premises after giving no-



tice of their election to exercise the option and after failing to pay the rent. It then concluded that plaintiffs lost their right to exercise the option by failure of the plaintiffs to pay or offer to pay the 1944 rental at the time of giving such notice; that plaintiffs were estopped to claim such right and that the evidence produced was not sufficient to show that plaintiffs suffered any damage, and rendered judgment for defendants accordingly. Whether or not there was substantial evidence produced to establish an estoppel under the facts related, in the face of the written agreement, is questionable. *Hosner v. Skelly*, 72 Cal.App.2d 457, 164 P.2d 573; *Bank of American v. Pacific Ready-Cut Homes*, 122 Cal.App. 554, 10 P.2d 478; *Cohn v. Rudneck*, 49 Cal.App. 1, 192 P. 461; *William v. Stearns*, 48 Cal.App. 213, 191 P. 965. A further question arises under the lease, whether the amount due for the renewal period of 1944 would become payable at the time the option was exercised and, under the circumstances related, whether an offer of payment was necessary. *Penilla v. Gerstenkorn*, 86 Cal.App. 668, 670, 261 P. 488; *Buckmaster v. Bertram*, 186 Cal. 673, 200 P. 610; *Foley v. Cowan*, 80 Cal.App.2d 70, 181 P.2d 410; *Levy v. Lyon*, 153 Cal. 213, 214, 94 P. 881; *Community Industrial Land Co. v. Walker*, 61 Cal.App.2d 298, 303, 142 P.2d 757. Regardless of the findings on these questions, there was evidence produced by plaintiffs in reference to the damages for loss of profits claimed to have been suffered by reason of the claimed breach of the terms of the lease by defendants. This evidence consisted mainly of anticipated profits and evidence of claimed net profits made on the adjoining land for the year 1944. As opposed to this there was evidence that plaintiffs stated to the defendants that they lost money on their 1943 operations of that property; that they had not even "made wages"; and that they therefore did not care to take advantage of the option. There was the additional evidence that plaintiffs advertised for a sublessee of the property for the year 1944, at \$25 per acre and were unable to secure one. The finding that plaintiffs suffered no damage has

evidentiary support and is conclusive on this appeal. *Chichester v. Seymour*, 28 Cal. App.2d 696, 83 P.2d 301.

It will therefore not be necessary to pass upon the other questions presented.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



97 Cal.App.2d 280

**KARALLIS v. SHENAS.**

Civ. 3939.

District Court of Appeal, Fourth District,  
California.

April 28, 1950.

Rehearing Denied May 26, 1950.

Hearing Denied June 26, 1950.

Action by John Karallis against Peter Shenass to recover debt, amount of chattel mortgage, and additional damages for conversion of a business and its assets. The Trial Court entered judgment for plaintiff for amount of note and chattel mortgage and granted defendant's motion for new trial with respect to the mortgage item. The Superior Court of Imperial County, Stanley Mussell, P. J., rendered judgment for defendant on issue of note and chattel mortgage, refused to hear any testimony in respect to damages for conversion, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that where plaintiff did not appeal from that portion of judgment which did not expressly award damages for conversion of the business and its assets, judgment became final, and in new trial confined to issue of defendant's liability on note and chattel mortgage, plaintiff was properly precluded from presenting evidence relating to damages for conversion.

Judgment affirmed.

#### 1. Appeal and error ⇐1212(3)

Where plaintiff did not appeal from that portion of judgment which did not expressly award damages for conversion of business and its assets, that portion of judgment became final, and on new trial awarded to defendant on issue of defendant's liability to plaintiff on note and chat-

tel mortgage, plaintiff was properly precluded from presenting evidence relating to damages for conversion.

## 2. New trial ☞9

On a motion for new trial, where there are several issues of fact which are distinct and separable, court is authorized to grant a new trial as to one issue only, and deny motion as to all other issues, and when such a new trial is granted it opens for examination all of facts and circumstances relative to that one issue, but as to other issues, there can be no retrial or examination of facts.

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Harry W. Horton, R. L. Knox, Jr., El Centro, for appellant.

C. B. Smith and A. C. Finney, El Centro, for respondent.

GRIFFIN, Justice.

This action was before this court on two prior appeals. *Karallis v. Shenias*, 41 Cal. App.2d 694, 107 P.2d 395, involving a nonsuit judgment of dismissal; and *Karallis v. Shenias*, 66 Cal.App.2d 475, 152 P.2d 499, in which the facts are rather fully stated. Suffice to say that the plaintiff and one Callas, as copartners, operated a restaurant in a building they leased from the defendant. Callas died in 1931, and through the estate proceedings defendant purchased at least his interest in the restaurant for \$1,000. Plaintiff contended that through certain fraud and misrepresentation he was induced to sell and permit the sale of the business to defendant and to loan the defendant \$1,000 with which to purchase the estate's interest in the business, on the agreement that the defendant would repay him the \$1,000 plus \$1,059.40 owed to the plaintiff by Callas and secured by a note and chattel mortgage on the restaurant fixtures, and that he and the defendant would then operate the restaurant as equal partners. Defendant contended that there was no such agreement; that he bought the entire business from the estate for \$1,000; that he borrowed no money from plaintiff but that plaintiff agreed to pay him \$1,000

to cancel the lease on the restaurant property, of which only \$700 was actually paid.

The complaint alleged that defendant procured a loan of \$1,000 from the plaintiff; that through fraud or misrepresentation plaintiff was induced to transfer to defendant his interest in a restaurant business, including the fixtures; that Callas owed plaintiff \$1,059.40 on a note secured by chattel mortgage on his interest in the restaurant fixtures; that defendant, in consideration of his desire to enter into a partnership with plaintiff in operating the restaurant, orally agreed to pay said note and mortgage. It is then alleged that by reason of these facts and the failure of said defendant to pay said sums, plaintiff was damaged in the sum of \$5,000. After the first appeal above mentioned, the trial court (Judge Leonard) found in all respects in favor of the plaintiff and awarded him a judgment in the sum of \$2,059.40, being \$1,000 for the loan by the plaintiff to the defendant in connection with the sale, and \$1,059.40 for the note and mortgage originally given by Callas to the plaintiff, with interest on both amounts.

On motion of defendant, a new trial was granted with respect to the mortgage item in the following language: "The motion \* \* \* is \* \* \* granted as to the issue relating to the item of \$1050.40 referred to in the plaintiff's complaint, and which relates to the chattel mortgage and note \* \* \* upon the ground of the insufficiency of the evidence to justify the decision filed herein; and the judgment is hereby modified by reducing the amount thereof to \$1,000 with interest."

On appeal by defendant the portion of the judgment awarding plaintiff \$1,000 plus interest was affirmed and this amount was subsequently paid by him. As to the "mortgage" item on a new trial had before Judge Mussell, it was plaintiff's position that he was not limited to the one item pertaining to the mortgage but had the right to offer additional evidence as to the damages he claimed by reason of the fraud of the defendant in converting plaintiff's one-half interest in the business and the assets of the partnership to himself, since

the trial court did not, by the portion of the judgment that was affirmed, dispose of that issue.

Defendant claims that the \$1,000 allowed plaintiff included all claims for general damages and that that issue was disposed of by the judgment allowing plaintiff \$1,000 plus \$900 interest, from which plaintiff did not appeal, and that the new trial was therefore limited to the one issue, i.e., the recovery of the \$1,059.40, predicated on the claimed oral promise to pay plaintiff the amount of the Callas note and mortgage. On the new trial Judge Mussell confined proof of the issue accordingly, and found that defendant did not orally agree to pay to plaintiff the amount of said note and mortgage, refused to hear any testimony in respect to any other claimed damage and rendered judgment for defendant on that issue. Plaintiff appeals from this judgment.

At the hearing before Judge Mussell, it was stipulated that the issues he submitted to the court upon the reporter's transcript of the trial upon which judgment was originally rendered, the clerk's transcript, exhibits, the reporter's transcript upon the pleadings on the motion for new trial, the reported statements of counsel and their briefs, and the deposition of Mrs. Shenias taken after the rendition of the former judgment. That deposition merely bore upon the question as to whether or not the defendant orally promised to pay plaintiff the amount of the note and mortgage above mentioned. The evidence on that question was conflicting but was sufficient to support the finding that defendant did not agree to assume this liability. Plaintiff does not question this finding on appeal but argues that since the original findings determined that Shenias had been guilty of fraud in obtaining the property in question, and since he was allowed no damages for this fraud and for the conversion of the partnership assets in that portion of the judgment that was affirmed, he had the right to have that question determined on the new trial and that the order granting a new trial pertaining to the mortgage in the sum of \$1,059.40 did not preclude him from presenting that issue at the new trial;

that if he is limited in the new trial, as contended, he, in effect, is denied any damage for this item because the item allowed in the first judgment pertained only to the claimed loan of \$1,000 plus interest.

[1] In the original action plaintiff claimed a total damage in the sum of \$5,000, which claim was made up of the amount claimed to have been loaned to defendant, the amount due on the chattel mortgage, and the value of the business and assets. It is apparent from the findings and the face of the original judgment that the trial court did not allow or refused to allow any damages to plaintiff in addition to the sum of \$1,000 for the loan, plus interest and the amount of the chattel mortgage which was in the sum of \$1,059.40. The reason why Judge Leonard refused to or refrained from allowing any additional damages for the claimed conversion of the business and its assets does not appear from the record. There was evidence offered on the first hearing as to its value. It was the contention of the defendant that the fixtures and equipment and property was of little or no value; that plaintiff was obligated under a most expensive lease which graduated in price over a particular term of months; that the lease was a liability rather than an asset; and that the business was operating at a loss. Plaintiff produced testimony to the contrary. The conclusion is, from the wording of the order granting the new trial, that the trial court refused to allow plaintiff damages for this item, or that said damages, if any, were included in the item allowed. Since plaintiff did not appeal from that portion of the judgment and it became final, he cannot now be heard to complain. *Gill v. Peppin*, 41 Cal.App. 487, 182 P. 815.

[2] On a motion for new trial, where there are several issues of fact which are distinct and separable, as there were in the case before Judge Leonard, the court is authorized to grant a new trial as to one issue only, and deny the motion as to all other issues and when such a new trial is granted it opens for examination all of the facts and circumstances relative to that one issue and as to other issues there shall be no retrial or examination of the facts.



Johnstone v. Johnson, 38 Cal.App.2d 700, 102 P.2d 374; Estate of Everts, 163 Cal. 449, 125 P. 1058; Henslee v. Fox, 25 Cal. App.2d 286, 77 P.2d 307; Adams v. Hildebrand, 51 Cal.App.2d 117, 124 P.2d 80; Crandall v. McGrath, 51 Cal.App.2d 438, 124 P.2d 858.

Judgment affirmed.

BARNARD, P. J., concurs.

MUSSELL, J., being disqualified, did not participate herein.

Hearing denied; SCHAUER, J., dissenting.



**MOTT v. HORSTMANN.**  
Civ. 14240.

District Court of Appeal, First District,  
Division 2, California.

April 26, 1950.

Hearing Granted May 25, 1950.\*

William Penn Mott, Jr., sued Russell C. Horstmann, as Auditor of the City of Oakland, a municipal corporation, for a writ of mandate declaring rights and duties of parties in reference to respondent's rejection of salary claims presented by petitioner. The Superior Court of Alameda County, Ralph E. Hoyt, J., entered judgment for respondent, and petitioner appealed. On the appeal respondent attacked that part of judgment denying indebtedness of petitioner to city resulting from petitioner's retention of fees from other municipalities. The District Court of Appeal, Nourse, P. J., 216 P. 2d 50, held that appeal would be confined to single issue of whether petitioner forfeited his office under terms of city charter, and that when petitioner accepted position with planning Commission of County he thereupon relinquished all right to occupy his position with city, and that petitioner was not entitled to compensation as a city officer, and respondent petitioned for a rehearing. The District Court of Appeal, Per Curiam, held that under the circumstances the petition was required to be denied.

Petition denied.

\* Subsequent opinion 224 P.2d 11.

**1. Mandamus ⇨187(1)**

Where District Court of Appeal has affirmed a judgment discharging alternative writ of mandate and approved findings and conclusions on which discharge was based, court cannot thereafter review at appellant's request the correctness of other findings and conclusions rejecting defenses which other points were not reflected in judgment below and were favorable to appellant.

**2. Mandamus ⇨187(1)**

Where District Court of Appeal affirmed a judgment rendered in mandamus proceedings and failed to pass upon an unappealed from issue, petition for rehearing on ground that court failed to pass upon such issue would be denied.

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Buckley & Ehlers, Oakland, for appellant.  
Stanley C. Smallwood, Oakland, for respondent.

**PER CURIAM.**

The petition for a rehearing is based solely on the ground that this court failed to pass upon the issue relating to the purported violation of section 32 of the Oakland Charter. That issue was decided adversely to the respondent in the trial court and was argued by respondent on appellant's appeal, the respondent urging that we reverse that portion of the judgment but appellant insisting that it should not be considered because respondent had not appealed from it. We agreed with appellant's position and limited our judgment to the matter properly before us.

[1,2] Where we have affirmed a judgment discharging the alternative writ of mandate and approved the findings and conclusions on which the discharge was based we cannot thereafter review at appellant's request the correctness of other findings and conclusions rejecting certain defenses which other points were not reflected in the judgment below and were favorable to appellant. See 2 Cal.Jur. Appeal and Error, secs. 471, 492, 493.

The petition is denied.

97 Cal.App.2d 272

**PEOPLE v. HERMAN.**  
**Cr. 4412.**

District Court of Appeal, Second District,  
Division 3, California.

April 28, 1950.

Harry Verl Herman was convicted in the Superior Court, Los Angeles County, Charles W. Fricke, J., of incest, and he appealed from an order denying motion for a new trial, and from conviction and sentence. The District Court of Appeal, Wood, J., held that evidence supported finding that defendant was father of prosecutrix.

Appeals from conviction and sentence dismissed, and judgment and order denying motion for new trial affirmed.

**1. Incest**  $\S$  14

In incest prosecution, evidence sustained finding that defendant was father of prosecutrix.

**2. Incest**  $\S$  14

In incest prosecution, testimony by prosecutrix that she, defendant, and another had been up during all of two preceding nights drinking and bowling, that they had not slept during two preceding days and nights, that at time of illicit act between prosecutrix and defendant, other party was sleeping, and was "out", was not inherently improbable, and was admissible.

**3. Criminal law**  $\S$  507(7)

In incest prosecution, prosecutrix, who was 16 years of age, was not an accomplice, and her testimony did not have to be corroborated. Pen.Code,  $\S$  261, subd. 1.

**4. Criminal law**  $\S$  371(9), 372(7)

In incest prosecution, lewd photographs taken by defendant of prosecutrix and another, were admissible to show defendant's lewd intent, his disposition to commit act charged, and probability of his having committed it. Pen.Code,  $\S$  288.

**5. Criminal law**  $\S$  780(1)

In incest prosecution, where prosecutrix was 16 years of age, refusal to give certain instructions pertaining to testimony of an accomplice was not error.

**6. Criminal law**  $\S$  829(1)

In incest prosecution, where instructions which were given included in substance requested instruction of defendant, refusal to give defendant's instruction was not error.

**7. Criminal law**  $\S$  673(5)

In incest prosecution, where lewd photographs taken by defendant of prosecutrix and another were introduced to show defendant's lewd intent, his disposition to commit act charged and probability of his having committed it, instruction that jury could consider any evidence of conduct between defendant and prosecutrix on other occasions to show defendant's intent, advised jury of limited purpose for which evidence was received, and was proper.

**8. Indictment and Information**  $\S$  161(8)

In incest prosecution, amendment of information to conform to proof, by changing date on which alleged illegal act occurred, was not error especially where defendant did not object nor ask for a continuance in order to prepare for trial under information as amended. Pen.Code,  $\S$  1008.

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Morris Lavine, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Gilbert Harelson, Deputy Attorney General, for respondent.

WOOD, Justice.

In a jury trial, defendant was convicted of two counts of the crime of incest, in that, he had sexual intercourse with his daughter on December 29, 1948, and on January 16, 1949. He appeals from "the conviction, judgment and sentence and the denial of a Motion for an New Trial."

Appellant asserts that the evidence is insufficient to support the verdicts. One of his arguments is that he is not the father of the prosecutrix.

Viola Marie Herman testified as follows: She became 16 years of age on May 14, 1948. She always knew the defendant as her father. She called him "father," and

he called her "daughter." From the earliest time she could remember until she was 8 years old, he lived in the same house where she and her mother lived in Cleveland, Ohio. He left her and her mother when she (Viola) was 8 years old. When Viola was 9 years old, her mother divorced defendant and married Mr. Deubel. After the marriage Viola did not see Mr. Deubel for about 4 years—he was in the army. In 1946, when she was 14 years old, she and her mother went to live with Mr. Deubel, and Mr. Deubel adopted Viola, and at the time of the trial she had "the name of Deubel." In August, 1948, defendant telephoned to Viola in Cleveland and asked her to come to Los Angeles. He "wired" an airplane ticket to her, and she arrived in Los Angeles on November 20, 1948. She went to live with defendant at his apartment, and she slept in a bed in the living room, and he slept on a couch in the dining room. There was an archway between those rooms. She had sexual intercourse with defendant on December 29, 1948, and on January 16, 1949. The latter act occurred on the couch in the dining room, and at that time her boy friend, one Dodd, was asleep in the bed in the living room. She had sexual intercourse with defendant 11 times and with Dodd 4 times. On February 7, 1949, at the request of defendant, she had sexual intercourse in the apartment with William Brown in the presence of defendant, and during that occurrence defendant took several pictures of her and Brown. (She identified 2 pictures, then shown to her, as 2 of those pictures. The pictures were received in evidence as People's exhibits 1 and 2.) For several hours prior to the time the pictures were taken, she and her father had been "drinking," and she had about 15 drinks. After the pictures were taken, she and the defendant were in "the car," and he had been hitting her and she "jumped out and ran down the street." While defendant had her up against a building trying to quiet her she kept screaming, and the police came and took her to juvenile hall.

A police officer, who investigated the case, testified that he asked the defendant why he had been fighting his daughter,

and he replied that he and another man had been drinking with her and she decided to go to her home in Cleveland and they had an argument about going to the juvenile division; that he asked defendant if the girl, Viola, was his daughter, and the defendant replied, "Yes, that is my daughter." The officer also testified that defendant said that he never had sexual intercourse with Viola; that he (officer) showed two pictures (People's exhibits 1 and 2) to defendant and asked him if he had taken the pictures, and defendant replied that he had taken them to protect himself from any accusations made by his daughter regarding him; and that the defendant said the woman in the pictures was his daughter, Viola.

The judge of the juvenile court testified that at a pre-detention hearing in the juvenile court, pertaining to Viola, he asked the defendant if defendant was the father of Viola, and that defendant replied, "Yes." He also testified that on another occasion, when the defendant was requesting that the court grant Viola permission to marry Dodd, the defendant said he (defendant) was the father of Viola.

A deputy probation officer testified that defendant told her that he was the father of Viola. A police officer, who arrested defendant, testified that defendant said he (defendant) was the father of Viola.

Defendant testified in part as follows: He had been married to Viola's mother, and he separated from her in April, 1931, at Cleveland, and then he had gone to Washington, D. C., where he stayed 8 months. He went to Peoria, Illinois, on January 12, 1932, and there resumed marriage relationship with his wife. He had no sexual intercourse with his wife after April, 1931, and prior to January 12, 1932. He stayed in Peoria until July, 1932, and during that time his wife told him that she was going to give birth to a child, and she asked him if she could say that it was defendant's child. The child, Viola, was born about May 15, 1932. He allowed his name to be used for the child because he liked her mother. The mother and defendant agreed that they would never tell Viola who she "really was." Viola wrote



several letters to defendant begging him to let her come to Los Angeles. After she had been with him and his second wife about 2 weeks, he returned home from work and found his second wife and Viola very much intoxicated. His second wife returned to her former home in Michigan, and he told Viola that he wanted her to return to Cleveland. She said that she did not want to go there and that if he did not keep her, she would tell "them" that it was defendant who had had sexual relations with her and that it was not Dodd. He never had sexual intercourse with Viola. On February 7th, the day the pictures were taken, William Brown came to defendant's apartment and after Brown had been there about three hours with defendant and Viola the defendant went away and returned in about half an hour. When he returned and entered the apartment he saw Viola and Brown in bed having sexual intercourse, and he took 2 pictures of them, and he said, "This will show that I haven't done anything to you, Viola, this is one thing you are not going to blame me for." He then threw Brown out of the apartment. Later that night, while defendant and Viola were fighting in the street, they were arrested, and thereafter they were taken to juvenile hall.

[1] The evidence was sufficient to support the finding of the jury that appellant is the father of Viola, the prosecutrix. Cf. *People v. Schafer*, 12 Cal.App.2d 5, 6, 54 P.2d 733; *People v. Roberts*, 82 Cal. App.2d 654, 187 P.2d 27.

[2] Appellant also argues, regarding the alleged insufficiency of the evidence, that the testimony of the prosecutrix is inherently improbable. In this respect, he asserts that it is improbable that she would have sexual intercourse with appellant while her friend Dodd was in the next room. She testified that the act referred to occurred on January 16th about 7 a. m., that she, Dodd, and appellant had "been up" during all of the two preceding nights drinking and bowling, that they had not slept during the two preceding days and nights, that at the time of said act Dodd had had "a lot of drinks," he was

sleeping, he was "out." The testimony was not inherently improbable.

[3] Appellant also argues that the evidence was insufficient because the prosecutrix was an accomplice and her testimony was uncorroborated. In *People v. Pettis*, 95 Cal.App.2d 790, at page 793, 213 P.2d 731, at page 733, wherein the defendant was convicted of incest in that he had sexual intercourse with his seventeen year old daughter, it was said: "[T]he complaining witness being under the age of consent (Penal Code, section 261, subd. 1) she was not at law an accomplice. It therefore follows that her testimony alone was legally sufficient to sustain the conviction of the act charged." The prosecutrix herein, who was sixteen years of age, was not an accomplice and it was not necessary that her testimony be corroborated.

[4] Appellant contends that the court erred in receiving in evidence the photographs of Brown and the prosecutrix which were taken by appellant. He argues that the photographs were "irrelevant regarding any proof of incest"; that since they tended to show that appellant committed another crime, namely taking a lewd picture, it was error to receive them herein. The prosecutrix testified that, at the request of appellant, she had sexual intercourse with Brown in the presence of appellant; that he told her that she could go home to her mother if she would have intercourse with Brown while appellant watched, that he liked to watch; that appellant told her to take her clothes off and get in bed with Brown; that she undressed in the presence of appellant and Brown; that appellant took twenty-four pictures of them—"From the beginning, before I was undressed, to the end"; that appellant gave her instructions as to the manner in which to have intercourse with Brown while he took pictures, and that he posed her. The photographs were admissible in evidence as tending to show appellant's lewd intent, his disposition to commit the act charged and the probability of his having committed it. See, *People v. Boyd*, 95 Cal.App.2d 831, 213 P.2d 724, wherein it was held in a prosecution under section 288 of the Penal

Code that evidence of similar lewd acts committed upon a person other than the prosecutrix was admissible as tending to show lewd intent, disposition to commit the act charged, and probability of having committed it. As stated in *People v. Boyd*, supra, 95 Cal.App.2d at page 833, 213 P. 2d at page 726: "If evidence of another crime is necessary or pertinent to proof of the charge against a defendant it will not be excluded merely because it involves the commission of another crime." The court did not err in receiving the photographs in evidence.

[5] Appellant also contends that the court erred in refusing to give certain instructions, requested by appellant, pertaining to the testimony of an accomplice. Since, as hereinabove stated, the prosecutrix was not an accomplice, the court did not err in refusing to give such instructions.

[6] Appellant also contends that the court erred in refusing to give an instruction, requested by appellant, "that unless you find beyond a reasonable doubt \* \* \* that Viola Deubel is the daughter of the defendant, Harry Herman, you must acquit the defendant." The court gave the following instruction: "Before the defendant may be convicted of the offenses charged in \* \* \* the information \* \* \* you must find that the defendant committed those specific offenses. You may not convict him of any offense with which he is not here charged. \* \* \*" The offenses charged in the information were two counts of the crime of incest, in that, the defendant Harry Verl Herman did unlawfully "have sexual intercourse with Viola Marie Herman, who was then and there the daughter of the said Harry Verl Herman." The court also instructed the jury that: "Every person who has an act of sexual intercourse with his daughter is guilty of a crime known as incest." The court also instructed the jury properly on the subject of reasonable doubt. The instructions which were given included in substance the said instruction requested by appellant.

[7] Appellant also contends that the court erred in giving the following instruction: "Before the defendant may be convicted of the offenses charged in \* \* \* the information \* \* \* you must find that the defendant committed those specific offenses. You may not convict him of any offense with which he is not here charged. You may, however, consider any evidence as to the conduct and relationship between the defendant and the girl Viola on occasions other than that involving the offenses charged, as tending to show, if it does show, the disposition of the defendant toward such child and his intent at the time of the alleged offense here charged against him." He argues that the instruction was prejudicial, in that, it told the jury that appellant's conduct in taking the photographs might tend to show the disposition of appellant toward Viola and "his intent of his crime" of alleged incest. The photographs and the testimony regarding the taking of them having been properly received in evidence, the instruction was required in order to advise the jury as to the limited purpose for which such evidence was received. The instruction was properly given.

[8] Appellant also contends that the court erred in permitting an amendment of the information whereby the date of the offense alleged in count I, namely, "on or about" December 27, 1948, was changed to "on or about" December 29, 1948. Viola testified that one of the acts of intercourse with appellant was on December 29, 1948, and was not on December 27, 1948, as alleged in the information. The deputy district attorney made a motion to amend the information as to said date, and the court stated the information is amended to conform to proof by changing the date to read "on or about December 29th." Appellant did not object to the amendment, and he did not ask for a continuance in order to prepare for trial under the information as amended. He did not suggest that he was surprised, or unprepared for trial, by reason of the amendment. Appellant asserts that he "had a complete alibi for" the date of December 27, 1948,

and that the amendment destroyed his alibi which he "had to present and did present to the jury." The record does not show any evidence pertaining to an alibi for December 27th or December 29th. The appellant testified regarding the 27th and the 29th, stating that he did not have sexual intercourse with Viola on either of those dates or at any time. Section 1008 of the Penal Code provides that an information may be amended "for any defect or insufficiency, at any stage of the proceedings; and the trial shall continue as if it had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable continuance \* \* \* may be granted." The court did not err in permitting the amendment. See, *People v. Lachuk*, 5 Cal.App.2d 729, 730, 43 P.2d 579, where it was held that it was not error to amend the information by changing the date of the alleged offense where the defendant did not object, nor suggest surprise, nor request a continuance. See, also *People v. Moranda*, 87 Cal.App.2d 703, 704, 197 P.2d 394, where it was held there was not a fatal variance between the date alleged, "on or about" December 16th, and proof showing that the offense occurred on December 18th.

The judgment and the order denying the motion for a new trial are affirmed. The purported appeals from the conviction and the sentence are dismissed.

SHINN, P. J., and VALLEE, J., concur.



97 Cal.App.2d 309

**GIORDANO et al. v. AMERICAN FIDELITY & CASUALTY CO., Inc.**

Civ. 4028.

District Court of Appeal, Fourth District,  
California.

May 1, 1950.

Rehearing Denied May 26, 1950.

Hearing Denied June 29, 1950.

Ralph Giordano and Gladys Giordano brought action against American Fidelity

& Casualty Company, Inc., on automobile insurance policy covering a motor carrier, as required by the Railroad Commission pursuant to provisions of the Highway Carriers Act, St.1935, p. 878, as amended. A judgment for plaintiffs was entered in the Superior Court of Fresno County, Philip Conley, J., and the defendant appealed. The District Court of Appeal, Barnard, P. J., held that provision in policy that it should have no effect "with respect to any liability" in excess of \$5,000 and \$10,000 related to liability thereby imposed upon the insurer, and not to assured's liability which might be entirely different, and, hence, proof of payment of amounts equal to limits specified in policy on judgments against assured from other sources did not relieve insurer of liability.

Judgment affirmed.

#### 1. Insurance ⇨171

Provision in automobile liability policy covering motor carrier as required by Railroad Commission that policy should have no effect "with respect to any liability" in excess of \$5,000 related to liability thereby imposed upon insurer, and not to assured's liability which might be entirely different, and, hence, proof of payments on judgments against assured arising out of automobile accident from other sources of amounts equal to limits specified in policy did relieve insurer from any further liability. St. 1935, p. 878, §§ 5, 6.

#### 2. Judgment ⇨878(1)

A payment by one of several judgment debtors usually entitles the other to a credit to that extent on their obligation, but it is not an invariable rule and is not applicable under all circumstances.

#### 3. Insurance ⇨591½

An automobile liability policy issued to motor carrier in compliance with statute requiring such security not only indemnifies assured motor carrier but imposes on insurer an original and direct liability to members of the public for injuries sustained by them because of negligence of insured motor carrier. St. 1935, p. 878, §§ 5, 6.

#### 4. Principal and surety ⇨113

Where partial payment made on judgment, for which surety is liable only in part, is not specifically designated as payment on



part of the judgment for which principal or surety is liable, it may be regarded as payment on part of judgment for which surety is not liable, since surety has no right to designate how payment shall be applied.

#### 5. Insurance ⇨603

Insurer's liability on automobile liability policy issued to motor carrier as required by Railroad Commission for judgment entered against assured motor carrier and other joint tort-feasors arising out of highway accident was not terminated or rendered ineffective by partial payments upon the judgment made in behalf of some of the joint tort-feasors. St. 1935, p. 878, §§ 5, 6; Civ.Code, § 1474.

#### 6. Insurance ⇨621

Where assured motor carrier took no appeal from adverse judgment in action arising out of collision in which assured's truck was involved, but carrier's liability was based solely on doctrine of respondeat superior and a notice of appeal by carrier's employee had been timely filed, proof that nothing further had been done for more than two years authorized finding that employee had abandoned appeal and judgment had become final, so that action against carrier's insurer, to recover on policy the unpaid judgment against carrier within limits of policy was not prematurely brought. St. 1935, p. 878, as amended.

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Reginald I. Bauder, W. I. Gilbert, Jr., Everett W. Thompson, Henry F. Walker, Los Angeles, for appellant.

John D. Chinello, Fresno, for respondents.

BARNARD, Presiding Justice.

This is an action on an automobile insurance policy covering a motor carrier, as required by the Railroad Commission pursuant to the provisions of the Highway Carriers Act. Stats. 1935, Ch. 223, p. 878, as amended.

On October 2, 1945, the plaintiffs were injured in an accident involving a truck then being used in a trucking business operated by A. M. Hendrix, under a permit

from the Railroad Commission. This truck was owned by one Atwood, was used by A. M. Hendrix under some lease arrangement, and was being driven by one Ruiz. These plaintiffs brought an action for damages against A. M. Hendrix, her husband Harry W. Hendrix, Atwood and Ruiz. Judgment was entered in that action in favor of Mr. Giordano for \$50,000 and in favor of Mrs. Giordano for \$10,000 as against all four-defendants.

The defendant in the present action had issued a policy to A. M. Hendrix and her husband, doing business as the Hendrix Truck Company, covering three described vehicles with respect to bodily injury to third persons. This policy bore an endorsement commonly known as "Form T & S 391", as required by the Railroad Commission and pursuant to sections 5 and 6 of the Highway Carriers Act. Section 5 required the commission, in granting permits, to procure from the carrier adequate protection against liability for bodily injuries in the amount of not less than \$5,000 for one person, and \$10,000 for more than one. Section 6 provided that this protection might be in the form of an insurance policy covering each vehicle used under the permit applied for. "Form T & S 391" thus attached to this policy provided, so far as material here, that the insurer agreed to pay any final judgment against the insured for bodily injury to third persons arising out of the use of any vehicle operated under authority of the Highway Carriers Act, as amended, even though such vehicle was not described in the policy; that the judgment creditor may maintain an action in any court to compel such payment; that the right of any third person to recover under the policy shall not be affected by any act or violation of any condition on the part of the insured or his employees; and that the policy and this endorsement shall not be canceled and shall not become void for any reason whatsoever, except at the expiration of the term, until ten days after written notice to the Railroad Commission. It then provided that this endorsement shall prevail over any conflicting provision in the policy, and that "this endorsement shall be of no effect with respect to any liability in

excess of" \$5,000 for bodily injuries to one person and \$10,000 for bodily injuries to two or more persons in any one accident.

This insurer refused to defend A. M. Hendrix in the other action, denying liability on the ground that the truck involved in the accident was not covered by its policy, and she employed other counsel to defend that action. She was insolvent and paid nothing on the judgment there entered, but \$10,000 was paid in behalf of the other three defendants. The record does not disclose who made that partial payment. A partial satisfaction of judgment was filed showing a payment of \$5,000 on the judgment in favor of Mr. Giordano; that it remained unsatisfied to the extent of \$45,000; that a like payment had been made on the judgment in favor of Mrs. Giordano; and that it remained unsatisfied to the extent of \$5,000.

Thereafter, the present action was brought to recover from the insurer \$10,000, being \$5,000 for each of the injured persons. The court found in favor of the plaintiffs finding, among other things, that the policy thus issued to A. M. Hendrix was in force at the time and that the endorsement "Form T & S 391" formed a part of that policy; that the truck causing plaintiffs' injuries was being operated by A. M. Hendrix through her agents and employees under authority of a permit granted by the Railroad Commission; that the plaintiffs had recovered a judgment, as above described, which has become final; and that this judgment remains wholly unsatisfied except that \$5,000, with some interest and costs, has been paid upon the judgment in favor of Mr. Giordano and a like amount upon the judgment in favor of Mrs. Giordano. Judgment was entered against this defendant awarding Mr. Giordano \$5,000 and Mrs. Giordano \$5,000. From this judgment the defendant has appealed.

[1] The appellant first contends that it has no liability here since the purpose of "Form T & S 391" was otherwise fully accomplished when \$5,000 was paid to each of the respondents. It is argued that the purpose of this endorsement was merely to

meet the requirements of sections 5 and 6 of the Highway Carriers Act; that these sections only required protection for third persons up to \$5,000 for one and \$10,000 for two persons; that the owner of the truck involved in the accident had insured it with another company and thus fully met the requirement of the act and the endorsement; that the endorsement itself provides that it shall have no effect with respect to any liability in excess of the \$5,000 and \$10,000 limits; that this refers to the assured's liability, which has already been met to that extent; and that the appellant has thus been relieved from any further liability.

While there is evidence that another company had issued to its owner a different policy covering this truck, we are pointed to no evidence in the record, and we can find none, that such policy was filed with the Railroad Commission, that "Form T & S 391" was attached thereto, or that anything was paid by that insurer. The truck in question was being operated by A. M. Hendrix under her permit as a carrier; the appellant issued this policy to her for the direct purpose of furnishing the protection to third persons which was required by the statute; and the appellant agreed to be bound to that extent, as required by the Commission and as set forth in the endorsement. It would be unreasonable to hold that this agreement was intended, either by the law or by the endorsement, to be a conditional obligation of the insurer to pay only so much of \$5,000 or of \$10,000 as a judgment creditor or creditors were unable to collect elsewhere. The insurer's contractual liability, while limited to the amounts named, was not limited by whether or not the insured had other assets which could be reached or whether or not someone else might or should pay something upon the judgment so long as an amount equal to that owed by the insurer was still unpaid on the judgment. The clause of the endorsement providing that it shall have no effect "with respect to any liability" in excess of \$5,000 and \$10,000 clearly relates to the liability thereby imposed upon the insurer, and not to the assured's liability which may be entirely different. The con-

tention here made is without merit and, insofar as the endorsement itself is concerned, the appellant is liable to the extent of the amounts therein named.

It is next contended that the partial satisfaction of the prior judgment relieved the appellant of any further liability on its policy. It is argued that the four judgment debtors were joint tort-feasors; that the partial payment made in behalf of some of them must be considered as having been made for the benefit of all; that this extinguished the liability of each to the extent of the amount paid; that since the full sum of \$10,000 has thus been received by the respondents, the purpose of the Act and of "Form T & S 391" has been accomplished and fully complied with; and that appellant's policy guaranteeing such compliance became no longer effective.

[2-4] It is true, as provided in section 1474 of the Civil Code, that performance of an obligation by one of several persons jointly liable extinguishes the liability of all, but the judgment debtors' obligation here has not been fully performed and the appellant's obligation has not been performed at all. While, as pointed out in 15 Cal.Jur. 269, a payment made by one of several judgment debtors usually entitles the others to a credit to that extent on their obligation, this is not an invariable rule and is not applicable under all circumstances. A different situation appears where a bond or policy is furnished in compliance with a statute requiring such security for a definite purpose and as a protection to the public. As pointed out in 60 C.J.S. Motor Vehicles, § 116, pages 419-421, a policy so issued not only indemnifies the assured motor carrier but imposes on the insurer "an original and direct liability to members of the public for injuries sustained by them because of the negligence of the insured motor carrier. After such a judgment the right of the judgment creditor to recover thereon against insurer becomes fixed as of the time of the accident, and nothing which occurs afterward affects such right. \* \* \* and, where a partial payment made on a judgment, for which the surety is liable only in part, is not specifically designated as a payment on the

part of the judgment for which the principal or surety is liable, it may be regarded as payment on the part of the judgment for which the surety is not liable, since the surety has no right to designate how the payment shall be applied."

[5] The obligation of the appellant is both contractual and statutory, and that obligation has not been performed. While different principles might be applicable under other circumstances, any rule that might sometimes apply as between two joint tort-feasors, in the absence of any other relationship, should not be so extended as to relieve a surety from such a distinct statutory liability as that which here appears, because of some act of another after that liability has been fixed and determined by a judgment. The statute here in question was intended to furnish a definite and certain protection, in the amounts named, to third persons who might be injured through the operations for which a permit was being issued, and it was not intended that this protection should be diminished or destroyed by a technical rule established and intended to apply under entirely different sets of circumstances. The appellant issued its policy with this statutory requirement in mind. Where a judgment creditor is suing on a policy issued to meet the requirements of such a statute, the rights of the parties must be determined by viewing the obligations of the contract in the light of the statutory requirement and purpose. We conclude that the appellant's liability was not terminated or rendered ineffective by the partial payments made upon the other judgment.

[6] The appellant further contends that this action was prematurely brought since the judgment against its assured was not then final. That judgment was entered on November 15, 1946. No appeal therefrom was taken by A. M. Hendrix or her husband. A notice of appeal was filed by Atwood and Ruiz on January 16, 1947. This action was filed on August 14, 1947, and was tried on March 31, 1949. It is argued that Ruiz, the driver of the truck, was an employee of Mr. and Mrs. Hendrix; that their liability was based solely on the doctrine of *respondeat superior*; and that if the appeal



by Ruiz should result in a reversal of the judgment this would necessarily set it aside as to Mr. and Mrs. Hendrix.

While a notice of appeal was filed by Atwood and Ruiz on January 16, 1947, nothing further was done and at the time of the trial of this action, more than two years later, no further steps had been taken on that appeal. The court found that such judgment was final and the evidence, though meager, is sufficient to support that finding. The only reasonable inference from the record is that Atwood and Ruiz had abandoned their appeal. No possible prejudice appears, and it would be an idle thing to reverse this judgment for the sole purpose of retrying the action after a formal dismissal of that appeal was entered.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.



97 Cal.App.2d 237

HOLMAN et al. v. STATE et al.  
Civ. 4026.

District Court of Appeal, Fourth District,  
California.

April 27, 1950.

Hearing Denied June 22, 1950.

Action by Al Holman and Edward L. Aldrich, copartners, doing business under the firm name and style of Industrial Power & Equipment Company, of Kern County, against State of California, and others, in inverse condemnation proceedings for damages to property by reason of construction of a dividing strip in highway. The Superior Court of Kern County, Robert B. Lambert, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Fourth District, Mussell, J., held that complaint seeking damages for diversion of traffic from their business resulting from state's exercise of its police power in

providing for public safety, did not state a cause of action.

Judgment affirmed.

#### 1. Eminent domain ⇐2(1)

Damages resulting from the exercise of police power are not compensable.

#### 2. Eminent domain ⇐2(6)

The re-routing or diversion of traffic is a police power regulation and the incidental result of a lawful act, and not the taking and damaging of a property right. Streets and Highways Code, § 144.

#### 3. Eminent domain ⇐2(6)

Where state in exercise of its police power to provide for public safety, constructed dividing strip in state highway adjoining plaintiffs' realty, which prohibited northerly bound vehicular traffic on highway from directly entering plaintiffs' place of business especially designed for servicing of heavy highway trucks, but traffic could enter via a more circuitous route, plaintiffs could not recover damages for diversion of traffic from their business on ground that their easement embraced a right to pursue most convenient course from their business to such designation they might seek. Street and Highways Code, § 144.

Werdel & DiGiorgio, Bakersfield, for appellants.

Fred N. Howser, Attorney General, Timothy W. O'Brien, Deputy Attorney General, C. R. Montgomery, Robert E. Reed, Sacramento, Russell S. Munro, and Harry S. Fenton, Sacramento, for respondents.

Bodkin, Breslin & Luddy, Los Angeles, J. F. Goux, Percy C. Heckendorf, Santa Barbara, Robert H. Schwab, Jr., Woodland, Norris J. Burke, Santa Barbara, and Peter E. Giannini, Los Angeles, of counsel, amici curiæ.

MUSSELL, Justice.

Action for damages to property by reason of certain highway improvements.

Plaintiffs appeal from the judgment in this, an action in inverse condemnation pro-

ceedings, brought against the State for damages to property by reason of the construction of a dividing strip in the state highway adjoining plaintiffs' property. A general demurrer to the amended complaint was sustained without leave to amend and judgment for the defendants followed.

The complaint alleges ownership by plaintiffs of property situated on the southwest corner of First Street and United States Highway 99 in Bakersfield. The highway at this point extends north and south. Plaintiffs' frontage is 146.62 feet on the highway and approximately 492 feet on First Street, which extends westerly from the highway and bounds plaintiffs' property on the north. Brundage Lane (the next street south of plaintiffs' property) crosses the highway and is approximately 200 feet south of plaintiffs' south property line. Second Street is approximately 600 feet north of First Street, is parallel thereto and extends westerly from the highway. V Street extends northerly from Brundage Lane, is one block west of the highway and crosses First and Second Streets. It is alleged that highway 99 is divided by a center dividing strip and concrete island, approximately 8 inches high and 6 feet wide, down the center of said highway and across the intersection of First Street therewith, thus prohibiting northerly bound vehicular traffic on the highway from entering plaintiffs' property at that corner; that the building located on the premises of plaintiffs is especially designed for carrying on the business of servicing and repairing heavy highway trucks and equipment; that prior to the erection of said dividing strip, plaintiffs' property was easily accessible by heavy truck traffic proceeding northerly on said highway but as a proximate result of the construction of such dividing strip, all reasonable access to plaintiffs' property by such northbound traffic has been prevented and likewise, vehicles leaving plaintiffs' property may not cross the southbound lane and immediately make a left-hand turn and proceed in a northerly direction, resulting in the depreciation of the reasonable market value of plaintiffs' property.

It is the contention of the plaintiffs and of the amici curiæ that the plaintiffs, as abutting owners, have the right to the use of the highway in either direction and that they are entitled to compensation for any damage occasioned by the construction of a public work or improvement in the highway interfering with their access to the next intersecting street in either direction from their property.

The defendants contend that the case involves solely "circuity of travel" or "diversion of traffic" which is not compensable because no violation of property rights is involved; that depreciation in value, if any, resulted solely from traffic regulation under police power.

The plaintiffs, in support of their contention, refer to Article I, Section 14, of the California Constitution and cite the following cases:

*Rockridge Place Co. v. City of Oakland*, 61 Cal.App. 791, 216 P. 64, in which the city had excavated a street and the sidewalk adjoining plaintiff's property to a depth of nearly 30 feet lower than it had formerly been, thus leaving the property at the property line on a cliff;

*Eachus v. Los Angeles Railway Co.*, 103 Cal. 614, 37 P. 750, 42 Am.St.Rep. 149, where the defendant railway company, in preparing a street adjoining plaintiff's lot for the construction of its railroad, made an excavation in the street, the excavation being 28 feet in depth at one corner of the plaintiff's property, gradually diminishing to a depth of 20 feet at the other corner, and extending to within 10 feet of the boundary line of the lot fronting on the street, thus leaving the property on a bluff with no possibility of motor vehicles entering or leaving the property from the highway;

*Eachus v. City of Los Angeles*, 130 Cal. 492, 62 P. 829, 80 Am.St.Rep. 147, wherein the city excavated the street adjoining plaintiff's property to a depth of 28 feet up to plaintiff's property line;

*Reardon v. City and County of San Francisco*, 66 Cal. 492, 6 P. 317, 56 Am. Rep. 109, where the complaint alleged that

the city, in improving an adjoining street, deposited certain heavy material in the street and in consequence of the presence of the weighty material on the soil underlying the street, the adjoining lot of plaintiffs was forced upwards with the result that the foundations of certain houses located on plaintiffs' lot were injured;

*McCandless v. City of Los Angeles*, 214 Cal. 67, 4 P.2d 139, wherein the plaintiff alleged that access to the center one-third of her property abutting on Sunset Boulevard was substantially impaired by reason of the construction at that point of an open cut and stairway surrounded by an iron railing, which railing was above the surface of the sidewalk. This cut and stairway, which was the approach to a subway, was approximately 20 feet in length and paralleled the center portion of plaintiff's property line and was 7 feet distant therefrom. Direct access from the plaintiff's property to any portion of the street along this 20 foot strip was, therefore, physically cut off entirely. The court held that under the facts alleged it could not be said as a matter of law that the plaintiff under her allegation had suffered no damage.

*Wolff v. City of Los Angeles*, 49 Cal.App. 400, 193 P. 826, in which it was held that the grading of one block of a city street located a considerable distance from the plaintiff's property and beyond another cross street, which in no way interfered with the easy and convenient access to plaintiff's property by other streets, does not show that damage contemplated by Section 14, Article I, of the Constitution, although the use of the street as a thoroughfare near plaintiff's property was not as extensive as before such grading.

*People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799, where prior to the construction of the improvement, the property owner had direct access to the through traffic on the highway. After the construction of the improvement, the property no longer fronted on the through highway but on a service or access road, and additional travel was required to go from the property in question by means of the access road to the

through traffic lane of the highway. A factual situation far different from the case before us where plaintiffs have access from every point on their property to the highway, the same as before the construction of the improvement complained of.

The case of *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818, 824, also cited, is clearly distinguishable on its facts from the facts pleaded by the plaintiffs herein. This case involved the creation of a cul de sac or dead end street as a result of the highway construction, and it was held in that case: "Where formerly plaintiff had an outlet from his property at both ends of Sterling Street, he now has access at only one end, which definitely affects ingress to and egress from his property. It would seem clear that the reasonable modes of egress and ingress would embrace access to the next intersecting street in both directions." The facts herein pleaded by the plaintiffs show that no dead end street was created by the mere division of the United States Highway 99 into opposing lanes of traffic.

In all of the foregoing cases in which it was held that compensation must be paid there was either physical injury to an owner's property itself, as in the *Reardon* case, or a physical impairment of access from the property to the street, whether caused by change of grade as in the *Eachus* cases and the *Rockridge* case, or by physical impairment of the property to the street by the means of the construction of a physical barrier as in the *McCandless* case, or by removing the property from the through highway and placing it on a side or service road as in the *Ricciardi* case, or by the creation of a dead end street as in the *Bacich* case. None of these cases involve the division of a highway into separate roadways by concrete islands or division strips and all are factually different from the case at bar. In this connection, it should be noted that the rule that reasonable modes of egress and ingress embrace access to the next intersecting street as announced in the *Bacich* case, *supra*, is not applicable here for plaintiffs have access to Brundage Lane, the next intersection to the



south, and to First Street on the north, adjoining their property.

In the case of *Beckham v. City of Stockton*, 64 Cal.App.2d 487, 149 P.2d 296, the action was brought by owners of property abutting on East Worth Street, in Stockton, to recover damages alleged to have been sustained by them as the result of the construction of a subway in Wilson Way, a street which intersects East Worth Street at one end of the block in which their properties are located. The construction of the subway left the property owners with two outlets, as formerly, except that the subway acted, in effect, as a center dividing barrier in Wilson Way and necessitated a certain amount of additional travel in order to reach the various portions of the city from plaintiffs' properties. The court held that such mere inconvenience and circuitry of travel constituted no grounds for the recovery of damages and that plaintiffs' easement could not be held to embrace a right to pursue the most convenient course from their properties to such destination as they might seek to reach. The court further stated that the plaintiffs' access in one direction was not lost by reason of the construction of the subway but that the route to be pursued was merely rendered less convenient. The court in that case said, 64 Cal.App.2d at page 502, 149 P.2d at page 303: "Not every depreciation in the value of property by reason of a public improvement can be made the basis of an award of damages. *Wolff v. City of Los Angeles*, 49 Cal.App. 400, 402, 193 P. 862; *Eachus v. Los Angeles etc. Ry. Co.*, 103 Cal. 614, 617, 37 P. 750, 42 Am. St.Rep. 149; *People v. Ricciardi*, supra, [23 Cal.2d at p. 396], 144 P.2d at page 802. For instance, diversion of traffic is not a proper element to be considered in computing damages. *Rose v. State of California*, supra, 19 Cal.2d 713 at pages 737, 740, 123 P.2d 505; *City of Stockton v. Marengo*, 137 Cal.App. 760, 764, 31 P.2d 467; *People v. Ricciardi*, supra, [23 Cal.2d pp. 397, 400], 144 P.2d at pages 802, 804. Regulations such as the prescribing of one-way traffic or the prohibiting of left-hand turns may interfere to some extent with right of access without furnishing a basis

for recovery of damages even by an abutting owner. See note, 100 A.L.R. 487, 491-493. In *Eachus v. Los Angeles etc. Ry. Co.*, supra, the court said: "The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution; \* \* \*."

The facts alleged in the instant action indicate that the real basis of plaintiffs' claim is diversion of traffic from their business. However, the rule is, as stated in *Rose v. State of California*, 19 Cal.2d 713, 737, 123 P.2d 505, 519: "The damage suffered by plaintiffs is, as we have seen, the interference with their right of access. The diversion of traffic is not a proper element to be considered in computing those damages inasmuch as a landowner has no property right in the continuation or maintenance of the flow of traffic past his property."

In *City of Los Angeles v. Geiger*, 94 Cal. App.2d 180, 191, 210 P.2d 717, 724, it was held that: "Injury to business is a detriment to its owner but it is not a damage to the property on which it is conducted, hence a property owner is not entitled to damages for loss of business caused by an improvement or by diversion of traffic. *Rose v. State*, 19 Cal.2d 713, 737, 123 P.2d 505; *City of Oakland v. Pacific Coast L. & M. Co.*, 171 Cal. 392, 399, 153 P. 705."

In *City of Stockton v. Marengo*, 137 Cal.App. 760, 31 P.2d 467, the court held that the evidence as to the damage caused by the diversion of traffic by reason of highway construction was properly stricken from the record because diminution in value resulting therefrom was not caused by any injury for which the landlord was entitled to recover damages.

[1] Damages resulting from the exercise of police power are not compensable. *Simpson v. City of Los Angeles*, 4 Cal.2d 60, 47 P.2d 474. It seems quite clear that the division of a highway is an exercise of

the police power being directly intended for the public safety.

Statutory authority for a center division strip, such as that under consideration in this case, is found in Section 144 of the Streets and Highways Code. Under that section the state highway engineer is authorized to divide or separate any state highway into separate roadways whenever there is particular danger to the traveling public of collision between vehicles proceeding in opposite directions or from cross traffic by constructing curbs, central dividing sections or other physical separation, or by signs, marks or other devices in or on the roadway appropriate to designate the dividing line.

As was said by Mr. Justice Edmonds in the Bacich case, *supra*, 23 Cal.2d at page 363, 144 P.2d at page 830: "But the traveling of additional distances occasioned by modern traffic engineering to make travel more safe and to adapt the highway system to the adequate disposal of the increasingly heavy burden of automobile traffic—as, for example, by the construction of divided highways for various types of traffic, or the re-routing of traffic by one-way regulations or the prohibition of left-hand turns—is an element of damage for which the property owner may not complain in the absence of arbitrary action \* \* \* and therefore, in testing the merits of the majority rule, mere 'circuity of travel,' in the sense that it refers to the additional distance required to be traversed because of a proper highway construction, should not be used to justify the allowance of compensation to the owner abutting upon the street in the block where the obstruction exists."

And by Mr. Justice Traynor, 23 Cal.2d at page 371, 144 P.2d at page 834: "\* \* \* The California Vehicle Code St.1935, p. 93, and city traffic ordinances abound with regulations that limit a property owner's freedom of movement upon the street on which his property abuts. Thus 'U' turns or the making of left turns upon emerging from a building or private driveway are frequently prohibited, and the diversion of traffic into one-way streets is common. Frequently traffic moving in opposite di-

rections is separated by some physical barrier such as a raised curbing. These restrictions have the same effect whether they ensue from traffic regulations or physical obstructions and there is no more reason to allow compensation because of the resulting diminution in property values or the inconvenience of circuity of travel in the one case than in the other."

[2] The facts pleaded herein show that the highway upon which plaintiffs' property abuts is not closed and that plaintiffs, once on the highway to which they have free access, are in the same position and subject to the same police power regulations as every other member of the traveling public. Because of a police power regulation for the safety of traffic, they are, like all other travelers, subject to traffic regulations. They are liable to some circuity of travel in going from their property in a northerly direction. They are not inconvenienced whatever when traveling in a southerly direction from their property. The re-routing or diversion of traffic is a police power regulation and the incidental result of a lawful act and not the taking or damaging of a property right. *People v. Ricciardi*, *supra*, 23 Cal.2d at page 399, 144 P.2d 799.

[3] If the contention of the plaintiffs herein is sustained, the right of the State to control the traffic as a safety regulation would be definitely curtailed and traffic islands or double lines in the highway to separate through traffic would be prohibited. The damage of which plaintiffs complain would be the same if no division strip had been constructed on the highway in question but that double white lines had been painted on the highway and a "no left turn" sign had been erected, or if the entire highway had been designated as a one-way street.

We conclude, therefore, that the plaintiffs failed to state a cause of action in their amended complaint and the judgment is, therefore, affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.

97 Cal.App.2d 203

**MAYES v. KUHN.**

Civ. 7736.

District Court of Appeal, Third District,  
California.

April 26, 1950.

Mandamus proceeding by W. E. Mayes, member of the Board of Supervisors of the County of Tehama against Rosa L. Kuhn, Auditor of Tehama County to compel respondent to make payment to petitioner for mileage for use of petitioner's private automobile in performance of his official duties of inspecting roads. The Superior Court, Tehama County, Ben. R. Ragain, J., quashed writ on the ground that petition did not state facts sufficient to have warranted issuance of alternative writ and petitioner appealed. The District Court of Appeal, Van Dyke, J., held that supervisors of Tehama County were not entitled to mileage.

Order affirmed.

**1. Counties ↵3**

Where amended charter of Tehama County presented to legislature for ratification, made no provision for compensation of supervisors as required by Constitution, legislature was authorized to make provision for compensation of those officers of the county. Pol.Code, § 4270; St.1947, p. 488, § 4, p. 3467; Const. art. 11, § 7½.

**2. Counties ↵46**

Where statute fixing salary of supervisors of Tehama County at \$1200 a year was passed so that compensation of supervisors would remain unaltered if charter amendments presented to legislature were ratified and county charter prior to amendment fixed supervisor's salary at \$1200 per annum in full for all services, mileage and transportation, statute prohibited payment to supervisors of any mileage, and Collier-Burns Highway Act providing for payment of mileage to county supervisors where not otherwise provided by law, did not entitle county supervisors of Tehama County to mileage. Streets and Highways Code, § 2010, St.1947, Ex.Sess., pp. 3788, 3789; St. 1947, p. 3467; Pol.Code, § 4270; St.1947, p. 488, § 4; Const. art. 11, §§ 5, 7½.

Edmund M. Moor, District Attorney of Tehama County, Red Bluff, for appellant.

Curtiss E. Wetter, Red Bluff, for respondent.

VAN DYKE, Justice.

Petitioner, W. E. Mayes, who, during the period with which we are here concerned, was a member of the Board of Supervisors of the County of Tehama, filed a petition in mandate in the Superior Court of Tehama County. He alleged that during the period from January 1, 1948, to and including June 30, 1948, he had used his private automobile in the performance of his official duties of inspecting county roads; that he had traveled a distance of 2500 miles in the performance of those duties, and that by the terms of the Collier-Burns Act of 1947, St.1947, Ex.Sess. p. 3789, Streets and Highways Code, section 2010, he was entitled to payment at the rate of six cents per mile for each mile so traveled. Respondent herein, Rosa L. Kuhn, is the auditor of Tehama County, and petitioner alleged proper demand upon her as such auditor for the payment of said mileage totaling \$150.00, and her refusal to make such payment. The warrant presented to the auditor, a copy of which is an exhibit attached to the petition, discloses that the stated reason for such refusal was that such payment would be contrary to the charter of Tehama County in that such charter prohibits payment of mileage to supervisors. The superior court issued an alternative writ directing the auditor to show cause why the warrant should not be paid. Thereafter respondent Kuhn moved the court to quash the alternative writ upon the ground that the petition did not state facts sufficient to have warranted the issuance of the writ. The trial court granted this motion, holding in substance that the Tehama County charter prohibited the paying of any mileage to members of the board of supervisors of that county. From the order granting the motion petitioner has appealed.

In order to state the legal issues presented here, it is necessary to state in consider-



able detail the pertinent constitutional, statutory and charter provisions.

Section 7½ of Article XI of the State Constitution provides for the adoption of county charters. *Inter alia* it declares that such charters shall provide for boards of supervisors and for their compensation, and it is declared that when a county charter has been adopted and approved by the legislature the general laws adopted by the legislature in pursuance of section 5 of said Article XI shall, as to such county, be superseded by the charter as to matters for which it is competent to make charter provision, "and for which provision is made."

Tehama County adopted a charter in 1917. In 1946 it amended its charter. Prior to this amendment the charter had provided that the supervisors should receive a salary of \$1200 per year and that this compensation should "be in full for all services, mileage, transportation and expenses within the County of Tehama." In 1946 the charter was amended, eliminating the provision for supervisors' salaries. The result was that the charter made no provision for such salaries. During the regular session of the Fifty-seventh Legislature in 1947, this charter as amended was before the legislature for approval, St.1947, p. 3467, and the legislature was also considering the situation thus presented with regard to supervisors' salaries. Responsive to this situation the legislature enacted a statute, Chap. 13, p. 487, Political Code, § 4270, which provided that in counties of the forty-first class (Tehama) the annual salary of each supervisor should be \$1200.00. The act was declared to be an emergency measure and the legislature made the following statement of facts constituting the necessity: "The compensation of officers in Tehama County, the only county of the forty-first class, is now fixed by the charter of that county. The charter fixes the salary of each of the supervisors at one thousand two hundred dollars (\$1,200) per year. \* \* \* Pending amendments to the charter fail to provide for the compensation of the supervisors, and if ratified there will be confusion and uncertainty as to what the salary of the supervisors will

be. In order to avoid such uncertainty and to preserve the regularity and continuity of county business it is necessary to make the provisions of the statute and the charter uniform *to the end that the compensation of the supervisors of said county will remain unaltered if the county charter amendments are ratified by the Legislature.*" Section 4. The legislature ratified the charter as amended.

Shortly after the regular session of the legislature convened in 1947 the Governor called the legislature into special session known as the 1947 First Extra Session, mainly for the purpose of considering the passage of what became the Collier-Burns Highway Act of 1947. This act had to do with providing for a system of public streets and highways in the state, for the financial support thereof, including the levying of taxes therefor, and for the repeal of numerous existing legislative enactments made necessary thereby. The act was passed. It provided for a primary and a secondary system of county roads and for the appointment in each county of a road commissioner by the board of supervisors. It created a fund known as "The Highway Users Tax Fund," and appropriated all funds to be placed therein for the acquisition of rights of way for, and the construction and maintenance of, public streets and highways throughout the state. It provided for appropriations to counties from this fund for the maintenance of the county road systems, and in particular directed regular apportionments to each county of \$20,000.00 per year, in quarterly payments, which amounts were to be used "exclusively for engineering costs and administrative expenses in respect to county roads." The county supervisors were to fix the salary of the road commissioner, which would be chargeable against this same fund; the board was to determine general policies with respect to county highway matters which should be carried out and administered by the road commissioner. By section 2010 the act provided: "*When not otherwise provided by law, each supervisor who uses a privately owned automobile in the discharge of duties imposed upon him in connection with the county road system*

shall receive for the performance of such duties in addition to the compensation paid him as supervisor, but not for the same mileage for which an allowance is otherwise made by law, six cents (\$.06) per mile for mileage traveled, but not more than three hundred dollars (\$300) in any one year, which shall be chargeable against the twenty thousand dollars (\$20,000) annual apportionment to the county under the first subdivision of Section 2111." (Italics added.) The claim of the petition here is based upon this provision for mileage.

By the express provisions of the Collier-Burns Act the provisions with which we are here concerned became effective on the ninety-first day following the adjournment of the extra session. That session adjourned June 24, 1947. The act fixing the salaries of Tehama County supervisors, above referred to, being emergency legislation went into effect immediately. It was approved by the Governor February 4, 1947, and thus was in effect when the Collier-Burns Act was passed.

Compensation of county officers and employees has frequently received the attention of the courts. Numerous methods of payment have from time to time been adopted by legislative and charter enactments. With respect to supervisors' salaries the Supreme Court in *Chapin v. Wilcox*, 114 Cal. 498, at page 500, 46 P. 457, at page 458, said concerning the various methods that had been used: "In some counties supervisors receive a fixed, annual salary, without any provision for mileage, while in others mileage to a limited amount is allowed them. In some they receive a *per diem*, without any limitation upon its amount, and a mileage not to exceed a certain amount; and in some there is a limit upon each, while in others the limit is upon the *per diem* alone. Of those that receive a *per diem* and mileage, there is in some a limitation upon one, and in some a limitation upon the other, and in some a limit upon neither. The provision for these officers in the forty-second class differs from all the others in that the limit to the entire compensation is made definite and

precise. After determining that the basis upon which their compensation is to be fixed shall be a *per diem* and mileage, and fixing the amount of each of these elements, the legislature has declared that 'all of which compensation in the aggregate shall not exceed four hundred dollars *per annum* each,' thus leaving little, if any, room for construction. It would be difficult to express in more explicit language that the entire amount which a supervisor in this class of counties shall receive in any one year for the services required of him by law, or by virtue of his office, is \$400. Traveling to and from his residence to the county seat is as much a part of the services required of him as is the sitting in the council chamber of the board, and the compensation for these services has been fixed by the legislature in the foregoing language." Holding that the provision for mileage was part of the compensation, the court affirmed the judgment of the trial court, refusing to direct payment of a claim presented to the county auditor for mileage other than that expressly provided for in the act.

[1] It is apparent that by the Tehama County charter, both before and after the amendments of 1946, the electors of that county had adopted two plans for the compensation of county officers and employees. With respect to supervisors they adopted the plan of computing their compensation, by charter provision, at a sum which in their judgment was sufficient to include reasonable compensation for their time expended in the discharge of their duties and a recompense for any outlays necessary in the performance of those duties. On the contrary, with respect to other county officers and employees whose salaries were to be fixed by the board, the electors adopted a different plan and directed the supervisors expressly, by section 5 of Article IV, to provide from time to time for, and to limit the amount of, mileage, transportation and traveling expenses. We are, of course, not concerned with the reasoning lying behind these charter provisions. When the charter was amended so as to strike down the provision for compensation of the supervisors the electors acted in contra-

vention of the plain constitutional mandate, hereinbefore quoted, to the effect that the charter should provide for the compensation of supervisors. While legislative provisions for their compensation were superseded so long as the charter did provide therefor, when and if the charter failed so to do the duty of providing for such compensation fell upon the legislature under the provisions of Section 5 of Article XI of the Constitution, which commanded the legislature to provide for county boards of supervisors and to regulate their compensation. It was therefore competent for the legislature, in view of the situation created by the charter amendments of 1946, to make provision for the compensation of those officers of the county. *Jones v. De Shields*, 187 Cal. 331, 202 P. 137. As we have said, the legislature did this by the emergency legislation noted. But the nature of the provision thus made must now be considered.

[2] Bearing in mind that by language unmistakable as to its meaning the compensation of supervisors fixed by the charter included, in a flat salary provision, all compensation of whatever kind or character that was to be paid to them, and expressly prohibited the payment to them of any mileage, transportation or other expenses, we turn to the emergency legislation to determine whether or not this prohibition against mileage was carried into the legislative act, or, in other words, whether or not the legislature itself, in turn, adopted that method of computing the salary which the charter had used. The question is answered by an express declaration of legislative intent so clear as to make construction unnecessary and therefore improper. The legislature said that the charter had fixed the salary of each supervisor at \$1200 per year, and that in view of the pending

amendments they wished to avoid any uncertainty, and by fixing the salary themselves preserve regularity and continuity of county business, and that they passed the act to the end that the compensation of supervisors of that county would *remain unaltered* if the charter amendments were ratified. It therefore follows that the legislature did adopt the method of paying supervisors which had been used under the charter, and that the \$1200 per year salary included, as a part of that salary, payment for any mileage, and excluded the possibility that any claim for mileage for supervisors could be allowed or paid.

When the Collier-Burns Highway Act became law, the same legislature that passed it had made, as we have seen, provisions forbidding payment of mileage to Tehama County supervisors. And in respect to the payment of mileage under section 2010 of the Collier-Burns Act to county supervisors generally, the legislature made such payments dependent upon there being no provision otherwise by law. Said the legislature then, these payments should be made "when not otherwise provided by law." With respect to Tehama County supervisors the legislature had provided otherwise, and, therefore, by the plain terms of the legislative enactments being considered, mileage to Tehama County supervisors under that section of the Collier-Burns Highway Act could not be paid. It should be stated that section 2010, *supra*, was amended in 1949 by eliminating the introductory clause which by its presence made the provisions of the section inapplicable to Tehama County supervisors.

For the reasons given the order appealed from is affirmed.

ADAMS, P. J., and PEEK, J., concur.



**KENNEDY v. AMERICAN FIDELITY &  
CASUALTY CO., Inc.**

Civ. 4029.

District Court of Appeal  
Fourth District, California.

May 1, 1950.

Rehearing Denied May 26, 1950.

Hearing Denied June 29, 1950.

Lawrence Kennedy, as trustee in bankruptcy for A. M. Hendrix, brought action against the American Fidelity & Casualty Company, Inc., to recover amount expended by A. M. Hendrix in defending an action against her, on ground that defendant should have defended the action under automobile liability policy. The Superior Court of Fresno County, Philip Conley, J., rendered a judgment for the plaintiff, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that defendant had waived any claim that notice provisions of policy had not been complied with, that policy required the defendant to defend the action against A. M. Hendrix, and that defendant, having repudiated the policy in its entirety, was in no position to rely on certain clause thereof for purpose of denying all liability under the policy.

Affirmed.

**1. Insurance** ⇨559(2)

Where insurer denied liability under automobile liability policy on ground that policy did not cover insured's truck involved in accident, insurer thereby waived any claim that notice provisions of policy had not been complied with by insured.

**2. Insurance** ⇨514½

Where automobile liability policy provided that insurer agreed to defend on behalf of the insured any suit brought against the insured to enforce a claim, whether groundless or not, arising from any accident covered by a policy, and original policy covered only three designated vehicles, not including truck subsequently involved in accident but endorsement extended coverage to any vehicle used or operated by insured though such vehicle was not specifically described in the policy, insurer had duty to defend insured in damage action for damages resulting from accident involving the truck.

**3. Insurance** ⇨514½

Where insurer renounced automobile liability policy, as far as truck accident was concerned, on ground that policy did not cover the truck, and insured incurred expense in defending an action for damages caused by the truck, insurer could not deny liability in action by insured's trustee in bankruptcy to recover expense of defending the action against insured, under clause of endorsement of policy whereby insured allegedly agreed to reimburse insurer for any payment insurer made because of endorsement but which it would not otherwise be obliged to make under original policy.

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Reginald I. Bauder, W. I. Gilbert, Jr.,  
Everett W. Thompson, Henry F. Walker,  
Los Angeles, for appellant.

Bert M. Green, Fresno, for respondent.

BARNARD, Presiding Justice.

This case was tried with the case of *Giordano v. American Fidelity & Casualty Company, Inc.*, and involves the same general factual situation. The appellant having refused to defend A. M. Hendrix in the action brought against her, she employed and paid other counsel for that purpose. In this action, the trustee of her bankruptcy estate recovered a judgment for \$1150 the amount thus paid. This appeal followed.

[1] The appellant first contends that it was under no duty to defend A. M. Hendrix in the damage action since she violated a condition of the policy requiring her to give "immediate written notice" to the insurer upon the occurrence of an accident covered by the policy. The court found that A. M. Hendrix did not give notice as thus provided in the policy but that "defendants had actual notice of said accident on the 4th day of October 1945 and that neither of defendants suffered prejudice by reason of such failure to give such notice." Not only is this finding supported by the evidence but A. M. Hendrix sent the summons and complaint to the appellant immediately after they were served on her and the appellant denied liability on the ground that its

policy did not cover the truck involved in the accident. The appellant in thus renouncing the policy as far as this accident is concerned, waived any claim that the notice provisions of the policy had not been complied with. *Mercer Casualty Co. v. Lewis*, 41 Cal.App.2d 918, 108 P.2d 65.

[2] Appellant's main contention is that there was nothing in the policy or in the endorsement known as "Form T & S 391", which required it to defend an action arising out of an accident involving equipment not described in its policy. It is argued that its only obligation under "Form T & S 391" was to pay any final judgment against the insured, and that there is nothing in that endorsement requiring the appellant to provide a defense for an action the coverage for which could arise only by virtue of that endorsement. "Form T & S 391" was added to the policy as an endorsement and became a part of the policy. While the original policy covered only three designated vehicles, this endorsement extended that coverage to any vehicle used or operated in the business for which a permit was given "although such vehicle may not be specifically described in the policy." The policy which thus covered the truck in question provided that the insurer agreed to defend on behalf of the assured "any suit brought against the Assured to enforce a claim, whether groundless or not," arising from any accident covered by the policy. The duty of the appellant to defend A. M. Hendrix in the damage action clearly appears.

[3] It is further contended that under another clause of this endorsement the insured agreed to reimburse the appellant for any payment it made because of that endorsement, but which it would otherwise not be obliged to make; that if the appellant had defended the damage action it would have been entitled to recover the cost thereof from the assured; that respondent, as trustee for the assured, would then be liable for the same amount represented by the judgment here appealed from; and that "such circuity of action" should not be permitted. This argument is more ingenious than convincing. The appellant did not pay out anything in defend-

ing the damage action or in compliance with the provisions of its policy. It repudiated the policy entirely insofar as the accident in question is concerned. The judgment here is based upon the appellant's violation of its agreement. Having repudiated that agreement in its entirety, the appellant is in no position to rely upon one clause thereof for the very purpose of continuing its denial of all liability under the policy.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.



#### PEOPLE v. ONE 1940 FORD V-8 COUPE.

Cr. 17341.

District Court of Appeal, Second District,  
Division 1, California.

April 25, 1950.

Hearing Granted June 22, 1950. \*

The People of the State of California brought forfeiture proceedings against One 1940 Ford V-8 Coupe, Engine No. 18-5601077, Serial No. 18-5601077, (1947) License No. 6D 3752, to forfeit the vehicle to the state for violation of the provisions of the Health and Safety Code. The Superior Court of Los Angeles County, Edward R. Brand, J., rendered a judgment forfeiting the automobile but declaring the forfeiture subject to a lien of the Bank of America National Trust & Savings Association, legal owner of the vehicle, in the sum of \$442.92, and the State appealed. The District Court of Appeal, Doran, J., held that lien of the legal owner did not fail because it made no investigation as to moral character of the registered owner of the automobile before making loan, where it was shown that the registered owner was of good moral character.

Judgment affirmed.

#### Forfeiture — 5

Fact that bank which held legal title to automobile as security, made no investigation as to the moral character of the reg-

\* Subsequent opinion 224 P.2d 677.

istered owner of the automobile before making loan, did not cause bank to lose lien on automobile on forfeiture of automobile to the state because of a violation of provisions of the Health and Safety Code relating to narcotics, where bank showed in forfeiture proceeding that the registered owner of the automobile was in fact of good moral character, since the law does not require idle acts. Health and Safety Code, § 11620; Civ.Code, § 3532.

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Fred N. Howser, Attorney General, Dan Kaufman, Deputy Attorney General, for appellant.

Hugo A. Steinmeyer and John E. Walter, Los Angeles, for respondent.

DORAN, Justice.

"This is an appeal by the plaintiff, the People of the State of California, from a judgment of the Superior Court of Los Angeles County ordering the forfeiture of a vehicle to the State of California for violation of the provisions of the Health and Safety Code relating to narcotics, said forfeiture being declared subject to the lien of the legal owner of said vehicle in the sum of \$442.92. Notice of seizure and intended forfeiture proceedings was served and filed, notifying the registered owner and the legal owner of said vehicle of the time, place and reason for the seizure of the vehicle, and disclosing the intention of the State to forfeit said vehicle. The registered owner did not file an answer, but an answer was filed by the legal owner, Bank of America National Trust and Savings Association, denying the unlawful use of said vehicle upon information and belief and alleging that it was the assignee and holder of a conditional sales contract on said vehicle which it had acquired from Art Taylor Motor Company from which Nick G. Chronis, the registered owner, had purchased the vehicle in question; the answer also alleged that said bank was the legal owner of record and that Nick G. Chronis was the registered owner of record. The answer did not allege that any investigation of the character of the purchaser, Nick G. Chronis, had been made by the bank nor do any

allegations appear therein concerning the character of said Nick G. Chronis. Subsequently, the case was tried and the court rendered its judgment forfeiting said vehicle to the State of California subject to the right, title and interest in and to said vehicle of the Bank of America National Trust and Savings Association in the sum of \$442.92.

"The trial court found that the vehicle in question was used contrary to the provisions of law relating to narcotics, and with regard to the lien of the Bank of America National Trust and Savings Association, found that it had a right, title and interest in and to the subject vehicle in the sum of \$442.92, that this right, title and interest was bona fide and was created without any knowledge that said vehicle was being or was to be used in violation of the provisions of law relating to narcotics, that before its right, title and interest in said vehicle was acquired, the bank did not make any investigation of the moral responsibility, character, and reputation of the registered owner and purchaser of said vehicle. The court made the finding that the moral responsibility, character and reputation of the registered owner and purchaser of said vehicle, to-wit, Nick G. Chronis, was, at the time of the creation of the right, title and interest of Bank of America National Trust and Savings Association and, is good, but such fact was not known to the legal owner before or at the time its right, title and interest was created. The court concluded that Section 11620 of the Health and Safety Code was not applicable and no reasonable investigation need be shown by the legal owner since the moral responsibility, character and reputation of the owner and purchaser of said vehicle was good and since under Section 3532 of the Civil Code *the law neither does nor requires idle acts*. The court then concluded that the vehicle should be forfeited to the State of California subject to the lien of the bank in the sum of \$442.92 and entered judgment accordingly. This appeal is only from that portion of the judgment which allows the lien of the bank in the sum of \$442.92." (Italics added.)

The record reveals that at the time the car was seized it was being driven by Frank



Chronis the brother of the owner. The owner Nick Chronis is 23 years old and the brother Frank is 17. The evidence shows that both have good reputations; both lived at home with their parents.

Appellant contends that because the bank made no investigation as to moral character of the car owner its lien must fail. Also that the so-called "Health and Safety Code" was not complied with by the bank in other technical respects. It is also contended that the court erred in permitting the bank to prove "that the purchaser in fact was of good moral character".

There is no merit to this contention in the circumstances. The evidence supports the findings and the trial court's application of the law heretofore noted, viz., that the law does not require idle acts is, in the light of the record, a complete answer to appellant's contention in this regard.

The court's ruling on the admissibility of evidence was not error.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J.,  
concur.



97 Cal.App.2d 169

In re GUZZETTA'S ESTATE.

PARTRIDGE v. WILLIAMS et al.

Civ. 17227.

District Court of Appeal, Second District,  
Division 3, California.

April 25, 1950.

Stanley Owen Williams, a creditor of the estate and legatee under the will of Viola Elmo Guzzetta, also known as Viola Partridge Guzzetta, deceased, filed a petition to revoke letters of administration with the will annexed, issued to Lula M. Partridge. From an order of the Superior Court of Los Angeles County, Alfred E. Paonessa, J., re-

voking the letters and appointing Ben H. Brown, Public Administrator, as defendant's successor, defendant appealed. The District Court of Appeal, Shinn, P. J., held that the lower court had power to remove defendant administratrix because of her filing of a petition to revoke the probate of the will.

Order affirmed.

Vallée, J., dissented.

#### 1. Executors and administrators Ⓒ35(16)

Where answer to petition for revocation of letters of administration with will annexed raised no fact issue and matter was submitted on petition and answer only, order revoking letters represented only a decision of law question, and written findings by court were not required.

#### 2. Executors and administrators Ⓒ35(2)

Where a legatee, procuring her appointment as administratrix with will annexed by representing herself to be testatrix' mother and sole heir, filed petition to revoke probate of will as procured by chief beneficiary's undue influence, duress, coercion, and fraud, superior court had inherent power to remove administratrix on ground of continuing conflict between her selfish interest as heir and her duty as administratrix and trustee for beneficiaries to defend will and see that its terms were carried out, though such conflict is not statutory ground for removal of administrator. Probate Code, §§ 521, 523; Civ. Code, § 2233.

#### 3. Executors and administrators Ⓒ75

The duty rests on executor or administrator with will annexed to uphold probate of will and protect interests of beneficiaries thereunder.

#### 4. Executors and administrators Ⓒ35(2) Trusts Ⓒ166(1)

A trustee, acquiring interest or becoming charged with duty adverse to beneficiary's interest, may be removed, and such principle applies in proper cases to executors and administrators of decedents' estates. Civ. Code, § 2233.

#### 5. Executors and administrators Ⓒ35(2)

Generally, adverse interest, asserted by executor or administrator in making claim to property claimed by other interest-

ed parties to belong to decedent's estate, furnishes sufficient ground for executor's or administrator's removal.

#### 6. Executors and administrators $\S$ 35(2)

The statutes specifying grounds for removal of executors and administrators of decedents' estates and requiring such removal in certain cases do not expressly or impliedly deprive superior court of its inherent power to remove executor or administrator whose self-interest is so opposed to interests of beneficiaries under decedent's will as to render him unfit to act as such representative. Probate Code,  $\S\S$  521, 523.

W. W. Comstock, Los Angeles, for appellant.

Maurice Gordon, Los Angeles, for respondent Stanley Owen Williams.

Harold W. Kennedy, County Counsel, Henry W. Gardett, Deputy County Counsel, Los Angeles, for respondent Ben H. Brown.

SHINN, Presiding Justice.

Lula M. Partridge appeals from an order revoking letters of administration with will annexed which had been issued to her, and appointing the Public Administrator as her successor.

The order was made upon the petition of Stanley Owen Williams, a creditor of the estate and the chief beneficiary under the will, which alleged that Williams, Lula Partridge and one Carl Carter were named as legatees in decedent's holographic will dated August 11, 1947; testatrix died May 26, 1948; the will was admitted to probate on July 6, 1948, and Lula Partridge was appointed administratrix with will annexed; on November 18, 1948 she filed a petition to revoke probate of the will upon the ground that Williams had procured its execution by means of undue influence, duress, coercion and fraud; she claimed to be the mother of decedent, and by virtue of such relationship would inherit the entire estate in the event of intestacy; the interest of Lula Partridge in the estate was adverse

to that of petitioner and there was a conflict of interest between her as administratrix and petitioner as a person interested in the estate. In her answer Lula Partridge admitted, either expressly or by not denying, all of the foregoing allegations of the complaint. The minute order from which the appeal is taken recites that the petition came on for hearing on January 19, 1949, that notice of hearing had been given as required by law, and that removal was ordered by the court "after hearing the evidence." The minutes do not recite that appellant or her attorney was present. No findings of fact or conclusions of law were signed by the court. The appeal is presented solely on the clerk's transcript.

[1] It is contended that the failure to make written findings constitutes reversible error. This contention is not tenable. Appellant's answer raised no issue of fact. Although the minute order recites that evidence was taken it is stated by respondent and not questioned by appellant that the matter was submitted on the petition and answer. The order represents only a decision of a question of law. Findings were not required.

[2-5] The question here is whether it was an abuse of discretion to remove appellant as administratrix with will annexed where she was contesting the will in order to acquire the entire estate by inheritance. Section 521 of the Probate Code authorizes the court to revoke the letters of an executor or administrator for actual or threatened waste or embezzlement of property of the estate or mismanagement or actual or threatened fraud or for incompetency, removal from the state, or wrongful neglect of the estate, and section 523 requires removal and revocation of letters if the executor or administrator fails to appear in obedience to the citation, or if he appears and the court is satisfied from the evidence that cause for removal exists. There are numerous other provisions in the Probate Code which authorize or require removal in special circumstances. However, conflict between the interest of an executor or administrator

with will annexed, consisting of a right of inheritance in case of intestacy, and his duty to defend the will and to fairly represent and protect the rights and interests of beneficiaries of the will is not made a statutory ground for removal. Appellant was the one who procured admission of the will to probate. She represented herself to be the sole heir, and her right to be appointed was duly recognized. She contends that she was subject to removal only for one of the causes enumerated in section 521, and that her statutory right is not affected by the assertion of a claim to the entire estate adversely to the beneficiaries of the will. We do not doubt that the court has the inherent power to remove an executor or administrator with will annexed in such a case. The duty to uphold the probate of a will and to protect the interests of the beneficiaries rests upon an executor. *Estate of Webster*, 43 Cal.App.2d 6, 20, 110 P.2d 81, 111 P.2d 355; 11B Cal.Jur., sec. 819, pp. 222, 223; 68 C.J., sec. 680, p. 935, note 66. An administrator with will annexed has the same duty to see that the desires of the testator are given effect. Appellant's claim as sole heir and her attack upon the will are inconsistent with the performance of her duty to defend the will and to see that its terms are carried out. She was a trustee for the beneficiaries, 11A Cal.Jur., sec. 22, p. 72, and took a position which conflicted with her fiduciary duties when she instituted the contest. The court should have felt impelled to exact of her as a trustee and officer of the court the ultimate in the performance of her duties, and was not required to retain her in her office of administratrix with will annexed when there would be a continuing conflict between her selfish interest and her duty. In re *Estate of Tersip*, 86 Cal.App.2d 43, 194 P. 2d 66. A trustee who acquires any interest or becomes charged with any duty adverse to the interest of his beneficiary may be removed. Civ.Code, sec. 2233. There is no reason why this principle of the law of trusts should not be applied in a proper case to executors and administrators. There is here not merely a trivial or incidental

conflict of interest but a major one deliberately brought about by appellant. Had the adverse claim of appellant been known to the court at the time she applied for letters, it would have furnished a sufficient ground for denial of her petition. *Estate of St. John*, 8 Cal.2d 175, 64 P.2d 725. It is a general rule that when an executor or administrator makes claim to property which other interested parties claim belongs to the estate, the adverse interest thus asserted furnishes sufficient ground for removal. 119 A.L.R. 306. Although the precise question we have to consider appears not to have been decided in California, the views we express are consistent with the principles announced in *Luckey v. Superior Court of Los Angeles County*, 209 Cal. 360, 370, 287 P. 450; *Estate of Bell*, 135 Cal. 194, 67 P. 123; *Estate of Palm*, 68 Cal.App.2d 204, 213, 214, 156 P.2d 62; and *Estate of Tersip*, supra, 86 Cal.App.2d 43, 194 P.2d 66. See, also, *Moore v. Thomas*, 115 W.Va. 237, 174 S.E. 876; *In re Pearson's Estate*, 228 App.Div. 418, 239 N.Y.S. 653, 33 C.J.S., *Executors and Administrators*, § 9 (e), p. 1036; *Annotations* 119 A. L.R. 306, 138 Am.St.Rep. 535. If appellant had been retained as administratrix with will annexed she would have found herself in the contradictory and impossible position of attempting to procure revocation of probate of the will while under a duty to sustain it. The circumstances required her to make a choice between her right to contest the will and her right to letters.

[6] Sections 521 of the Probate Code, which specifies certain grounds for removal, and section 523 relate only to situations in which removal is mandatory. The code does not place any limitations upon the discretionary power of the court in such matters. There is nothing in the statutory law which expressly or by implication attempts to deprive the court of its inherent power to remove an executor or administrator whose self interest is so opposed to the interests of the beneficiaries under a will as to render him unfit to act as such. The court is not compelled to retain as its own officer one whom it would be required to remove from any other type of trus-



teeship. We can conceive of no good reason why the court should not have removed appellant.

The order is affirmed.

WOOD, J., concurs.

VALLÉE, J., dissents.



97 Cal.App.2d 173

**PEOPLE v. POLLUM.**

Cr. 4409.

District Court of Appeal, Second District,  
Division 3, California.

April 25, 1950.

Cecil R. Pollum was convicted in the Superior Court of Los Angeles County, Charles W. Fricke, J., on all four counts of an indictment charging abortion, and he appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained conviction, but that admission of testimony as to the common practice of consulting two members of hospital staff for opinion before performing a therapeutic abortion was prejudicial as to count involving woman who had described her condition to defendant and had stated that she was fearful for her life.

Judgment and order denying new trial reversed as to first count, and affirmed as to remaining counts.

#### **1. Abortion ☞11**

Criminal law ☞508(9)

Wife's testimony as to abortion was sufficiently corroborated by testimony of husband who accompanied wife to office of defendant and paid for his services, though under the evidence husband was an accomplice. Pen. Code, § 1108.

#### **2. Abortion ☞11**

Evidence was sufficient to sustain a determination that abortion was not necessary to preserve life of wife, though wife

had been advised by a physician that she could not undergo a normal childbirth and that a caesarean operation would be necessary.

#### **3. Abortion ☞1**

Existence of pregnancy and effecting of miscarriage are not elements of abortion, and offense was committed if defendant committed acts testified to with intent to produce a miscarriage.

#### **4. Abortion ☞11**

Testimony by woman who did not want to have a baby because her husband was subject to epileptic fits, as to abortion, was sufficiently corroborated by her mother who accompanied her to defendant's office and testified that she and daughter arranged with defendant for an abortion and paid him \$250. Pen. Code, § 1108.

#### **5. Abortion ☞11**

Testimony by woman as to facts of alleged abortion was sufficiently corroborated by evidence that after operation and while semi-conscious she jumped from operating table and fled from building, that she was in a highly emotional and incoherent state, and that a vaginal speculum and cervical dilator were found in defendant's office. Pen. Code, § 1108.

#### **6. Abortion ☞11**

Evidence was sufficient to sustain conviction of abortions. Pen. Code, § 1108.

#### **7. Criminal law ☞404(4)**

In abortion prosecution, admissibility of hypodermic syringe and needle, a vaginal speculum, a sound and a cervical dilator did not depend on proof that such instruments had a connection with commission of alleged offenses, and the instruments were admissible though they were found in defendant's office more than a year after times of alleged offenses and were not shown to have been used by defendant upon any of women involved. Pen. Code, § 1108.

#### **8. Criminal law ☞745**

The weight to be given fact that surgical instruments suitable for performing abortion were found in defendant's office

about a year after commission of alleged offenses was for the jury. Pen. Code, § 1108.

#### 9. Abortion ☞9

##### Criminal law ☞1169(1)

Guilt of committing an illegal abortion is not established by failure to follow common practice of calling on two doctors of hospital staff for opinion, and admission of testimony concerning practice was prejudicial as to count involving woman who had stated to defendant that she was fearful for her life. Pen. Code, § 1108.

#### 10. Criminal law ☞730(10)

Argument of prosecutor calling attention to the fact that defendant had not taken the witness stand to deny any of the evidence against him, and that the defendant had seen fit to exercise his right under the constitution to stay off the witness stand, asking whether the right to deny the accusations was more valuable than the right to remain silent and asking as to who knew best as to what had actually happened, was not prejudicial, when considered in light of instruction as to significance of defendant's failure to explain or deny adverse testimony.

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Stahlman & Cooper, George Stahlman and Percy V. Hammon, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Stanford D. Herlick, Deputy Attorney General, for respondent.

SHINN, Presiding Justice.

Appellant Pollum, a chiropractor, and one Dr. Kirk were jointly indicted for four offenses of abortion, three of the subjects being married women and the fourth a single woman. Appellant was tried separately to a jury and was convicted on all counts. He was denied probation and sentenced to State Prison. He appeals from the judgment and from an order denying his motion for a new trial. Four grounds of appeal are urged: (1) Insufficiency of the evidence as to each count; (2) error in admission as exhibits of certain surgical instruments; (3) error in the receipt of testi-

mony of a physician as to alleged customary medical practices; (4) prejudicial argument of the prosecutor with respect to appellant's failure to testify.

[1] The claim of insufficiency of the evidence relates to the testimony of the four women descriptive of the acts and statements of appellant and also to the testimony relied upon for corroboration. The evidence disclosed the following: The first woman was the mother of two children, 10 and 12 years of age. She was pregnant, had lost 15 pounds in weight, and was in an anemic condition. She had been advised by a physician, other than appellant, that she could not undergo a normal childbirth and that a caesarean operation would be necessary. She believed this to be true and was greatly concerned about her health. Notwithstanding these facts she was able to do her housework and was otherwise in good health. She consulted Dr. Kirk and was referred to Dr. Pollum. She and her husband went to appellant's office. In the presence of her husband the wife told appellant she was pregnant and had lost 15 pounds of weight. She testified that she believed at that time her life was in danger if "she went through with this pregnancy" and that she so informed appellant. She testified that one of her objections to a caesarean operation was that "caesarean sections do cost a good deal of money." The husband and wife arranged with appellant for an abortion and the husband paid him \$250 in cash for which no receipt was given. The husband testified that his wife appeared to be in good health at the time but when she came out of appellant's operating room she was pale, in a hysterical condition and almost unable to stand. The husband also testified that he did not remember that his wife told appellant she feared for her life if she went through with the pregnancy although she did tell him she was under the impression she was unable to have the child. A few days later she was relieved of her condition of pregnancy. The testimony of the woman left no room for doubt that an abortion was performed. While corroboration was necessary, Penal Code, sec. 1108, the testimony of the husband was sufficient for that purpose, al-

though, under the evidence, he was an accomplice. *People v. Wilson*, 25 Cal.2d 341, 153 P.2d 720; *People v. Clapp*, 24 Cal.2d 835, 151 P.2d 237; *People v. Collins*, 80 Cal. App.2d 526, 182 P.2d 585; *People v. Seifert*, 81 Cal.App. 195, 253 P. 189.

[2] It is earnestly contended by appellant that there was insufficient evidence from which the jury could conclude that the abortion was not necessary to preserve life. We cannot agree that the evidence was legally insufficient.

[3] The second woman testified she had missed one period and did not believe she was pregnant. She had consulted Dr. Kirk three or four weeks before she saw appellant as directed by Dr. Kirk. Her health was good. She was accompanied to appellant's office by a man for whom she worked. He had not known appellant before that time. Both the man and the woman testified that the woman paid appellant \$300 in cash and went into another room with him. The woman testified she was on an operating table 15 or 20 minutes and the man testified that in about 30 minutes she came out pale, nervous and almost hysterical. The woman's testimony as to appellant's acts were sufficient to prove the performance of an abortion. Although she testified that she told appellant she did not believe herself to be pregnant, appellant's charge of \$300 clearly indicated that he did not share her belief. Moreover, the payment of such a sum and her submission to the operation cast doubt upon the professed belief of the woman that she was not pregnant. And it is not a necessary element of the offense that pregnancy should exist or that a miscarriage be accomplished. If appellant committed the acts testified to by the woman with intent to procure a miscarriage he committed the offense charged. The circumstances testified to by the woman and corroborated by the man constituted legally sufficient evidence to support the conviction.

[4] The third woman did not want to have a baby because her husband was subject to epileptic fits. She testified she was in good health. A physician who had examined her testified she was pregnant and

that no reason was discovered why she could not safely undergo a natural childbirth. She was accompanied to appellant's office by her mother. The two women testified they arranged with appellant for an abortion and paid him \$250. The testimony of the daughter was sufficient to prove the commission of the offense charged and was sufficiently corroborated by that of her mother.

[5,6] The fourth woman was unmarried. She testified that she was pregnant but in good health. She was taken to appellant's office one evening by Dr. Kirk where arrangements were made for an abortion. She paid no money to either of the men but promised to make payments each week until the fee was paid. According to her testimony Dr. Kirk administered an anesthetic; she became unconscious but recalled that at times she was screaming and crying. Her description of the acts performed by appellant in the presence of Dr. Kirk was sufficient to prove an attempt to procure a miscarriage. After the operation and while she was semi-conscious she jumped off the operating table and ran out of the building into the street, completely nude except for her shoes. She ran across the street screaming, where she met persons who testified at the trial. Dr. Kirk and appellant followed her with a sheet which they wrapped around her. It had a splotch on it which resembled blood. A woman wrapped a coat around her; the police were called and the subject was taken to the police station accompanied by the doctors. Dr. Kirk brought the woman's clothing and she dressed in the police station. She was in a highly emotional and incoherent state. The doctors were questioned and stated that the woman was undergoing a minor female operation, the nature of which Dr. Kirk said he preferred not to disclose. He said the woman came to the office voluntarily and was under the influence of an anesthetic when she ran out of the building. Police officers testified that appellant was present, although Dr. Kirk was questioned and did the talking, while appellant said nothing. A police officer testified that he arrested appellant and made a search of his office. He found a



small hypodermic syringe and needle, a vaginal speculum, a sound, and a cervical dilator. When questioned appellant said that as a chiropractor he was entitled to use the dilator; he pointed out that it was rusty and said he had not used it for a long time; that the sound was used to determine the depth of wounds and that as a chiropractor he was not entitled to use the hypodermic syringe. The operation was one in which the doctors considered it advisable to administer an anesthetic. The woman's hysterical condition, although no doubt due in part to the anesthetic, also could have indicated that she had been through a severe ordeal. There was, in our opinion, sufficient corroboration. Cases cited supra.

[7,8] The surgical instruments above mentioned were received in evidence over the objection of appellant. It is claimed this was error inasmuch as they were found in appellant's office more than a year after the times of the alleged offenses and were not shown to have been used by appellant upon any of the women. As already stated there was testimony that appellant admitted they belonged to him. There was also testimony that some of the women had been given hypodermic injections and that vaginal instruments of some sort had been used upon them. It is true that the discovery of the instruments in appellant's office was remote as to time but we do not regard the case as one in which it was necessary in order to render them admissible that evidence should have been produced from which it could reasonably be inferred that they had some connection with the commission of the crime. See *People v. McCall*, 10 Cal.App.2d 503, 52 P.2d 500. If it had been necessary to produce such evidence in the present case there was a failure of such preliminary proof. But it was not necessary to connect the instruments with the commission of the acts charged to render them admissible in evidence. Possession of the instruments was evidence that defendant's office was equipped for the performance of operations of the nature described by the witnesses. The testimony was that the cervical dilator was used only in surgery and is usually found

only in offices where surgery is performed. According to appellant's admission he was not qualified as a chiropractor to give hypodermic injections. When questioned by the arresting officer concerning the instruments, appellant stated that he had not used the dilator for a long time, and he justified his possession of the sound upon the ground that it was used to probe wounds. We think that under these circumstances the mere lapse of time between the commission of the alleged acts and the discovery of the instruments was not of itself a sufficient reason to require their exclusion from evidence. It could be inferred from appellant's remarks to the officer that he regarded them as essential to his practice and that they were not newly acquired. They were suitable for use in the operations described by the witnesses and this was sufficient to justify their admission. *People v. Beltowski*, 71 Cal.App. 2d 18, 23, 162 P.2d 59; *People v. Duncan*, 72 Cal.App.2d 247, 164 P.2d 313; *People v. Ramsay*, 83 Cal.App.2d 707, 719, 725, 189 P.2d 802; *People v. Gilman*, 43 Cal. App. 451, 185 P. 310; *People v. Lee*, 81 Cal.App. 49, 252 P. 763. It was for the jury to determine from all the evidence what weight should be given to the fact that the instruments were found in appellant's office about a year after the commission of the alleged offenses. *People v. Peete*, 54 Cal.App. 333, 202 P. 51; *People v. Nakis*, 184 Cal. 105, 193 P. 92; 22 C.J.S., Criminal Law, § 712, p. 1209.

[9] Dr. Ethel Margaret Hamilton, a physician and gynecologist, testified for the people. She stated her qualifications, which were not questioned by counsel for appellant in the first instance. She was the physician who examined the third woman, found she was pregnant, and expressed the opinion that she could undergo a natural childbirth. She was questioned by the people as follows: "What procedure is followed in performing such an operation, that is, one where it is necessary to preserve life." The question was objected to and the witness answered: "The patient is hospitalized for the 24 hours before the dilatation and curettage is performed and is seen by two practicing physicians which are on a

definite committee appointed by the hospital staff. These two physicians see the patient and determine by examination whether or not they feel the patient can go through with pregnancy or whether the pregnancy should be interrupted." A motion to strike the answer was made and the court stated "I think it is proper to show what the regular medical practice is in the community in question in regard to a particular case. The objection will be overruled." The witness had testified previously on the subject to the effect that she had performed operations in order to save life. She proceeded to tell of a particular case but was informed by the court that she was getting away from the subject matter. She was not shown to be familiar with the standard practice used by reputable physicians in performing operations to preserve life nor was it shown that such a standard practice existed in the community. So far as shown she was testifying only to cases within her own experience. Both the objection and the answer were upon the ground, among others, that no proper foundation had been laid for her testimony. Appellant's attorney stated, out of the presence of the jury: "Judge, the doctor has not testified to the technical procedure, she has testified to the moral aspect of the thing, what doctors do to protect themselves" to which the court replied: "Which has been the standard of the medical profession as far back as I can remember. \* \* \* All doctors performing therapeutic abortions do get the opinion of other doctors, call other doctors in, at least two doctors in the hospital, doctors on the hospital staff. A man with hospitals available for performing an abortion in the privacy of his office without consulting another doctor is an indication of not performing a therapeutic abortion, a circumstance which goes to the weight and not to the admissibility. The objection will be overruled. Motion denied."

The people seek to justify the admission of this testimony upon the ground that the question involved was the same as in a malpractice action, namely, whether the treatment administered was in accordance

with the standard practice of reputable physicians in the community. It was not the same. No question of knowledge, judgment, skill or care was involved. The court instructed: "An abortion is legal only when it is *apparently* necessary to save the life of the woman" (emphasis added). It may be presumed that the jury, because of the instruction, would have acquitted appellant if it had determined the evidence to be insufficient to prove want of apparent necessity. If the jury accepted the testimony of Dr. Hamilton that doctors performing abortions in order to preserve life first receive the advice of two doctors appointed by a hospital staff, it would have weighed heavily against appellant. The concurring opinions and advice of two physicians, appointed for that purpose, are deemed essential to prove necessity to preserve life, and the absence of such advice is evidence of nonnecessity. Such were the implications of the testimony. Whatever the usual practice may be in certain medical circles, the guilt of one accused of committing an abortion should not be deemed established by his failure to follow the practice.

Appellant's contention in this connection relates only to the case of the first woman, who described her condition to appellant and stated she was fearful for her life. The uncontradicted evidence was that the other women were in good health. See *People v. Malone*, 82 Cal.App.2d 54, 185 P.2d 870. We are of the opinion that the testimony concerning the described practices was prejudicial as to the first count.

[10] The final contention is that improper comment was made by the prosecutor upon the failure of appellant to testify in his own behalf. The following statements were made during argument: "The defendant has not got on this witness stand here to explain or deny any of this evidence that has been piled up against him. The People's case stands absolutely uncontradicted in any way—." "Now, the defendant has seen fit to exercise his right under the constitution to stay off of that witness stand and tell us or explain to us or make

any of these denials." "Mr. Bowler: You know, ladies and gentlemen, in the olden days when the law was young, the defendant didn't have the right to get on that witness stand and explain the evidence that was within his knowledge or to contradict those who appeared against him." "Mr. Bowler: Ladies and gentlemen of the jury, as I said before, that used to be the law. Now, in the present day the defendant has two rights. Under the Constitution he has the right to stay off of that stand and not testify, and he likewise has the right to get on that stand and deny these accusations against him and explain the evidence that appears against him. He has seen fit not to do that. Now, which of those two rights are more valuable—" "Mr. Bowler: Which of those two rights is more valuable? If a defendant were innocent, I would say that the right to get on that stand would be the more valuable right, to get on that stand and deny, and have the privilege of explaining evidence that appears against him in any particular case." "Mr. Bowler: He has placed on your shoulders, ladies and gentlemen of this jury—he has placed on each and every one of you the burden and the responsibility of finding an explanation for the matters that these women have testified about in this case." "Mr. Bowler: Who knows better what took place out there—who knows better as to what happened to Mrs. White, what happened to Carmen Lund, what happened to Mrs. Carter, and what happened to the other ladies who testified here—who knows better than the defendant Pollum? It is certainly within his knowledge as to what took place out there. Why, he was standing between these women's legs; why, he accepted all this money. What did he do?" "I am going to let Mr. Stahlman come up here and tell you how innocent his

man is, and then I will devote a little time to answering what he has to say."

The foregoing argument was interspersed with objections by the defense and assignments of prejudicial misconduct, all of which were overruled. The court instructed the jury as to the significance of the failure of the defendant to explain or deny adverse testimony as to matters concerning which he would have had knowledge. The instruction was substantially in the language used by the court in *People v. Adamson*, 27 Cal. 2d 478, 490, 165 P.2d 3, with respect to the consideration that should be given to the failure of the accused to explain or deny such evidence. There was no assertion by the prosecutor, as there was in *People v. Pianezzi*, 42 Cal. App.2d 265, 268, 108 P.2d 732, that the failure to testify was tantamount to an admission of guilt, which assertion, although approved by the District Court of Appeal, was subsequently disapproved by the court in the *Adamson* case. Neither was there an assertion that the failure of appellant to testify justified an inference or raised a presumption of guilt. The argument was to the effect that such failure warranted the jury in according more weight to the evidence of the prosecution because the testimony as to the conduct of appellant stood uncontradicted. It would seem reasonable to suppose that in following the court's instruction the jury would not have given less effect to the failure of defendant to testify than was suggested by the remarks of the prosecutor.

The judgment and order denying a new trial are reversed as to the first count of the indictment, and affirmed as to the remaining counts.

WOOD and VALLÉE, JJ., concur.



97 Cal.App.2d 236

**ZELKOWITZ v. TOBIN.**

Civ. 17425.

District Court of Appeal, Second District,  
Division 1, California.

April 27, 1950.

Action by Jack Zelkowitz against Nathan R. Tobin, to recover broker's commission. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., rendered judgment against plaintiff on defendant's motion for nonsuit, and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that since inference could be drawn from testimony that plaintiff produced buyer ready, able and willing to purchase the property, granting of defendant's motion for nonsuit was improper.

Judgment reversed and cause remanded for a new trial.

**1. Brokers ⇐88(3)**

In action by broker to recover commission allegedly due on sale of vendor's realty, evidence that broker introduced purchaser to vendor, and that vendor sold property to purchaser, within time limit specified in contract, was sufficient to warrant inference that broker produced a buyer ready, able and willing to purchase the property, and trial court's granting of defendant's motion for nonsuit, was improper.

**2. Trial ⇐165**

On a motion for nonsuit, the evidence must be viewed most favorably to the plaintiff, with every legitimate inference drawn in his favor, and conflicts disregarded.

**3. Trial ⇐165, 178**

A nonsuit or a directed verdict may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.

Arthur V. Kaufman, Los Angeles, for appellant.

No appearance for respondents.

DRAPEAU, Justice.

[1] Plaintiff and defendant entered into a broker's listing agreement in writing, plaintiff to sell defendant's real property, and to be paid the usual commission of 5%. Plaintiff introduced a purchaser to defendant. Defendant sold the property to this purchaser, but the purchaser and defendant sidetracked the plaintiff broker, who got no commission. The sale was made within the time limit specified in the contract.

At the close of plaintiff's case, judgment was rendered against him on defendant's motion for nonsuit.

[2,3] No brief has been filed on behalf of respondent. A brief could not do him much good, because the rule here to be applied is elementary and the inference may be drawn from the testimony that appellant produced a buyer ready, able and willing to purchase the property. As was said in *Raber v. Tumin*, — Cal.App.2d —, at page —, 216 P.2d 167, at page 169: "It is well established that on a motion for nonsuit the evidence must be viewed most favorably to the plaintiff, with every legitimate inference drawn in his favor, and conflicts disregarded. *Barnett v. La Mesa Post No. 282*, 15 Cal.2d 191, 99 P.2d 650; *McClelland v. Acme Brewing Co.*, 92 Cal. App.2d 698, 207 P.2d 591. 'A nonsuit or a directed verdict may be granted "only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given." \* \* \* Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon

appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury.' In re Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768."

The judgment is reversed, and the cause remanded for a new trial.

WHITE, P. J., and DORAN, J., concur.



97 Cal.App.2d 198

**In re CRISLER'S ESTATE.**

**RODOLPH et al. v. NELSON.**

Civ. 7720.

Sac. 6040.

District Court of Appeal, Third District,  
California.

April 26, 1950.

Hearing Denied June 22, 1950.

Proceeding in the matter of the estate of Vera L. Crisler, also known as Vera Crisler Rose, as Vera Crisler and as Vera Rose, wherein Lena King Nelson filed a petition for an allowance from the assets of the estate, opposed by Rollin P. Rodolph, individually and as executor of the estate, and others. The Superior Court, Sacramento County, Malcolm C. Glenn, J., ordered that a payment be made to Lena King Nelson, and Rollin P. Rodolph and others appealed. The District Court of Appeal, Adams, P. J., held that Lena King Nelson did not forfeit her rights as beneficiary under the will by moving for dismissal of probate proceedings in California on the ground of lack of jurisdiction.

Judgment affirmed.

#### 1. Wills ⚡665

Beneficiary's motion for dismissal of probate proceedings in California on ground of lack of jurisdiction in that testatrix was Oregon resident at time of death was not contest which would destroy beneficiary's right to take under forfeiture pro-

visions in will, notwithstanding that under Oregon law the beneficiary might be permitted to contest will in Oregon probate proceedings without forfeiting rights under will, and that affidavits accompanying beneficiary's motion contained reflections on character of testatrix, such as that she was given to drinking and had deteriorated mentally. Probate Code, § 380.

#### 2. Wills ⚡667

Where forfeiture is claimed under clause in will forfeiting bequests to beneficiaries attempting to defeat provisions of will, burden is on party claiming forfeiture to show bad faith of beneficiary.

Gilford G. Rowland, Rowland & Craven,  
Sacramento, for appellants.

David York, Palmer & York, Calistoga,  
for respondent.

ADAMS, Presiding Justice.

Vera L. Crisler died at Klamath Falls, Oregon, leaving estate in Sacramento County, California, and in Oregon. She left a will dated February 1, 1940, and two codicils dated March 9, 1944 and August 20, 1945, respectively. She left estate in Oregon, and in Sacramento County, California. Her will was admitted to probate in Sacramento County and no contest thereof was instituted either before or after probate.

On February 18, 1947, more than six months after the will had been admitted to probate, Lena King Nelson, a beneficiary under the will, respondent in this appeal, filed in the probate court a notice of motion for an "order dismissing and dropping the probate proceedings," on the ground that decedent was a resident of Klamath Falls, Oregon, at the time of her death, and, therefore, the Probate Court of Sacramento County had no jurisdiction. That motion was denied after hearing, and on appeal to this court the order was affirmed. In re Estate of Crisler, 83 Cal.App.2d 431, 188 P.2d 772.

Thereafter Mrs. Nelson petitioned the probate court for an allowance from the assets of the estate. Under the will the

residue of the estate was given in trust, the net income of such trust payable to Mrs. Nelson, decedent's aunt, as long as she should live, with remainder over to four strangers by blood, to wit, Albert J. Powell of Sacramento, Dola N. Clemens of Klamath Falls, Rollin P. Rodolph of San Francisco (now the executor of the estate and a trustee of the trust), and E. G. Funke, an attorney of Sacramento. Along with the petition of Mrs. Nelson for such allowance the Probate Court considered a final account and petition for distribution filed by the executor, which petition prayed for distribution to the four remaindermen, it being alleged by the executor that Mrs. Nelson had forfeited all rights to take under the will because she had contested it, and thus brought herself within the provision of same which reads:

"Eleventh: I have intentionally omitted all my heirs who are not specifically mentioned herein, and I hereby generally and specifically disinherit each, any and all persons whomsoever claiming to be or who may be lawfully determined to be my heirs at law, except as otherwise mentioned in this will, and if any such persons or such heirs, or any devisees or legatees under this will, or their successors in interest, or any other persons who if I died intestate would be entitled or shall lawfully become entitled to any part of my estate shall either, directly or indirectly, singly or in conjunction with other persons, seek to establish or assert any claims to my estate or any part thereof, excepting under this will, or attack, oppose or seek to set aside the probate of this will, or to impair, invalidate or set aside its provisions, or to have the same or any part thereof, or any devise or devisees, or trust herein, limited, declared void or deminished, or to defeat or change any part of the testamentary plan of this will, \* \* or shall endeavor to secure or take any part of my estate in any manner other than through or under this will, then, in any or all of the above-mentioned cases and events, I hereby give and bequeath to such person or persons the sum of One Dollar (1.00) and no more, in lieu of any other share or interest in my estate; \* \* \*."

The trial court held that Mrs. Nelson had not forfeited her right to take under the will and ordered that a payment to her be made. From that order this appeal has been taken.

The sole question before us is whether Mrs. Nelson did or did not forfeit her rights as beneficiary, by the action which she took in moving for the dismissal of the probate proceedings in California on the ground of lack of jurisdiction. It must be conceded that she did not file any contest either before or after the probate of the will, and that, at the time she sought to secure the dismissal, the time within which a contest could be filed had expired. Prob.Code, sec. 380.

As to what constitutes a contest the court said, in *Re Estate of Hite*, 155 Cal. 436, 444, 101 P. 443, 446, 21 L.R.A., N.S., 953, 17 Ann. Cas. 993, that the mere filing of a paper contest which had abandoned without action and had not been employed "to thwart the testator's expressed wishes" did not constitute a contest; and that only when an opponent uses the appropriate machinery of the law to the thwarting of the testator's expressed wishes, could his action be considered a contest. Also see *In re Estate of Howard*, 68 Cal.App.2d 9, 11, 155 P.2d 841, where this rule is reiterated and *Estate of Hite* cited.

In *Lobb v. Brown*, 208 Cal. 476, 492, 281 P. 1010, the rule was asserted that forfeiture provisions in a will are to be strictly construed, and forfeiture avoided if possible; that only where the acts of the parties come strictly within the express terms of the punitive clause of the will may a breach thereof be declared. That case is cited in 3 *Page on Wills* (Lifetime Ed.) 819 et seq., where strict construction of forfeiture clauses in wills is considered and many acts which have been held not to constitute grounds for forfeiture are set forth. Also see 5 A.L.R. 1372 et seq. *Lobb v. Brown* was cited and followed in *Re Estate of Seipel*, 130 Cal.App. 273, 276, 19 P.2d 808.

In *Re Estate of Hill*, 176 Cal. 619, 169 P. 371, passing upon the effect of an opposition to admission to probate of a will in Cali-



fornia on the ground that the jurisdiction for such probate was in another state, it was said that in no sense did this amount to even an attempt to contest the allowance of the instrument as a will. Also see *Maguire v. Bliss*, 304 Mass. 12, 22 N.E.2d 615, citing *In re Estate of Hill*, supra.

Appellants argue that Mrs. Nelson's purpose in contending that Mrs. Crisler was a resident of Oregon at the time of her death was to secure probate in that state because, under Oregon law, she could contest the will there and not forfeit her rights under it. They cite *Wadsworth v. Brigham*, 125 Or. 428, 259 P. 299, 266 P. 875, as so holding, but whether it does or does not so hold, it forms no basis for speculation as to Mrs. Nelson's motives. They also urge that in affidavits which accompanied the notice of motion to dismiss the proceedings in California, Mrs. Nelson, in addition to allegations as to decedent's residence, made attacks upon her character, which, in effect, amounted to a contest of her will.

[1] We find no merit in either of these contentions. We cannot assume that Mrs. Nelson's motive was to permit her to contest in Oregon, and the question whether testatrix was a resident of Oregon or a resident of California at the time of her death was one of fact. In the will itself testatrix made provision for either contingency, as she stated that in the event that she had, at the time of her death, transferred her residence to Klamath Falls, Dola N. Clemens of that city was to act as executor and trustee in place of Rollin P. Rodolph of California, who was to act as such in the event she died a resident of California. We cannot see that Mrs. Nelson's contention that Mrs. Crisler was a resident of Oregon at the time of her death is any more an attack upon the will itself than was the petition for probate of the will in California on the ground that she was a resident of this state. Neither one affected or could affect the dispositive provisions of that instrument; and had it been concluded, in the prior proceeding, that the testatrix had in fact died a resident of Oregon, the will would have been probated in that state in exactly the same form that it was here. And had the court found that her contentions were

sound, would not appellants be chargeable with forfeiture for claiming that decedent was a resident of California?

[2] And as for the argument that the affidavits filed contained reflections upon the character of decedent, such as that she was given to drinking, and that she had deteriorated mentally, these did not constitute attacks upon the will or attempts to attack, oppose or set aside the probate of the will. Appellants rely upon bad faith on the part of Mrs. Nelson. Their attorney at the trial said that had she come in good faith and asserted, during probate proceedings, that testatrix died a resident of Oregon, that would not have constituted a forfeiture. But the burden was upon appellants to allege and show bad faith on her part if they relied upon bad faith. *In re Estate of Bergland*, 180 Cal. 629, 636, 182 P. 277, 5 A.L.R. 1363, and the trial court has held against that contention. In its order instructing payment to Mrs. Nelson, it recited:

"That said Lena King Nelson has not by reason of a certain motion to dismiss probate proceedings made by said Lena King Nelson in the above entitled matter before the above entitled Court on the 3rd day of March, 1947, nor by reason of the appeal taken from the order and decree of this Court in relation thereto, nor by reason of any other appearance by or proceedings heretofore instituted by said Lena King Nelson, sought to establish or assert any claims to the estate of said decedent, or any part thereof, excepting under the Last Will and Testament of said decedent, nor has said Lena King Nelson attacked, opposed or sought to set aside the probate of the Last Will and Testament of said decedent, nor has she sought to impair, invalidate or set aside the provisions of said Last Will and Testament, or to have the same or any part thereof, or any device or trust therein limited, declared void or diminished, nor has said Lena King Nelson sought to defeat or change any part of the testamentary plan of the Last Will and Testament of said decedent, nor has said Lena King Nelson settled or compromised, directly or indirectly, either in or out of Court, with any contestant of said Last Will and Testament, nor has said Lena King Nelson consented

to, acquiesced in or failed to contest such proceedings, nor has said Lena King Nelson sought to have any part of the estate of said decedent declared community property, nor has said Lena King Nelson endeavored to secure or take any part of the estate of said decedent in any manner other than through or under the Last Will and Testament of said decedent within the meaning of paragraph Eleventh of the Last Will and Testament of said decedent, or at all."

We find no ground for a different conclusion. The judgment appealed from is affirmed.

SPARKS, J. pro tem., and PEEK J., concur.



97 Cal.App.2d 286

**WEST v. PARKER et al.**  
Civ. 17178.

District Court of Appeal, Second District,  
Division 1, California.  
May 1, 1950.

Rehearing Denied May 15, 1950.

Hearing Denied June 29, 1950.

James E. West sued Robert H. Parker and others for an accounting. The Superior Court of Los Angeles County, William B. McKesson, J., rendered a judgment adverse to defendants and denied defendants a new trial, and defendants appealed. The District Court of Appeal, Drapeau, J., held that contract providing for division of net profits from sales of lots following subdivision of land was sufficiently ambiguous to warrant judicial determination by parol evidence of what parties intended by term "net profits", and that order appointing a receiver could not be reviewed.

Appeal from order denying new trial dismissed and judgment affirmed.

**I. Evidence ⇨457**

Contract whereunder plaintiff paid specified amount of money to defendant landowner to pay back taxes, and defendant

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was to convey to plaintiff an undivided one-half interest in the land, and whereunder net profits from contemplated subdivision of land and sale of lots were to be divided equally, and, as lots were sold, plaintiff was to receive the first money in a specified amount collected on sale of each lot until plaintiff received back money plaintiff paid defendant, was sufficiently ambiguous to warrant judicial determination by parol evidence of what parties intended by term "net profits".

**2. Appeal and error ⇨101(1)**

An order appointing a receiver was an appealable order. Code Civ.Proc. § 963.

**3. Appeal and error ⇨870(4)**

On an appeal from a final judgment court may not review any order from which an appeal could have been taken, including orders appointing receivers. Code Civ. Proc. §§ 956, 963.

Holbrook & Tarr, Leslie R. Tarr, and Freda B. Walbrecht, Los Angeles, for appellant.

Wood, Crump, Rogers, Arndt & Evans, Edward Alton, Guy Richard Crump, M. W. Young, Los Angeles, for respondent.

DRAPEAU, Justice.

Defendant, Robert H. Parker, acquired record title to a tract of 8 6/7 acres of land in Pasadena. He purchased and secured deeds from several residuary legatees in an insolvent probate estate, and the property was sold by the Probate Court to a third party, who in turn conveyed to him.

No taxes had been paid on the land for years. So Mr. Parker secured \$14,250 from plaintiff to pay the taxes. The plan was to clear title to the tract, and to subdivide and sell it.

Plaintiff and Mr. Parker entered into a written agreement, which, omitting description, is as follows:

**"Agreement for Purchase and Sale of  
Real Property**

"This Agreement, made in triplicate this 23rd day of June, 1945, between Robert H.

Parker and Jessie Lee Parker, joint tenants, herein called Seller, and James E. West, herein called Buyer,

"Witnesseth: that Seller, in consideration of the covenants and agreements of Buyer herein contained, agrees to sell and convey unto Buyer and Buyer agrees to buy one-half undivided right, title and interest in the real property situate in the City of Pasadena, County of Los Angeles, State of California, hereinafter referred to as 'said realty' and described as follows:

\* \* \* \* \*

"Subject To: Conditions, restrictions, reservations and easements of record, if any, for the principal sum of Fourteen thousand two hundred fifty Dollars (\$14,250.00) lawful money of the United States, of which principal sum Seller, by execution of this Agreement acknowledges receipt of Ten Dollars (\$10.00) and Buyer in consideration of the premises, promises and agrees to pay Seller through escrow the remainder of said principal sum, said money to be used to pay the taxes of the City of Pasadena and County of Los Angeles.

"It is also agreed that Robert H. Parker will prepare subdivision maps and be paid at the rate of \$1.50 per hour for surveys and preparation of same. Said surveys are not to exceed in cost \$500.00.

"It is mutually agreed that sub-division map will be recorded immediately upon payment of taxes and lots offered for sale. Net profits from sale of said lots shall be divided equally between Seller and Buyer, above. It is further understood and agreed that the first \$320.00 collected on the sale of each of the above said lots shall be paid to James E. West until such time as he has received back his principal payment of \$14,250.00.

"Robert H. Parker  
 "Jessie Lee Parker  
 "James E. West"

Plaintiff paid the money; it was used to pay the taxes; and Mr. Parker and his wife conveyed by their deed and undivided one-half interest in the tract to him.

Mr. Parker started to carry the project through the tortuous paths of subdivision:

to prepare the subdivision maps, to have them approved by the City of Pasadena; and to prepare plans, arrange for, and superintend the requisite improvement work—streets, curbs, sewers and public utilities. He testified that he was delayed by public officers charged with approving the map and work, he thought because he planned to sell lots in the subdivision to colored folks.

He procured a bond for \$20,000, to insure payment of the cost of the improvement work, to be deposited with the City of Pasadena. Then he conveyed his remaining one-half interest in the tract to Mr. and Mrs. Marvil, his son-in-law and daughter.

To indemnify the bonding company against loss, a trust deed and note were made to it by the record owners of the property at that time, plaintiff and Mr. and Mrs. Marvil. These records owners then entered into two agreements concerned with this case, subsequent in time, of course, to the original agreement between plaintiff and Mr. Parker. The latter agreements defined the rights of the owners in connection with the obligation to the bonding company, and provided that one half of the proceeds from lot sales should go to the bonding company up to \$20,000, and that "the remaining one-half (1/2) of the sales price of the lots sold \* \* \* shall be applied to and actually used in the payment of the construction work performed on said subdivision improvement which is the subject matter of this contract." To this extent the covenant to pay plaintiff \$320 per lot as sold was modified.

Later the bonding company demanded cash to cover the bond. This demand was met by borrowing \$15,000 and using \$5,000 from moneys paid for lots. The trust deed and note were assigned to secure repayment of the \$15,000 borrowed.

Just as Mr. Parker was obtaining deposits on lot sales, and the improvement work was under way, he found himself enmeshed in a most vexatious lawsuit. Two legatees of the estate from whence came the title sued him because they had not quitclaimed along with the other legatees.



Also, they alleged that at the time the probate sale was made, Mr. Parker was administrator with the will annexed of the probate estate, and caused the sale to be made to himself through a dummy purchaser.

When this happened, the title company refused to write policies of title insurance on lots, and none could be sold. So that lawsuit just had to be settled. It was compromised, and the claimants were paid \$1,250. And Mr. Parker incurred liability for substantial counsel fees to get him out of his legal difficulty.

When all but one or two of the lots were sold and the several obligations of the project paid, plaintiff and Mr. Parker could not agree upon the final division of the proceeds of the subdivision sales. Mr. Parker claimed equal division of the profits, without payment of \$14,250 to plaintiff first. He also claimed compensation for the expense of the lawsuit above mentioned, \$1,250 to settle it, and \$1,250 counsel fees; for clerical work done by his wife, \$4,900; for office rent for a room in his own house, \$525; for telephone services, \$490; and for 15% overriding commission for supervision and engineering of the street improvements, \$5,173.50.

Plaintiff brought this action for an accounting, a receiver was appointed, and after trial judgment followed: (1) that the contracts and conduct of the parties established a joint adventure to subdivide and sell the real property; (2) that the plaintiff first be paid \$14,250; (3) that the assets of the joint adventure be distributed equally between plaintiff and Mr. Parker, after surcharging Mr. Parker \$9,018.66 and paying the expenses of the receivership; and (4) that the Marvils held bare legal title only to the one-half interest in the tract of record in them, the real parties in interest being the plaintiff and defendant, Mr. Parker.

With respect to the specific items claimed by Mr. Parker, the Court found that he was entitled to compensation in the amount of 15% of the cost of the street improvements for supervision and engineering, \$5,173.50; and that the following were not

proper charges: amounts claimed for settlement of the lawsuit mentioned, clerical work, office rent, and telephone services.

All the defendants appeal, and contend: (a) that the finding of a joint adventure is erroneous; that the plaintiff purchased an undivided one-half interest in the property and was a tenant in common with the defendants; (b) that the several findings as to charges against the enterprise are erroneous, except, of course, \$5,173.50 allowed Mr. Parker for his services in connection with the improvement work; (c) that the expense of the receivership should not have been allowed, because it was not necessary; and (d) that the plaintiff is estopped to question the ownership of defendants Mr. and Mrs. Marvil.

In other words, defendants contend that the contract provides that after payment of \$500 to Mr. Parker for preparing the plans for the improvements, all profits from the subdivision were to be divided equally between Mr. Parker and plaintiff as tenants in common, plaintiff having purchased for \$14,250 and undivided one-half interest in the tract, *as was*; that it was error to receive parole evidence to explain the term "net profits" as used in the contract, that instrument being clear, plain, and unambiguous.

This is the principal question for determination. Substantial evidence upholds the findings as to allowance or disallowance of the several charges claimed, whether the accounting was in a joint adventure or for sales of property held in common tenancy. Also the evidence sustains the finding as to the *status* of the daughter and son-in-law. And there is no estoppel in plaintiff's relations with them.

The original contract may be paraphrased as follows: Plaintiff paid \$14,250 to Mr. Parker to pay the taxes; Mr. and Mrs. Parker were to convey to plaintiff an undivided one-half interest in the real property; Mr. Parker agreed to survey the land and prepare subdivision maps at a cost not to exceed \$500; the subdivision map was to be recorded immediately and the lots offered for sale; the net profits were to be divided equally between Mr. Parker and

the plaintiff, and as the lots were sold, plaintiff was to receive \$320 from each lot until he "received back" his \$14,250.

[1] The construction placed upon the contract by the trial court is helped by the language of the contract. Giving effect to the words "received back," in endeavoring to ascertain the intent of the parties, supports the theory of the findings that the plaintiff was to get his money out first, and then to share in the net profits, and that the transaction was a joint adventure. In any event, the contract is sufficiently ambiguous to warrant judicial determination by parole evidence of the intent of the parties.

[2-3] This leaves, then, only the contention of appellants that the order appointing the receiver was void, because receivership was unnecessary. The order appointing the receiver was an appealable order. Code Civ.Proc. sec. 963. On an appeal from a final judgment the court may not review any order from which an appeal could have been taken. This rule includes orders appointing receivers. Code Civ.Proc. sec. 956; *Weygandt v. Larson*, 130 Cal. App. 304, 19 P.2d 852.

The appeal from the order denying new trial is dismissed; the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



97 Cal.App.2d 234

**BLANCHARD v. HUTHSING.**  
Civ. 17300.

District Court of Appeal, Second District,  
Division 1, California.

April 27, 1950.

Action by Bessie E. Blanchard against Charles K. Huthsing to recover reasonable value of services rendered under oral brokerage contract. The Superior Court of Los Angeles, Wilbur C. Curtis, J., entered judg-

ment for defendant, and plaintiff appealed. The District Court of Appeal, Doran, J., held that letter upon which plaintiff relied was a general dissertation, and in no sense a note or memorandum of an agreement sufficient to fall within exception to statute of frauds.

Judgment affirmed.

**Brokers** — 43(3)

Where letter from vendor to broker was a general dissertation, and was not a note or memorandum of an agreement authorizing or employing broker to purchase or sell realty within exception of statute of frauds, oral agreement between vendor and broker was unenforceable. Civ.Code, § 1624, subd. 5.

Michael F. Shannon, Thomas A. Wood, Los Angeles, for appellant.

Orris R. Hedges, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment.

The action is, as the complaint alleges, for "the reasonable value of the services rendered by the plaintiff to the said defendant." It is alleged that, "plaintiff was employed by defendant orally to negotiate for either the sale or exchange" of certain real property owned by defendant. The court found, "That it is not true that on or about the 11th day of August, 1946, or at any other time, plaintiff was employed by Defendant orally, or in any other manner, to negotiate for either the sale or exchange of the real property owned by the Defendant" and, "that the reasonable value of the services rendered by Plaintiff to Defendant was the sum of \$10,000.00."

It is contended on appeal, in effect, that the evidence does not support the findings; that, on the contrary, the evidence supports appellant's contentions, viz., that "The plaintiff was the procuring cause in the exchange" and that the evidence of a letter written by defendant to plaintiff is, "sufficient to comply with subdivision 5 of section 1624 of the Civil Code."

The record fails to support appellant's contentions. The evidence supports the trial court's findings and conclusions. The letter upon which appellant relies is a general dissertation and in no sense is a "note or memorandum" of "an agreement authorizing or employing an agent or broker to purchase or sell real estate", within the application of the above-mentioned provision of the Civil Code. The facts in *Williams v. Kinsey*, 74 Cal.App. 2d 583, 169 P.2d 487, upon which appellant relies, are entirely different from the facts in the within action; the court in the *Kinsey* case was confronted with a variety of different situations.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



97 Cal.App.2d 158

**LOKE v. LOKE.**  
Civ. 14279.

District Court of Appeal, First District,  
Division 1, California.  
April 25, 1950.

Action for divorce by Anna Loke against Edward Loke. The Superior Court in and for the City and County of San Francisco, Twain Michelsen, J., entered an order requiring defendant to pay plaintiff's attorney's fees and costs on appeal from an order denying her application for counsel fees and costs in divorce action and defendant appealed. The District Court of Appeal, Schottky, J., Pro Tem, held that requiring husband to pay attorney's fees and costs was not abuse of discretion.

Order affirmed.

**1. Divorce** Ⓒ284

Order requiring husband to pay wife's attorney's fees and costs on appeal from order denying her application for counsel fees and costs in her action for divorce was

not abuse of discretion, in view of substantial showing by affidavit in support of order, though such showing was largely contradicted. Civ.Code, § 137.

**2. Divorce** Ⓒ284

Questions of necessity, good faith and merit were matters to be determined by trial court on wife's application for counsel fees and costs on appeal from order denying her application for counsel fees and costs in her divorce action. Civ.Code, § 137.

Samuel E. Yee, San Francisco, for appellant.

Phil F. Garvey, San Francisco, Julia M. Easley, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

On January 25, 1949, plaintiff and respondent Anna Loke filed an action for divorce against defendant and appellant Edward Loke. On February 21, 1949, plaintiff's application for counsel fees and costs was heard before the Honorable Frank T. Deasy, Judge of the Superior Court, and denied. Thereafter, on February 23, 1949, plaintiff filed a notice of appeal from the order of Judge Deasy, and on March 30 she filed a motion for an order requiring defendant to pay \$350 to plaintiff as and for attorney's fees and costs on said appeal. This motion was heard by Superior Court Judge Twain Michelsen, and on April 28, 1949, he made an order that defendant pay \$308.80 as and for attorney's fees and costs of plaintiff on the appeal from the order of Judge Deasy. This appeal is by defendant from the said order of Judge Michelsen.

The sole question to be determined on this appeal is whether Judge Michelsen abused the judicial discretion conferred on him by section 137 of the Civil Code, which provides: "When an action for divorce is pending, the court may, in its discretion, require the husband \* \* \* to pay as alimony any money *necessary* to enable the wife \* \* \* to support herself \* \* \* or to prosecute or defend the action." (Emphasis added.)

In the recent case of *Fallon v. Fallon*, 86 Cal.App.2d 872, at page 873, 195 P.2d 878,



this court said: "The rule is well stated in the extract chosen by plaintiff from the opinion in *Loeb v. Loeb*, 84 Cal.App.2d 141, at page 148, 190 P.2d 246, 250, the court says: 'As previously stated, the grant or denial of pendente lite allowances of temporary alimony and suit money rests in the sound discretion of the trial court. However, that discretion should not be exercised arbitrarily. *Sweeley v. Sweeley*, 28 Cal.2d 389, 394, 170 P.2d 469; *Turner v. Turner*, 80 Cal. 141, 144, 22 P. 72; *Smith v. Smith*, 147 Cal. 143, 145, 81 P. 411. The wife seeking these awards must establish her necessity for them. Such necessity may be proved only by showing that her need for proper support and the expenses of the litigation exceed her available resources. This means that the trial judge must be informed in detail not only as to her needs (*Tremper v. Tremper*, 39 Cal. App. 62, 66, 177 P. 868), but also as to her resources. Cf. *Kenney v. Kenney*, 220 Cal. 134, 138, 30 P.2d 398; *Busch v. Busch*, supra, 99 Cal.App. 198, 201, 278 P. 456.' While the *Loeb* case refers to attorney's fees and costs on the main case, the rule is the same as to fees and costs on appeal."

Plaintiff filed an affidavit in support of her motion for attorney's fees and costs on appeal which stated that \$350 was a reasonable sum and was necessary to permit her to prosecute her appeal; that defendant received an income of approximately \$200 per month and was well able to pay and that plaintiff was not; that she was informed by her attorney, Phil F. Garvey, "and believes that she has a good and meritorious appeal on the merits in the above entitled cause and that the said order dated February 21, 1949 will be reversed on appeal." A counter affidavit of Edward Loke, the defendant, was filed alleging "that the monthly income of plaintiff \* \* \* is about the same as that of the defendant"; that defendant had offered to pay reasonable attorney's fees and costs; and that the appeal was not taken in good faith but for the purpose of harassing defendant and collecting an unreasonable fee. A "Reply Affidavit" of Mr. Garvey was filed in behalf of plaintiff disputing defendant's allegation that the incomes of the parties were "about

the same" or that defendant ever had offered to pay a reasonable attorney's fee and alleging that defendant had offered to pay only a fee that was "nominal." In the "Reply Affidavit" it was also denied that Garvey "at any time stated that he would prosecute an appeal from the order heretofore made, unless he was paid a fee by the defendant \* \* \*."

The reporter's transcript shows that on the hearing of plaintiff's motion by Judge Michelsen the aforementioned affidavits were filed in support of and in opposition to the motion; that the views of both sides as to plaintiff's income were presented; that defendant's attorney urged before the trial court all the points now raised on appeal; and that a transcript of the testimony of the parties at the hearing before Judge Deasy on February 21 was considered by the trial judge and received in evidence.

In *Armstrong v. Armstrong*, 81 Cal.App. 2d 322, 183 P.2d 905, the situation was similar to the one here. In that case the husband appealed from an order granting attorney's fees and costs incident to the wife's appeal (from the setting aside of an interlocutory decree of divorce) on the ground that such order "amounted to a plain abuse of discretion" and that the wife's showing was insufficient to justify the order." The court stated, 81 Cal.App. 2d at pages 324-325, 183 P.2d at page 906: "It is not claimed that a wife possesses any absolute right to such an order, but as in other discretionary matters, the rule is well settled that the order made will not be disturbed by an appellate court 'save when it clearly appears that such discretion has been abused,' as was said in *Wittman v. Superior Court*, 19 Cal.App.2d 734, 736, 66 P.2d 180, 181, cited by appellant. \* \* \*

Each case must stand on its own merits, and what might be a proper order in one case would be clearly improper in another controversy. In the instant case no abuse of discretion is apparent. There is a substantial showing by way of supporting affidavit, which would justify the trial court's order. It is true that much of this showing is contradicted by the appellant, but this conflict is largely present in all litigation and does not demonstrate an abuse of discretion.

Likewise the record fails to disclose anything indicating that the wife's appeal was not in good faith, and this question also was doubtless considered by the trial court in passing upon the motion."

[1,2] In view of the authorities we are unable to hold upon the record here that the trial judge abused his discretion in allowing plaintiff and respondent counsel fees and costs on appeal. The questions of necessity, good faith and merit were matters to be determined by the trial court, and while we may believe that the ruling could have been otherwise, we cannot say that the order of the trial court was arbitrary or so lacking in evidentiary support as to constitute an abuse of discretion.

In view of the foregoing, the order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



97 Cal.App.2d 330

**ANDERSON et al. v. SAN JOAQUIN COUNTY.**

Civ. 7716.

District Court of Appeal, Third District,  
California.

May 3, 1950.

Action by Vera M. Anderson, individually, and Richard Walter Anderson and others, by and through their general guardian, Vera M. Anderson, against the County of San Joaquin to recover damages for wrongful death of Walter Anderson. The Superior Court of San Joaquin County, George F. Buck, J., entered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Adams, P. J., held that claims filed which bore address of attorneys, who admittedly were acting for plaintiff, constituted a substantial compliance with statute requiring that claims contain addresses of claimants.

Judgment reversed.

**1. Automobiles — 293**

Under statutes requiring claims against subdivisions of government to specify addresses of claimants, where claims against county, by surviving widow and children of deceased, who was killed in automobile accident alleged to have been due to defective condition of a county road, contained on each page the names and addresses of claimants' attorneys, such claims were sufficient in absence of showing that county was in any way hindered by omission of claimants' addresses from body of claim. Gen.Laws, Act 5149, § 1; Government Code, § 53053.

**2. Appeal and error — 169**

Contentions not made in the lower court cannot be considered when made for first time on appeal.

Hoberg & Finger, San Francisco, for appellants.

Gilbert L. Jones, Daniel S. Lane, Roy A. Weaver and Richard B. Daley, Stockton, Blewett, Blewett & Macey, Stockton, Frederick L. Felton, Stockton, for respondent.

ADAMS, Presiding Justice.

This action was brought by the surviving widow and children of Walter Anderson who was killed in an automobile accident alleged to have been due to the defective condition of a county road which caused the automobile driven by decedent to skid and then collide with an approaching truck. Plaintiffs' amended complaint alleged that claims for damages had been served upon and filed with defendant county "in the manner and form required by law." This allegation was first admitted by defendant, but subsequently, with leave of court, defendant amended its answer, denying it. By stipulation this defense was first submitted to the trial court for determination, and that court found that the claims were defective in that they failed to specify the addresses of the claimants or any of them, in conformity with section 1 of Act 5149, Deering's Gen.Laws, p. 1678, and section 53053 of the Government Code.

It is conceded that nowhere in the body of the claims were such addresses stated. However, each page of the claims bore the printed names and addresses of attorneys as follows: "Hawkins & Hawkins, Attorneys at Law, Modesto, California, Phone 3232"; and each claim bore evidence of verification before Lewis N. Hawkins, Notary Public, in Stanislaus County, a member of the firm of Hawkins & Hawkins. Also it was stipulated by the attorneys for the respective parties that Hawkins & Hawkins were the attorneys for plaintiffs and acted as such from the time of the filing of the claims and up to and until the time the complaint was filed.

The sole question for our determination then is whether the claims as filed substantially comply with the statutory requirement that they contain the addresses of the claimants.

In *Stewart v. City of Rio Vista*, 72 Cal. App.2d 279, 281, 164 P.2d 274, 275, we held that though a claim did not, in the body thereof, set forth the addresses of the claimants, there was sufficient compliance where the verification of the claim, made by attorney for plaintiffs, stated that affiant was an attorney at law and had his office in Vacaville, Solano County, California. We there said that "The verification is a necessary part of the claim required by the statute. Since the verification of the claim in this case contains the name and business address of the attorney of the claimant, where the claimant may readily be located it would appear to be a substantial compliance with the statute in that regard." We cited *Uttley v. City of Santa Ana*, 136 Cal. App. 23, 25, 28 P.2d 377, and *Ridge v. Boulder Creek etc. School Dist.*, 60 Cal. App.2d 453, 457, 140 P.2d 990, in which cases it was said that the purpose of the statute would seem to be accomplished if an address is given at which or through which the claimant may be found, in order that the officials of defendant may make such investigation of the merits of the claim as may be desired. Hearing by the Supreme Court was denied in the *Stewart* case and in the *Uttley* and *Ridge* cases.

[1] Here, as the claims all bore the address of attorneys who admittedly were

acting for plaintiffs we think that was sufficient to give defendant county information as to where plaintiffs could be found in order for them to make any desired investigation, and constituted a substantial compliance with the statute. There is no showing that defendant was in any way hindered by omission of the addresses of plaintiffs from the body of the claims, and, obviously, seeing that the claims were written upon the professional and customary legal papers of attorneys, defendant could readily have secured all needed information regarding addresses of plaintiffs by calling Hawkins & Hawkins at the telephone number on such paper, or by writing them at the address given.

In the recent case of *Holm v. City of San Diego*, Cal.App., 208 P.2d 777, where the claim did not specify the addresses of claimants, but did contain language from which the inference that they were residents of or could be reached at La Mesa or Lakeside (in San Diego County) could be drawn, the District Court of Appeal affirmed a judgment of the trial court which held that the claim was insufficient in not stating the addresses of claimants, but the Supreme Court granted a hearing on a petition asserting that reasonable inferences as to addresses of claimants could be drawn from the allegations of the claims, relying upon the decisions in the *Stewart*, *Ridge* and *Uttley* cases above cited.

[2] On this appeal appellants raise the further point that in a death case, such as this, no claim of any kind need be filed, wherefore the sufficiency of the one filed becomes unimportant. This contention was not made in the lower court, and generally speaking a contention not so made cannot be considered when made for the first time on appeal. *MacKenzie v. Angle*, 82 Cal. App.2d 254, 263, 186 P.2d 30; *Rubel v. Peckham*, 94 Cal.App.2d 834, 211 P.2d 883; *Grimes v. Nicholson*, 71 Cal.App.2d 538, 543, 162 P.2d 934. But while there may be exceptions to that rule, we are satisfied that in this case there was substantial compliance with the statute, and that the judgment of the trial court must be reversed for that reason; wherefore it becomes unnec-



essary to determine whether or not, in this state, the filing of a claim in a death case is requisite.

The judgment is reversed.

PEEK, J., concurs.



## SEI FUJII v. STATE.

Civ. 17309.

District Court of Appeal, Second District,  
Division 2, California.

April 24, 1950.

Rehearing Denied May 22, 1950.

See 218 P.2d 595. \*

Action by Sei Fujii against The State of California to determine whether an escheat had occurred under provisions of the Alien Land Law, General Laws, Act 261, as to real property acquired by plaintiff in July, 1948. From a judgment of the Superior Court of Los Angeles County, Wilbur C. Curtis, J., adjudging that property described in the deed to plaintiff had escheated to the State on date of the deed, the plaintiff appealed. The District Court of Appeal, Wilson, J., held that the provisions of the Alien Land Law restricting ownership of land by aliens who are ineligible for citizenship are unenforceable, under the Charter of the United Nations.

Reversed with directions.

### 1. Treaties ☞7

Charter of the United Nations, upon ratification by Senate, became supreme law of the land, within constitutional provision relating to treaties, and every state is required to accept and act upon the Charter according to its plain language and its unmistakable purpose and intent. United Nations Charter, 59 Stat. 1035 et seq.; U.S. Const. art. 6, § 2.

1. Section 738.5 authorizes the bringing of an action against the State of California by any person claiming an interest in real property to determine whether or

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### 2. Treaties ☞11

Charter of the United Nations, as a treaty, is paramount to every law of every state in conflict with it. United Nations Charter, 59 Stat. 1035 et seq.; U.S. Const. art. 6, § 2.

### 3. Aliens ☞13

#### Constitutional law ☞215

Provisions of the Alien Land Law restricting ownership of real property by aliens who are ineligible for citizenship, viewed in light of fact that expansion by Congress of the classes of persons eligible to citizenship has left only Japanese aliens ineligible to own real property, and fact that the restrictions are actually referable to race or color, are unenforceable because contrary to letter and spirit of the Charter of the United Nations. Code Civ.Proc., § 738.5; Gen.Laws, Act 261, §§ 1, 2, 7, 9, 13; Const. art. 1, §§ 11, 21; Art. 4, §§ 1, 25, subd. 33; Nationality Act of 1940, §§ 303, 701, as amended, 8 U.S.C.A. §§ 703, 1001; United Nations Charter 59 Stat. 1035 et seq.; U.S. Const. art. 6, § 2.

J. Marion Wright, Owen E. Kupfer, Los Angeles, for appellant.

Fred N. Howser, Attorney General of the State of California, Everett W. Mattoon, Assistant Attorney General, John F. Hassler, Jr., Deputy Attorney General, for respondent.

WILSON, Justice.

The sole question on this appeal is the validity and enforceability of the Alien Land Law, sometimes referred to as the Alien Property Initiative Act of 1920. Stats.1921, p. lxxxiii, 1 Deering's Gen. Laws, 1944 ed., p. 129, Act 261.

Pursuant to permission to sue the State of California granted by section 738.5<sup>1</sup> of the Code of Civil Procedure plaintiff brought this action for the purpose of obtaining a determination whether or not

not an escheat has occurred as to such property under the provisions of the Alien Land Law of 1920. It is provided that no matter may be adjudicated in

\* Subsequent opinion 242 P.2d 617.

an escheat has occurred under the provisions of the Alien Land Law as to real property which he acquired by grant deed in July, 1948. An answer was filed by the State alleging as a defense that plaintiff was born in Japan; that he is ineligible to become a citizen of the United States by reason of the naturalization laws, and that by virtue of the provisions of the Alien Land Law he "is not qualified or permitted to acquire, possess, enjoy, use, cultivate, occupy or transfer real property or any interest therein in the State of California, or to have in whole or in part the beneficial use thereof."

When the cause came on for trial it was submitted on a statement of facts which it was stipulated should be considered as evidence, to wit: that plaintiff was born in Japan in 1882; he came to the United States in July, 1903, where he resided until June, 1911; in the latter month he departed for Japan and remained there until he returned to the United States in July, 1913; he has resided and made his domicile in the United States continuously since his last arrival; plaintiff is and at all times throughout his lifetime has been an alien, a citizen and subject of Japan and a person ineligible to become a citizen of the United States by reason of the naturalization laws; that there is no treaty now existing between the United States and Japan nor has there been at any time a treaty giving to plaintiff, a citizen and subject of Japan, or to any alien Japanese not eligible to citizenship in the United States, any right to acquire, possess, enjoy, use, cultivate, occupy or transfer real property in the State of California, or any interest therein; that plaintiff purchased and acquired the property which is the subject of this action by grant deed dated July 29, 1948.

The court made findings of fact in accord with the stipulated evidence, whereupon judgment was entered declaring and adjudging that the property described in the deed to plaintiff escheated to the State of California on July 29, 1948, the date of the

such action except the issue of the occurrence of an escheat and no issue shall be raised or claim made by the plaintiff

deed, by reason of the provisions of the Alien Property Initiative Act of 1920, and that plaintiff has no right, title or interest in or to such property or in or to any beneficial use thereof. From that judgment plaintiff has appealed.

The Alien Land Law was adopted by the electorate at a general election held in 1920 pursuant to the initiative provisions of the Constitution. Art. IV, sec. 1. Conformable to the permission to amend the initiative act granted to the Legislature by section 13 thereof several sections have been amended. Sections 1 and 2, as amended, Stats.1923, ch. 441, p. 1021, read as follows:

"Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, use, cultivate, occupy, transfer, transmit and inherit real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"Sec. 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the manner and to the extent, and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

That portion of section 7 of the statute applicable to this action reads as amended, Stats.1945, ch. 1129, p. 2164: "Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in Section 2 of this act, or by any company, association or corporation mentioned in Section 3 of this act, shall escheat as of the date of such acquiring, to, and become and remain the property of the State of California."

Plaintiff contends that the statute is in

based upon estoppel or failure of the State to have commenced an escheat proceeding.

violation of the Constitution of the United States in that it denies to him the equal protection of the law; that it arbitrarily discriminates against him solely because of his race; that classification on the sole basis of race is arbitrary and irrational; that the test of eligibility to citizenship, to wit, the so-called "primary standard" in the acts of Congress relating to naturalization and citizenship, does not afford a sound basis for discriminatory state classification; that no undesirable traits can properly be attributed to that class of aliens identified as those ineligible to citizenship; that no "clear or present danger" or other exceptional circumstances exist sufficient to justify arbitrary discrimination against Japanese; that the Alien Land Law is not a valid police regulation; that it is invalid, special legislation prohibited by sections 11 and 21 of Article I and section 25 of Article IV, Subd. 33, of the Constitution<sup>2</sup> of this State; that it unlawfully delegates state legislative power to Congress, and, finally, that the statute is inconsistent with the declared principles and spirit of the United Nations Charter.

The constitutionality of alien land laws has been the subject of attack for nearly 30 years and, except for a few provisions not relating to the right of an alien to own land, the attacks have failed. The Supreme Court of the United States sustained the provision of the Constitution of Washington prohibiting the ownership of lands by aliens other than those who in good faith have declared their intention to become citizens of the United States, *Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255, and the Alien Land Law of California. *Porterfield v. Webb*, 263 U.S. 225, 44 S.Ct. 21, 68 L.Ed. 278; *Webb v. O'Brien*, 263 U.S. 313, 44 S.Ct. 112, 68 L.Ed. 318; *Frick v. Webb*, 263 U.S. 326, 44 S.Ct. 115, 68 L.Ed. 323; *Cockrill v.*

*California*, 268 U.S. 258, 45 S.Ct. 499, 69 L.Ed. 944. The statute has been sustained also by the appellate courts of this state. In *re Akado*, 188 Cal. 739, 207 P. 245; *Porterfield v. Webb*, 195 Cal. 71, 231 P. 554; *Mott v. Cline*, 200 Cal. 434, 253 P. 718; *People v. Osaki*, 209 Cal. 169, 286 P. 1025; *People v. Cockrill*, 62 Cal.App. 22, 216 P. 78, affirmed sub nom. *Cockrill v. California*, supra; *People v. Nakamura*, 125 Cal.App. 268, 13 P.2d 805.

The validity of the statute was again sustained in *People v. Oyama*, 29 Cal.2d 164, 173 P.2d 794. That decision was reversed, *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249, on one ground only, to wit, the unconstitutionality of section 9 which (1) declares a prima facie presumption that a conveyance is made with intent to evade or avoid the statute if title to real property is taken in the name of a person eligible to citizenship and the consideration is paid by a noneligible alien, and (2) places the burden on the grantee to show the conveyance was not made with the intent to prevent, evade or avoid escheat. The court 332 U.S. at pages 646-647, 68 S.Ct. at pages 275, 276, 92 L.Ed. 249, expressly declined to re-examine the constitutionality of any provision of the statute other than section 9.

In plaintiff's brief he has quoted from concurring and dissenting opinions in many of the cases in which some of the justices have expressed the opinion that the statute is void, but he has not referred us to a case in which either court has overruled its former decision upholding the act. The cases cited by plaintiff to sustain his theory are *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249, supra; *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441, and *Takahashi v. Fish & Game Comm.*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478. In

2. Art. I, sec. 11: "All laws of a general nature shall have a uniform operation."

Art. I, sec. 21: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon

the same terms, shall not be granted to all citizens."

Art. IV, sec. 25: "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: \* \* \* [subd. 33] In all other cases where a general law can be made applicable."



none of these cases does a majority of the court indicate a disagreement with its former decisions sustaining the validity of the statute.

We have noted that in *Oyama v. California*, the latest expression of the court on the subject, only one provision of the act was discussed and that did not relate to the right of an ineligible alien to own land. The prior decisions of the court hereinbefore cited remained unchallenged by the majority opinion. No question relating to the Alien Land Law was involved in *Shelley v. Kraemer*, or in the *Takahashi* case. In the *Shelley* case it was held that restrictive covenants as to ownership of property based on race or color are not in themselves a violation of the equal protection clause of the Fourteenth Amendment, but that that clause inhibits judicial enforcement of such covenants by state courts. The *Takahashi* case held that the California statute forbidding the issuance of commercial fishing licenses to aliens ineligible to citizenship violates the equal protection clause. None of the three decisions of the United States Supreme Court relied on by plaintiff can be considered as modifying in any particular the previous opinions relating to the Alien Land Law. The only cases cited directly sustaining plaintiff's position is *Namba v. McCourt*, 185 Ore. 579, 204 P.2d 569, in which the Oregon Supreme Court invalidated a statute of that state similar in terms to the California act. The opinion in that case, after quoting extensively from majority and minority opinions of the United States Supreme Court in the cases last above cited, concludes that that court has now overruled its former decisions. We do not so construe the decisions in the *Shelley* and *Takahashi* cases, since no question relating to the Alien Land Law was there involved, and, as we have stated, the court refused in the *Oyama* case to consider the main questions as to constitutionality of the statute although such questions were squarely placed before the court and extensively argued in the briefs.

Save for the matters to be hereinafter discussed, which are based upon an au-

thority more potent than the Constitution of this State, an authority which for want of opportunity has not previously been made the basis of a judicial determination of the question before us, this opinion might well be terminated under the doctrine of *stare decisis* with a reaffirmation of the former decisions, since upon constitutional questions we deem ourselves obliged to follow the decisions of the Supreme Courts of the United States and of this State until one of those courts should announce the overruling of its own decisions.

While the Alien Land Law, as will hereinafter appear, is applicable at the present time to only a few aliens other than Japanese, historically it has not always been so. By the provisions of section 1 of the act "All aliens eligible to citizenship" may own or lease real property, and under section 2 "All aliens other than those mentioned in section one" may own or lease real property in the manner, to the extent and for the purposes prescribed by treaty "now existing" between the United States and the nation or country of which such alien is a citizen or subject. It is conceded that the treaty of commerce and navigation in effect between the United States and Japan in 1920 did not entitle Japanese nationals to own real property in California.

At the time of the adoption of the statute natives of Japan, China, India and many other nations were ineligible to become citizens of the United States and by reason of the nonexistence of treaties with such countries entitling their nationals to own real property in this State they were inhibited from that privilege. Thus the right of aliens to own real property in California was made by the Alien Land Law to depend upon the federal statute as it then existed designating the aliens who were "eligible to citizenship" and upon such amendments as the Congress might thereafter enact.

In 1920 only aliens who were free white persons, aliens of African nativity, persons of African descent and native born Filipinos having three years' honorable service in the United States Coast Guard, Navy, Marine Corps or Naval Auxiliary Service

were eligible to become naturalized citizens. 8 U.S.C.A. § 359, 40 Stat. 542, ch. 69. By the Nationality Act of 1940, 54 Stat. 1140, ch. 876, as amended 57 Stat. 601, ch. 344, 60 Stat. 416, ch. 534, the subject matter now being in 8 U.S.C.A. § 703, persons eligible for naturalization now include white persons, persons of African nativity or descent, persons who are descendants of races indigenous to the continents of North or South America or adjacent islands, Filipino persons or persons of Filipino descent, Chinese persons and persons of Chinese descent, and persons of races indigenous to India.

The list of persons eligible to citizenship has been further extended, 8 U.S.C.A. § 1001, permitting the naturalization of persons who served honorably in the military or naval services of the United States during World War II and who but for such service would be ineligible.

The census report of 1940 (16th Census, 1940, *Characteristics of Nonwhite Population by Race*, p. 2) shows that the number of aliens residing in the continental United States who were ineligible to naturalization under the law then in effect by reason of racial origin were: Japanese 47,305, Chinese 37,242, Hindu 1,495, Korean 749, Filipino 431, Polynesian 9, other Asian 95. The number of foreign born of each race then residing in California were: Japanese 33,569, Chinese 16,676. Other foreign born in California are not shown by the census report.

Using the figures shown by the 1940 census and applying the naturalization law now in effect only a total of 48,158, composed of Japanese, Korean, Polynesian and a small number of other Asiatics, residing

in the United States would be at present ineligible to citizenship. The census report shows a decline in the foreign born Japanese population residing in the United States from 70,477 in 1930 to 47,305 in 1940. Since there has been no Japanese immigration since 1940 it is reasonable to assume that there has been a further substantial decrease in such population since the last census was taken, that the number of Japanese in the United States ineligible to naturalization is now far below the total in 1940, and that the number in California has correspondingly declined. Since the number of resident Asiatics ineligible to citizenship other than Japanese is negligible it follows that the latter are practically the only persons affected by the statute under consideration.

The successive amendments to the naturalization law expanding the class of persons entitled to citizenship and therefore entitled to own land in California, have, by the process of congressional erosion, left only the natives of Japan and an insignificant number of nationals of other countries who remain ineligible to citizenship and hence ineligible under the terms of the statute to own real property.

In the period of thirty years since the Alien Land Law was adopted we have revised our opinions concerning the rights of other peoples. Out of the travail of World War II came the concept of "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" as expressed in the Charter of the United Nations.<sup>3</sup> 59 Stat. 1035 ff; U.S.Code Cong.Service, 79th Congress, 1945, p. 964.

The government of the United States has

3. The Preamble to the Charter, Chapter I and a portion of Chapter IX read as follows:

"We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind; and

"to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small; and

"to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained; and

"to promote social progress and better standards of life in larger freedom; and for these ends to practice tolerance and live together in peace with one another as good neighbors; and to unite our strength to maintain international peace and security; and

"to ensure, by the acceptance of prin-

traditionally been the leader in espousing the rights of man and has championed the cause of the smaller and less privileged nations. The war of 1898 was fought in support of an oppressed country. The efforts of our government in this regard reached fruition in the convention of representatives of the nations of the earth at which the Charter of the United Nations was adopted. It was promptly ratified by the Senate of the United States, thereby proclaiming allegiance to its principles and providing precedent and example for other countries. The United States has con-

sistently regarded its treaties with other nations as inviolate.

[1] The Charter has become "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S.Const., Art. VI, sec. 2. The position of this country in the family of nations forbids trafficking in innocuous generalities but demands that every State in the Union accept and act upon the Charter according to its plain language and its unmistakable purpose and intent.

ciples and the institution of methods, that armed force shall not be used, save in the common interest; and

"to employ international machinery for the promotion of the economic and social advancement of all peoples; have resolved to combine our efforts to accomplish these aims.

"Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

#### "Chapter I. Purposes and Principles

##### "Article 1

"The Purposes of the United Nations are:

"1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

"2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

"3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

"4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

##### "Article 2

"The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

"1. The Organization is based on the principle of the sovereign equality of all its Members.

"2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

"3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered.

"4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

"5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

"6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

"7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the



Since the Charter is now the supreme law of the land it becomes necessary to examine its provisions and guarantees and to interpret it in the light in which it was adopted by the participating nations. The Organization determined in the preamble "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, \* \* \* to promote social progress and better standards of life in larger freedom \* \* \*." Among the Purposes and Principles found in Article 1 of Chapter I are "To develop friendly relations among nations based on respect for the principle of equal rights \* \* \*; To achieve international cooperation \* \* \* in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion \* \* \*." In Article 2 it is affirmed that the Organization and its members "shall fulfil in good faith the obligations assumed by them in accordance with the present Charter."

It is agreed in Chapter IX, Article 55, that "the United Nations shall promote \* \* \* universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." By Article 56 it is declared that "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

In the address of the President of the United States to the Senate on July 2, 1945, urging the prompt ratification of the

Charter by that body he said: "It seeks to promote world-wide progress and better standards of living.

"It seeks to achieve universal respect for, and observance of, human rights and fundamental freedoms for all men and women without distinction as to race, language or religion.

"It seeks to remove the economic and social causes of international conflict and unrest.

"It is the product of many hands and many influences. It comes from the reality of experience in a world where one generation has failed twice to keep the peace. The lessons of that experience have been written into the document." U.S. Code Cong. Service, supra, pp. 961-962.

On December 10, 1948, the General Assembly of the United Nations passed and proclaimed and called upon all member countries to publicize, disseminate and expound in schools and elsewhere, a "Universal Declaration of Human Rights" affirming among other things that "All human beings are born free and equal in dignity and rights. They \* \* \* should act toward one another in a spirit of brotherhood. [Art. 1.] Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [Art. 2.] \* \* \* Everyone has the right to own property alone as well as in association with others." [Art. 17.]

Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

\* \* \* \* \*

#### "Chapter IX. International Economic And Social Cooperation

##### "Article 55

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

"a. higher standards of living, full em-

ployment, and conditions of economic and social progress and development;

"b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

"c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

##### "Article 56

"All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

This Declaration implements and emphasizes the purposes and aims of the United Nations and its Charter.

Democracy provides a way of life that is helpful; however its promises of human betterment are but vain expressions of hope unless ideals of justice and equity are put into practice among governments, and as well between government and citizen, and are held to be paramount. The integrity and vitality of the Charter and the confidence which it inspires would wane and eventually be brought to naught by failure to act according to its announced purposes. Its survival is contingent upon the degree of reverence shown for it by the contracting nations, their governmental subdivisions and their citizens as well.

This nation can be true to its pledge to the other signatories to the Charter only by cooperating in the purposes that are so plainly expressed in it and by removing every obstacle to the fulfillment of such purposes.

A perusal of the Charter renders it manifest that restrictions contained in the Alien Land Law are in direct conflict with the plain terms of the Charter above quoted and with the purposes announced therein by its framers. It is incompatible with Article 17 of the Declaration of Human Rights which proclaims the right of everyone to own property. We have shown that the expansion by the Congress of the classes of nationals eligible to citizenship has correspondingly shrunk the group ineligible under the provisions of the Alien Land Law to own or lease land in California until the latter now consists in reality of a very small number of Japanese. The other Asiatics who still remain on the proscribed list are so few that they need not be considered.

[2, 3] Clearly such a discrimination against a people of one race is contrary both to the letter and to the spirit of the Charter which, as a treaty, is paramount to every law of every state in conflict with it. The Alien Land Law must therefore yield to the treaty as the superior authority. The restrictions of the statute based on eligibility to citizenship, but which ultim-

ately and actually are referable to race or color, must be and are therefore declared untenable and unenforceable.

Judgment reversed with directions to enter a decree in favor of plaintiff in accord with the prayer of his complaint.

MOORE, P. J., and McCOMB, J., concur.



97 Cal.App.2d 115

**SIMON v. TOMASINI.**

Civ. 14213.

District Court of Appeal, First District,  
Division 1, California.

April 24, 1950.

Hearing Denied June 22, 1950.

M. Simon brought action against T. A. Tomasini to recover attorneys' fees and expenses. The Superior Court, in and for the City and County of San Francisco, Theresa Meikle, J., made an order granting the defendant's motion for new trial, and the plaintiff appealed. The District Court of Appeal, Bray, J., held that Superior Court had no jurisdiction to proceed to try the case because no notice was given defendant, as required by law, of time of trial, that defendant's motion to reopen the case should have been granted, and that therefore Superior Court, after denying motion to reopen, properly granted defendant a new trial.

Order affirmed.

#### **I. Appeal and error ☞933(4)**

Where defendant moved for new trial on ground of irregularity in proceedings and order of court denying defendant right to reopen trial, on ground of accident and surprise, on ground of insufficiency of the evidence, and on ground of error in law and refusal to grant nonsuit, and trial court's order granting new trial merely stated that new trial was granted, it was required to be conclusively presumed that order was not based upon insufficiency of the evidence. Code Civ.Proc. § 657.

**2. New trial** ⇨35

If trial court, in denying defendant's motion to reopen, did not abuse its discretion, it could not, on defendant's motion for a new trial, decide that it would have been wiser for it to have ruled the other way and therefore grant a new trial.

**3. New trial** ⇨35

**Trial** ⇨9(2)

Where no notice was given defendant, as required by law, of time of trial of case which had been held on ready calendar for almost two years, court had no jurisdiction to proceed to try the case, and should have granted motion to reopen case and therefore, after denying motion to reopen, properly granted defendant a new trial, though oral notice was given to defendant's attorney the day before trial, and though such attorney the day of the trial received notice to produce certain records and documents. Code Civ.Proc. §§ 594, 657, subd. 1; Rules of Superior Court, rule 9.

**4. Trial** ⇨9(2)

Where a case is held on ready calendar for almost two years, a party is entitled to rely on requirement that when it is finally assigned a day for trial, he will receive the five days' notice provided by law. Code Civ.Proc. § 657, subd. 1; Rules of Superior Court, rule 9.

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Joseph A. Brown, San Francisco, for appellant.

Howard C. Ellis, Bernard B. Glickfeld, San Francisco, for respondent.

BRAY, Justice.

In an action for attorneys' fees and expenses, the superior court, after judgment in favor of plaintiff in the sum of \$100,000 together with interest thereon for over 7 years, made an order granting a motion for new trial. Plaintiff appealed from that order.

**Question Presented.**

Where a memorandum of motion to set has been filed and notice of trial given, and thereafter the case is kept upon the ready calendar for a period of almost 2 years, is

defendant entitled to notice of the date finally assigned for trial?

**Facts.**

There is very little dispute as to the facts. On September 15, 1941, plaintiff filed suit for attorneys' fees and expenses claimed to be due plaintiff's assignors. There were two causes of action: (1) for the reasonable value of the services, alleged to be \$100,000, and for expenses incurred in the sum of \$1,250; (2) for the agreed value of said services in said sum of \$100,000, and for expenses in said sum of \$1,250. Defendant filed a demurrer which was overruled. On April 30, 1942, defendant filed his answer alleging, in effect, that the agreement to pay attorneys' fees was contingent upon certain results being attained, and that they were not attained, and denying that any sums were due or owing. On August 31, 1943, the parties stipulated in writing "that all objections which can or might be made by the defendant in the above entitled action or any motion or motions to dismiss for lack of prosecution are hereby waived, and it is hereby expressly stipulated that no advantage will hereafter be taken because the above entitled action has not been brought to trial for the reason that, by stipulation of the parties, due to the absence from San Francisco of the defendant and of his Attorney, the above entitled action has been deferred for trial. It is further stipulated that any and all objections that can or may hereafter be made that this action has not been brought to trial within five years is expressly waived."

The register of actions shows that on February 3, 1946, a memorandum to set and affidavit of mailing was filed. On April 9, 1946, notice for trial April 26 was filed. On October 21 the deposition of Curtis Hillyer, one of plaintiff's assignors, was filed. Nothing occurred of record until April 16, 1948, when the cause was assigned to a department to be tried the same day. No one appeared to represent defendant. The deposition of Hillyer was offered in evidence and the testimony of Attorney Gottesfeld taken. The cause was thereupon submitted. On November 10, 1948, judgment was signed and entered, reciting that due notice of



the time and place of trial had been given, that defendant had failed to appear, and judgment was given to plaintiff for \$100,000 plus interest at 7 per cent from September 15, 1941.

Thirteen days after the submission of the case, namely, on April 29, 1948, defendant filed a notice of motion to reopen the case for hearing and trial upon the ground that the matter had been heard and taken against defendant without notice and through his mistake and inadvertence. The hearing was had May 7 upon affidavits. Defendant presented three affidavits, one by himself, one by Attorney Olds and one by Attorney Ellis. Defendant's own affidavit stated that his attorney of record at the time of filing the answer was Attorney Olds; that a memorandum to set the cause for trial was filed in July, 1943; that at that time plaintiff's attorney Joseph A. Brown, defendant and his attorney Olds entered into a certain stipulation (the one hereinbefore set forth); that at said time the matter was dropped from the calendar because Attorney Olds had planned to absent himself from the state "for some time"; that on February 13, 1946, plaintiff filed another memorandum to set the cause for trial; that on April 9 a notice was addressed to Attorney Olds at 25 California Street, San Francisco, and that on April 22, 1946, notice of setting for trial was sent to defendant; that defendant believes and therefore alleges that the cause "was dropped from calendar and placed on the Superior Court ready calendar"; that Olds was absent from the state, being located in Princeton, Ky.; that defendant is informed and believes, and therefore alleges, that on or about April 16, 1948, plaintiff proceeded without notice to defendant or to Attorney Olds to present evidence to department 8 of the superior court; that defendant has a meritorious defense and that "plaintiff has improperly, and in deprivation of defendant's right to be heard on the merits of the case, attempted to 'rail-road' the matter to trial; that defendant has always maintained a business address at 209 Post Street, San Francisco, and a telephone number available in the San Francisco phone directory; that plaintiff well knew that defendant's attorney Olds was

without the state of California; that defendant desires the case reopened to be heard on its merits and desires to contact Attorney Olds and have him present at the trial.

The affidavit of Attorney Olds stated that he is the attorney of record for defendant; that he left San Francisco for Kentucky in 1943 for reasons of bad health. He referred to the stipulation hereinbefore set forth. He then stated that it was understood by him, defendant, and plaintiff's attorney Brown that no action to bring the case to trial would be taken until "affiant had been properly notified and \* \* \* was in a position to return from Kentucky"; that affiant, since he left California, has resided in Princeton, Ky., and that at no time had he received any notice of trial or any communication of any kind from the plaintiff, her assignors or their attorneys, since 1943.

The affidavit of Attorney Ellis stated that he was representing defendant for the purpose of reopening the trial of the case; that he is informed by Attorney Olds that he will be in California in late June ready and able to appear in the trial of the case; that "late in the afternoon" of April 15, 1948, affiant called Attorney Gottesfeld's phone number and talked to Attorney Brown who answered the phone, and was told for the first time that this case would be tried the following morning, April 16; that affiant told Brown that was not sufficient notice and he could not appear "in any event at that time"; that Brown then stated that Ellis was not the attorney of record and therefore "no notice was necessary in his case," in which statement affiant agreed. Affiant then asked Brown if the parties had been served in due course and to the best of his recollection was informed that they were not required to ascertain Olds' whereabouts or to serve him out of the state, but that they had served defendant in due time. Affiant then asked Brown to continue the matter and was informed that it would not be continued and thereupon affiant stated that under the circumstances there was apparently nothing he could do about it at this time; that in the morning mail of April 16 affiant received a

copy of notice to produce certain records and documents, and not having any of them affiant did not appear in answer thereto

In opposition to these affidavits plaintiff presented two affidavits of Attorney Brown and an affidavit of Attorney Gottesfeld. The affidavits of Attorney Brown stated that he was plaintiff's attorney in this action; that he never discussed with defendant or with Attorney Olds any matters "in regards to the handling of this case" and that there was no understanding at any time between him and them that "neither plaintiff or defendant would take advantage of the other" (defendant in his affidavit had stated that there was such understanding); that no advantage was taken of defendant or his attorney; that on April 22, 1946, a notice was sent to both Attorney Olds and defendant. A copy of this notice is attached to the affidavit. It is directed to defendant and states that the case has been set for trial for April 26, 1946, and notifies defendant to procure another attorney to represent defendant, inasmuch as his former attorney "has become inactive under the State Bar and has left the State of California \* \* \*." The notice further states that previous notices have been sent to his former attorney in Kentucky and a copy of this notice is being served on the county clerk. It advises defendant "to protect your interests at once." The affidavit then sets forth a letter written by Attorney Howard C. Ellis. This letter is dated May 21, 1946, addressed to Attorney Brown. It reads: "Mr. T. A. Tomasini has come in to me with a voluminous file in connection with some bridge project, and more particularly in relation to a notice of time and place of trial. As you know, the attorney of record in this matter is Frederick Olds, and that he is in Kentucky at the present time. I find that the matter could be called up for trial at any moment, and my calendar and position do not make it possible for me to even familiarize myself with this case sufficiently to appear in any connection therewith prior to the fall calendar, at which time I expect and have been informed Mr. Olds will be here to carry the laboring oar. I therefore will appreciate it if you will agree with me by stipulation

that the matter be set over for trial for the fall calendar or be put on the August motion to set calendar for early hearing this fall. Your courtesy and cooperation will be greatly appreciated." The affidavit then states "that in accordance with and with the knowledge of the defendant the matter was not tried but remained on the ready calendar; that affiant had nothing to do with the above case going to trial on April 16, 1946; that the first he knew that the case was going to be assigned to a department for trial on April 16th, 1946, when he received a notice from the Clerk of this court advising him that the case will go out on that date; that he received a call from Mr. Ellis, who purported to represent Mr. Tomasini, and the following conversation took place between affiant and Mr. Ellis: 'That the said Ellis had called to talk to Mr. Gottesfeld but in view of his absence from the office he would talk to affiant; that he was not concerned in the trial which was to take place either two or three days away and wasn't the attorney in the matter for the purposes of trial and so far as he was concerned the matter could proceed to trial and that he would not be at the trial.' That on the 14th day of April, 1948, a Notice to Produce certain documents at the trial was sent to Mr. Ellis and Mr. Tomasini. It is significant to note that Mr. Tomasini, in his affidavit makes no reference to such Notice to Produce which was received by Mr. Ellis and by the defendant prior to the trial of the case. Affiant believes that both Mr. Tomasini and Mr. Ellis had sufficient time and notice to appear and try this case." The affidavit then states that affiant never discussed with Attorney Olds any matter in connection with this case, and that there never was any conversation between him and Olds (as set forth in Olds' affidavit) "that no action to bring the above entitled matter to trial would be taken until Mr. Olds had been properly notified and until Mr. Olds was in a position to return from Kentucky."

The affidavit of Attorney Gottesfeld stated that he is one of the assignors in this action; that the reason the stipulation (heretofore set forth) was entered into was so that plaintiff would suffer no damage in

consenting to defendant's attorney's request for delay in the trial of the case; that there was no understanding at any time that neither defendant nor plaintiff would take advantage of the other. Affiant denied that by bringing the matter to trial after more than 6 years from issue joined any advantage had been taken; alleged that due notice had been given to defendant (referring to the notices mentioned in Brown's affidavit); "that the record of this court marked Exhibit 'C' will indicate that this case was never dropped from the calendar and was carried on the ready calendar of this court, after notice to the defendant and his attorney. The placing of this case on the ready trial calendar was not arranged for by the plaintiff and her attorney; that said case was tried pursuant to a notice by the clerk of this Court that said case was ready for trial and would be sent to a department for trial on April 16th, 1948."

The trial court denied the motion to reopen. After judgment, defendant moved for a new trial on the following grounds: "(1) Irregularity in the proceedings of the Court and order of the Court denying defendant right to reopen trial after submission of plaintiff's case, by which defendant was prevented from having a fair trial. (2) Accident and surprise which ordinary prudence on the part of the defendant could not have guarded against. (3) Insufficiency of the evidence to justify the decision of the Court. (4) Error in law occurring, and refusal of the above entitled Court to grant non-suit for defendant." The affidavit of defendant was filed which set forth the same matters which were in his affidavit on motion to reopen, in addition to which he denied receiving any notice of the time of trial. Plaintiff filed affidavits by Attorneys Brown and Gottesfeld which were substantially the same as those filed on the motion to reopen. The court's order granting the new trial merely states: "\* \* \* It is ordered that the motion for a new trial be and the same is hereby granted."

[1-3] In view of the form of the court's order, it must be conclusively presumed that the order was not based upon insufficiency

of the evidence. Code Civ.Proc. § 657. On what ground the court granted the new trial does not appear. Defendant contends that it was because of his contention that no notice of trial was received by defendant and because the court should have granted the motion to reopen. If the court, in denying the motion to reopen, did not abuse its discretion, it could not, on motion for new trial, decide that it would have been wiser for it to have ruled the other way and therefore grant a new trial. However, it is unnecessary to discuss this phase of the ruling, for the reason that it appears on the face of the proceedings that no notice of the time of trial as required by law was given defendant, and hence the court had no jurisdiction to proceed with the trial. The right to have the case reopened, or now, a new trial, is a matter of right in the defendant and is not a matter of discretion for the court. The refusal of the court on an application filed and heard after submission and before decision, to reopen the case, where the required notice of trial had not been given, deprived defendant of a fundamental right.

Section 594 of the Code of Civil Procedure provides that "either party may bring an issue to trial \* \* \* in the absence of the adverse party, \* \* \* *provided, however, if the issue to be tried is an issue of fact, proof must first be made to the satisfaction of the court that the adverse party has had five days notice of such trial.*"

Rule IX of the Rules of the Superior Court adopted by the Judicial Council, effective February 1, 1929, 204 Cal. lxix, at lxxiii, provides: "The moving party shall promptly serve upon all other parties written notice of the date of trial, and, in any event, not less than five (5) days' notice of such trial shall be given. Unless such service is admitted, proof thereof must be made by affidavit."

The record does not show when or how the case was set for trial for April 16, 1948. On April 16, the date of trial, the record did not show and does not now show that any notice of trial had been given. All that occurred was that at the opening of the



trial, the court inquired "Where is Mr. Olds?" Mr. Brown replied, "I don't know, your Honor; he was duly served." Apparently the court tried to get in touch with defendant, for the following appears in the transcript of the hearing of the motion for new trial: "The Court: That transcript is not complete, in that at the end of it, when I asked the question, 'Where is Mr. Tomasini?' I said that we put it over, and I said myself I did not know how many telephone calls were made to try to locate him. That is not in the transcript. It should be in the transcript." Informing Mr. Ellis, the day before the trial, and sending a notice to produce the day of the trial did not constitute the notice required by section 594 and the court rules. Therefore the court had no jurisdiction to proceed to try the case, and should have granted the motion to reopen. The court had the power, and was required, to grant the motion for new trial on the ground that, the lack of notice to the defendant, as required by law, constituted an "Irregularity in the proceedings of the court \* \* \* by which either party was prevented from having a fair trial." Code Civ.Prac. § 657, subd. 1.

Failure to give the 5 days' notice of trial required by section 594 is "an error of law which was properly corrected by granting the motion for a new trial. (Hurley v. Lake County, 113 Cal.App. 291, 295, 298 P. 123.)" Smith v. Halstead, 88 Cal.App. 2d 638, 641, 199 P.2d 379, 381. (Accord, that such notice is mandatory: see Beal v. Superior Court, 78 Cal.App. 33, 247 P. 922; Lapique v. Kelley, 82 Cal.App. 586, 256 P. 229; Cahill v. Verdier, 54 Cal.App. 465, 202 P. 154.

[4] Where a case is held on the ready calendar for almost 2 years, a party is entitled to rely on the requirement that when it is finally assigned a day for trial he will

receive the 5 days' notice provided by law. The record disclosed that defendant did not receive it, nor was it given. Plaintiff relies upon the notice of trial given in 1946, when a trial date was set, but the case, by agreement, was not tried then, but placed on the ready calendar to be tried later. Plaintiff also relies upon the oral notice given Attorney Ellis the day before the trial and the notice to produce which was mailed out only 2 days before the trial and received by Ellis on the day of the trial. Neither of these could take the place of the statutory notice and that required by the rules of court, nor does the fact that the court tried several times to reach defendant by telephone. It would be a travesty on justice to permit a judgment of \$100,000 plus interest to date of judgment, amounting to some \$49,000, to stand against a defendant who has not been given the legal notice of the date of trial.

The failure to give the required notice of time of trial is jurisdictional. Hence the ruling of the court on the motion to reopen was erroneous, not as an abuse of discretion but as a denial of a matter of right.

That portion of the motion to reopen which was based on claimed inadvertence and mistake was a matter to be decided in the discretion of the court, and failure to appeal from the judgment bars defendant from the right to claim an abuse of that discretion, but defendant's right to raise the jurisdictional question of lack of notice is not barred by his failure to appeal, as that can be raised at any time.

The order is affirmed.

PETERS, P. J., and SCHOTTKY, J.  
pro tem., concur.

Hearing denied; CARTER, J., dissenting.

97 Cal.App.2d 229

**BLUNK v. ATCHISON, T. & S. F. RY. CO.**  
Civ. 17190.District Court of Appeal, Second District,  
Division 1, California.  
April 27, 1950.

Hearing Denied June 22, 1950.

Action under the Federal Employers' Liability Act by Burley Blunk against the Atchison, Topeka & Santa Fe Railway Company. From a judgment of the Superior Court of Los Angeles County, Wm. B. McKesson, J., in favor of plaintiff, the defendant appealed. The District Court of Appeal, White, P. J., held that duty of railroad to provide a safe place to work does not extend to protection of its employee against horseplay of fellow employees outside the scope of their employment.

Reversed with directions.

**1. Appeal and error** ⇨1001(1)  
**Master and servant** ⇨85

Under Federal Employers' Liability Act, there can be no recovery in absence of a showing of negligence on part of employer, and accordingly unless evidence warranted an inference of negligence on part of railway management or negligence of an employee legally imputable to employer, judgment against railway company would be reversed. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

**2. Appeal and error** ⇨930(1)

An Appellate Court must view the evidence in light most favorable to prevailing party, and every reasonable inference must be indulged to support verdict.

**3. Master and servant** ⇨265(12)

Where fireman kept his working clothes in a metal grip on rack at eye level in change room, and some one in his absence placed a heavy brakeshoe in grip and a glass tube as a roller under grip, so that when fireman undertook to remove grip from rack the unexpected weight and ease of movement threw him off balance and caused him to fall against table, evidence that for some time the change room had been littered with various objects including brakeshoes and that employees had

duty to clean the room did not give rise to inference that brakeshoe was placed in grip and glass tube under grip in performance of a duty, arising out of or in scope of employment, for which railroad company was liable. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

**4. Master and servant** ⇨180½

Duty of railroad to provide safe place to work does not extend to protection of employee against horseplay of fellow employees outside scope of their employment. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

**5. Master and servant** ⇨265(12)

In action under Federal Employers' Liability Act, where fireman kept his working clothes in a metal grip on rack at eye level in change room and some one in his absence placed a heavy brakeshoe in grip and a glass tube as a roller under grip so that when fireman undertook to remove the grip from rack the unexpected weight and ease of movement threw him off balance and caused him to fall against table, court properly instructed that brakeshoes and boiler water glasses were not inherently dangerous articles which employer was required to keep in a safe place, and there was no duty on part of employer to anticipate that another employee would use such articles to rig a boobytrap for a fellow employee. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

**6. Master and servant** ⇨279(4)

In action under Federal Employers' Liability Act, evidence that fireman kept his working clothes in a metal grip on rack at eye level in change room, and that some one in his absence placed a heavy brakeshoe in grip and a glass tube as a roller under grip, so that when fireman undertook to remove grip from rack, the unexpected weight and ease of movement threw him off balance and caused him to fall against table, was insufficient to sustain recovery because not permitting reasonable inference of negligence and proximate cause, and because requiring re-

sort to speculation. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

#### 7. Master and servant ⇐85

Compensation statutes are liberally construed but in so doing court may not usurp function of legislative authors, and under guise of liberal construction impose liability not based upon fair and reasonable meaning of the word "negligence" and usual standards of proof required in civil cases, and court may not transform liability for negligence into liability as an insurer. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

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Robert W. Walker, J. H. Cummins, Los Angeles, for appellant.

Warner, Peracca & Magana, Los Angeles, for respondent.

WHITE, Presiding Justice.

Defendant railway company appeals from a judgment against it entered upon the verdict of a jury in an action for personal injuries brought by an employee under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

Defendant maintained a "change room" in a building located near the roundhouse in its yards at Winslow, Arizona. Plaintiff, a fireman, was injured in the change room when he went there preparatory to changing his clothes in order to go on duty. He kept his working clothes in a metal grip, and had placed the grip on a rack in the change room at approximately eye level. When he reached for the grip to take it down from the rack, it rolled toward him more easily and suddenly than he had anticipated and with unexpected weight, causing him to step back against a bench and fall against a table, injuring his back. Upon opening his grip he found therein a diesel brake shoe, estimated to weigh approximately fifty pounds. On the rack where his grip had been, he found a glass tube, described as a boiler "water glass", something less than an inch in diameter and from 12 to 16 inches long. Plaintiff's injuries resulted from the fact that the unexpectedly heavy bag, moving

easily on the glass as a roller, threw him off balance. He failed to regain his balance because in stepping back he struck a bench, with the result that he fell against a table.

[1] Under the Federal Employers' Liability Act, there can be no recovery in the absence of a showing of negligence on the part of the employer. Unless the facts just stated, together with other evidence to which we will presently refer, warrant an inference of negligence on the part of the railway, management or negligence of an employee legally imputable to the employer, the judgment herein must be reversed.

It is the position of appellant that the railway is not liable for an injury occasioned by sportive acts or horseplay of fellow employees not in the scope and course of their employment; that there was no evidence that the railway had notice that its employees were engaging in horseplay; that brake shoes and water glasses are not inherently dangerous articles which the master should keep in a safe place; and that consequently any finding of negligence on the part of the railway would be based on the sheerest speculation. We are in accord with appellant's contentions.

The obvious conclusion from the facts related is that the plaintiff was the victim of a practical joke, perpetrated by either a visitor to the change room or by a fellow employee—in all probability by the latter. The placing of the brake shoe in the bag and the roller beneath it was a deliberate act. The practical joker was guilty of negligence, it is true, but it was not negligence for which the employer is responsible. It is, we think, beyond the bounds of reasonable inference to assume that the placing of the objects in and under the bag was done within the course and scope of an employee's duties.

The evidence and the theory upon which respondent urges that the verdict should be upheld are contained in the following argument taken from his brief:

"The evidence presented several factors from which a jury could, and in this case did, reasonably infer that the rail-



road had been negligent and that said negligence proximately caused plaintiff's injuries. There was substantial evidence to the effect that debris and 'junk of all sort' was littered in and about the change room before and during the period when the accident occurred. Mr. Blunk testified that there were tie plates, railroad spikes, knuckle pins, broken knuckles and brake-shoes in the change room for several months prior to the accident. Indeed, he testified that for some time a brake-shoe had been used as a prop for the door to the change room. Ross Hazlett, Chairman of the Safety Committee for the employees, also testified that he had seen various items such as those mentioned by plaintiff littered about the change room for several months, and had complained to the company of these conditions as Safety Chairman. Corroborating the testimony of Blunk and Hazlett, one Santa Fe witness, J. R. Kenney, also testified that he had seen similar objects about the change room and that he had also seen a box-car brake-shoe used as a door prop.

"There was also considerable testimony showing the employees who used the change room had a duty to keep the premises clean. As plaintiff stated, there was a sign in the change room, 'Please Keep This Place Clean', and the roundhouse foreman had reprimanded the men for not keeping the room cleaner. Counsel respectfully submits that the jury could reasonably infer that the employees, in attempting to keep the room clean in accordance with their duties, would indulge in such practices as 'sweeping under the rug.' In short, one could reasonably infer that persons using that room would take objects off the floor and place them in any available receptacle. The fact that an employee would carelessly and negligently place a brake-shoe or any other stray object in someone's grip in order to 'get it out of the way' merely accentuates that employee's failure to meet the standards of ordinary care. It should be noted that there was a junk pile for the disposal of brake-shoes, knuckles and other objects, but that this junk pile was over 250 yards away from the change room, thus giving

rise to a reasonable inference that certain employees put objects in the nearest convenient place rather than carry them that long distance.

"That the brake-shoe and glass tube were put there by careless employees rather than some outside person was clearly indicated by the fact that the change room was inaccessible to anyone other than Santa Fe employees. In fact, the room was specifically intended for the use of enginemen only.

"Also showing that the entire accident was of a railroad character and specifically chargeable to the negligence of the Santa Fe railroad, is the fact that the brake-shoe and the tube were objects used on railroad engines and not foreign objects that would have been brought from the outside by persons not authorized to use the change room.

"Considering all these facts together—the untidy condition of the change room for long periods of time, the duty of employees to clean the room, the inaccessibility of the room to outsiders, and the railroad character of the brake-shoe and glass tube—it was reasonable for the jury to infer that some employee or employees carelessly put the brake-shoe in Mr. Blunk's grip rather than carry it the distance of 250 yards to the junk pile where it should have been placed; and it was just as reasonable for them to infer that the glass tube had been left on top of the lockers in a similarly careless and lazy manner."

[2,3] An appellate court must, of course, view the evidence in the light most favorable to the prevailing party, and every reasonable inference must be indulged in to support the verdict. But counsel's argument, putting the plaintiff's case as strongly as the evidence permits, is not persuasive. The inference that the brake-shoe was placed in the grip and the glass tube under the grip in the performance of a duty arising out of or in the scope of the employment simply cannot be accepted. Assuming, as we must, that brake-shoes and similar railroad equipment littered the change room from time

to time, if this constituted negligence on the part of the railroad it was not the negligence which proximately caused the accident. The proximate cause was the deliberate placing of the brake-shoe and tube as they were found. Even assuming, from the presence of the sign admonishing employees to keep the place clean, the existence of a duty on their part so to do, it cannot reasonably be inferred therefrom that an employee, in performing such duty, went to the trouble of placing a 50-pound piece of iron in a grip on a high shelf.

[4,5] The duty of the railroad to provide a safe place to work does not extend to protection of the employee against horseplay of fellow employees outside the scope of their employment. *Davis v. Green*, 260 U.S. 349, 43 S.Ct. 123, 67 L.Ed. 299; *Atlantic Coast Line R. Co. v. Southwell*, 275 U.S. 64, 48 S.Ct. 25, 72 L.Ed. 157; *Lavender v. Illinois Central R. Co.*, Mo.Sup. 1949, 219 S.W.2d 353; *Sheaf v. Minneapolis, St. P. & S. S. M. R. Co.*, 8 Cir., 162 F.2d 110; *Griffin v. Baltimore & O. R. Co.*, 98 W.Va. 168, 126 S.E. 571, 40 A.L.R. 1326; *Reeve v. Northern Pac. Ry. Co.*, 82 Wash. 268, 144 P. 63, L.R.A.1915C, 37; *Goupiel v. Grand Trunk Ry. Co.*, 96 Vt. 191, 118 A. 586, 30 A.L.R. 690. The question of the railroad's tolerating horseplay or negligently employing persons of known propensities is not here involved. The court properly instructed the jury that brake-shoes or boiler water glasses were not inherently dangerous articles which the master should keep in a safe place, and there was no duty on the part of the railroad to anticipate that another employee would use such articles to rig a booby-trap for a fellow employee. Obviously, a person desiring to play such a prank could find suitable objects almost anywhere in the vicinity of the change room or the roundhouse, or for that matter, almost anywhere. Bricks or rocks could be, and have been, used for the purpose.

[6] It must be concluded that as a matter of law plaintiff failed to present probative facts from which the jury could reasonably infer negligence and proximate

cause. The present verdict can be upheld only by resort to speculation. *Galloway v. United States*, 319 U.S. 372, 395, 63 S.Ct. 1077, 87 L.Ed. 1458; *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520; *Northwestern Pacific R. Co. v. Bobo*, 290 U.S. 499, 54 S.Ct. 263, 78 L.Ed. 462.

[7] The courts of this state have liberally construed workmen's compensation statutes to the end that their beneficent purposes might be fully realized. But in so doing the courts may not usurp the function of the legislative authors, in this case the Congress, and under the guise of liberal construction impose a liability not based upon the fair and reasonable meaning of the word "negligence" and the usual standards of proof required in civil cases. We may not and should not transform liability for negligence into liability as an insurer. Pertinent to the situation with which we are here confronted is the following language taken from *Eckenrode v. Pennsylvania R. Co.*, 3 Cir., 164 F.2d 996, 1000, affirmed 335 U.S. 329, 69 S.Ct. 91, 93 L.Ed. 41: "Any Federal Judge who sees these railroad accident cases come in and go out of the courts must be troubled by the unsatisfactory social results obtained. Some claimants go out with very large verdicts. Others go out with nothing. Yet in each case the injury has come as part of the business of train movement and the disastrous consequences upon the victim or his family are equally heavy. But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend that there is negligence when it does not exist. It does not exist in this case."

The conclusion arrived at makes it unnecessary to consider the asserted error in the giving of an instruction.

The judgment is reversed with directions to enter judgment for the defendant.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; CARTER, J., dissenting.

**PEOPLE v. COOK.**  
Cr. 2640.

District Court of Appeal, First District,  
Division 2, California.

May 1, 1950.

Hearing Denied May 25, 1950.

Willis Cook was convicted in the Superior Court, Santa Clara County, William F. James, J., of embezzlement and thereafter his motion to set aside the judgment was denied and he appealed. The District Court of Appeal, Nourse, P. J., held that a motion to vacate a judgment was not the proper proceeding to raise questions regarding the sufficiency of the evidence to show crime was committed within three years prior to return of indictment or the regularity of the selection of the grand jury.

Order affirmed.

**1. Criminal law**  $\S$  998

A motion to vacate a judgment is no more than a petition for a writ of error coram nobis and it does not lie to correct an error of law nor to redress an irregularity occurring at trial that could be corrected on motion for new trial or by appeal.

**2. Criminal law**  $\S$  1023(12)

A motion to vacate a judgment is a collateral attack on judgment and where judgment is not void on its face or illegally entered but merely erroneous, an order denying a motion to vacate the same is not reviewable, particularly when same points could have been raised on an appeal from the judgment.

**3. Criminal law**  $\S$  998

Where defendant attacked irregularity of selection of grand jury which returned indictment, attacked sufficiency of evidence as failing to show crime was committed within three years prior to return of indictment and asserted that he could not be prosecuted for embezzlement until he had been adjudged an embezzler in probate proceedings in estate from which he was charged with having taken funds, and that instructions to jury did not appear in record on file, but all matters could have been urged on motion for a new trial

or on appeal from judgment, questions could not be raised by motion to vacate judgment.

**4. Constitutional law**  $\S$  270

Denial of defendant's request to be permitted to leave state penitentiary and appear personally to take part in proceedings on motion to vacate judgment was not a denial of due process.

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Ernest Spagnoli, San Francisco, for appellant.

Fred N. Howser, Attorney General, Clarence A. Linn, Deputy Attorney General, for respondent.

NOURSE, Presiding Justice.

The defendant appeals from an order denying his motion to set aside a judgment convicting him following a trial by jury on an indictment charging the felony of embezzlement. The judgment was entered on March 5, 1948, and no appeal was taken therefrom. October 13, 1948, he moved to vacate the judgment, attacking the regularity of the selection of the grand jury which returned the indictment; attacking the sufficiency of the evidence as failing to show that the crime was committed within three years prior to the return of the indictment; asserting that he could not be prosecuted for embezzlement until he had been adjudged an embezzler in the probate proceedings in the estate from which he was charged with having taken the funds, and also urging that the instructions to the jury do not appear in the record on file. All these matters could have been urged on a motion for a new trial or on an appeal from the judgment.

[1] A motion to vacate a judgment is no more than a petition for a writ of error coram nobis. *People v. Gilbert*, 25 Cal.2d 422, 154 P.2d 657; *People v. Martinez*, 88 Cal.App.2d 767, 199 P.2d 375; *People v. Adamson*, 34 Cal.2d 320, 210 P.2d 13.

It does not lie "to correct an error of law, nor to redress an irregularity occurring at the trial that could be corrected on mo-



tion for new trial or by appeal." *People v. Martinez*, supra, 88 Cal.App.2d 771, 199 P.2d 378.

[2] Since the motion to vacate is a collateral attack on the judgment where the judgment is not void on its face or illegally entered but merely erroneous, an order denying a motion to vacate the same is not reviewable, particularly when the same points could have been raised on an appeal from the judgment. *People v. Ramirez*, 139 Cal.App. 380, 383, 33 P.2d 848; *People v. Russell*, 139 Cal.App. 417, 419, 34 P.2d 203; *People v. Clark*, 24 Cal.App.2d 302, 308, 74 P.2d 1070; *People v. Erickson*, 74 Cal.App.2d 339, 340, 168 P.2d 417. For further authorities see *People v. Gilbert*, 25 Cal.2d 422, 444, 154 P.2d 657.

Appellant argues that the prosecution was barred by the statute of limitations but concedes that this fact does not appear on the face of the record but would require proof of the date when the embezzlement was committed. He cites *People v. McGee*, 1 Cal.2d 611, 36 P.2d 378; *In re Davis*, 13 Cal.App.2d 109, 111, 56 P.2d 302; *In re McGee*, 29 Cal.App.2d 648, 85 P.2d 135; and *In re Connolly*, 16 Cal.App.2d 709, 61 P.2d 490, to the point that the statute of limitations is a jurisdictional defense. The first case cited was heard on an appeal from an order denying a motion to vacate the judgment. The Supreme Court held that the statute of limitations was jurisdictional and that the point could be raised at anytime when the indictment "shows on its face" that the prosecution is barred. The other three cases were in habeas corpus, which is the only remedy available under the circumstances shown here. See *People v. Adamson*, 34 Cal.2d 320, 210 P.2d 13, and concurring opinion, page 22.

[3] We are not here concerned with what showing should or could be made in a proceeding in habeas corpus. The issues were all raised on appeal from a motion to vacate the judgment. Under the rule of the *Adamson* case, supra, which is contrary to the earlier case of *People v. McGee*, 1 Cal.2d 611, 36 P.2d 378, that

is not a proper proceeding to raise questions of this kind.

[4] Appellant also complains that while the motion was urged in the superior court by his attorney he was not permitted to leave the state penitentiary and appear personally to take part in the proceedings. This question has likewise been covered by numerous decisions. *People v. Russell*, supra, 139 Cal.App. 419, 34 P.2d 203; *People v. Martin*, 78 Cal.App. 2d 340, 343, 177 P.2d 813.

The order is affirmed.

GOODELL and DOOLING, JJ., concur.



97 Cal.App.2d 186

In re COOPER'S ESTATE.

COOPER v. COOPER.

Clv. 17093.

District Court of Appeal, Second District,  
Division 2, California.

April 26, 1950.

Rehearing Denied May 12, 1950.

Hearing Denied June 23, 1950.

Petition by Mabel J. Cooper against Grace Zerbe Cooper in the matter of the estate of John S. Cooper for family allowance and for termination of family allowance to defendant. The Superior Court of Los Angeles County, Kurtz Kauffman, J., denied the petition, and petitioner appealed. The District Court of Appeal, Wilson, J., held that petitioner's evidence sustained burden of proof that decedent had not obtained a divorce from her, and that it overcame presumption of validity of subsequent marriage by deceased.

Judgment reversed.

#### I. Marriage ~~to~~ 40(10)

In action by first wife of decedent for family allowance and to terminate family allowance to subsequent wife of decedent, evidence showed decedent was

not divorced, and overcame presumption of validity of marriage to subsequent wife.

## 2. Marriage ⇨45

In action by first wife of decedent for family allowance, and to terminate family allowance to subsequent wife of decedent, admission of purported certificate of marriage between subsequent wife and decedent, which was not registered within one year from date of marriage, but four years thereafter, and which was not recorded upon acknowledgment of minister who performed marriage, was error. Civ. Code, §§ 68, 79; Health and Safety Code, § 10551.

## 3. Executors and administrators ⇨180

The granting of a family allowance is dependent upon the wife's right to support at time of husband's death.

## 4. Executors and administrators ⇨194(6)

In action by first wife for family allowance and to terminate family allowance to subsequent wife, whom decedent married without obtaining a divorce, where trial court erroneously found that subsequent wife was widow of decedent, and that first wife was not, and gave no consideration to first wife's application for such allowance, trial court would be required on retrial to consider evidence whether separation of decedent and first wife was caused by decedent's acts or whether it was by agreement between parties, and any other evidence relating to first wife's right to support at time of decedent's death.

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Hammack & Hammack, Los Angeles, for appellant.

Morris Lavine, Los Angeles, for respondent.

WILSON, Justice.

This is an appeal from a judgment denying appellant's petition for family al-

lowance and her petition for termination of family allowance to Grace Zerbe Cooper.

Both appellant and respondent claim to be the lawful widow of decedent who left a will in which he appointed Grace Zerbe Cooper as his executrix and devised to her all his property. The trial court allowed her a family allowance as the surviving widow.

Decedent and appellant were married in New Jersey on January 10, 1910. They established their home in New York City where he practiced law. Decedent left New York about a year later, leaving his wife in New York, and went to Texas where in the same year he married for a second time. He left Texas shortly thereafter and came to Los Angeles. During World War I he enlisted in the United States Army, later transferring to the British Army, and while he was in England in 1919 his second wife filed suit and obtained a divorce from him in Los Angeles.

After the Armistice decedent returned to New York and lived for a time with appellant. He then proceeded west and established himself in the practice of law in Los Angeles. He married for a third time in Los Angeles but his third wife, Carolyn, was burned to death in 1926. In about 1928 decedent established a home in Los Angeles with respondent and on October 5, 1929, they were purportedly married under the provisions of section 79<sup>1</sup> of the Civil Code. Decedent and respondent continued living together in Los Angeles until his death in 1948.

As grounds for reversal appellant contends that (1) she has sustained the burden of proving that she and decedent had never been divorced, (2) in any event the purported marriage between decedent and respondent was not a legal marriage since the requirements of section 79 of the Civil Code were not complied with, and (3) the court erred in admitting into evidence a certified copy of the records of

1. Section 79 reads: "When unmarried persons, not minors, have been living together as man and wife, they may, without a license, be married by any clergyman. A certificate of such mar-

riage must, by the clergyman, be made and delivered to the parties, and recorded upon the records of the church of which the clergyman is a representative. No other record need be made."

the county recorder as evidence of the marriage between decedent and respondent.

Respondent contends that appellant has failed to sustain the burden of proof that decedent had not obtained a divorce from her, citing *Marsh v. Marsh*, 79 Cal.App. 560, 250 P. 411, and *In re Estate of Hughson*, 173 Cal. 448, 160 P. 548.

Appellant testified that decedent told her when he returned to New York after his discharge from the service that he had never obtained a divorce from her; that he went to California to establish himself and wanted her and their child to join him as soon as possible; he did not, however, send her the money to come to California; in 1923 when she and decedent were together in Toledo, Ohio, where he had gone from Los Angeles to try a lawsuit, decedent told her he had married Carolyn but that he had never divorced appellant; that he was going to break off with Carolyn upon his return; that he wanted to put things right and appellant could come to the coast; that she came to California in 1925 and lived with him about two months and at that time he reiterated there had never been a divorce between them; again in 1927 she came to Los Angeles for a short time at which time he repeated there had never been a divorce; she never saw decedent again after 1927 and first learned of his death from a newspaper clipping she received from her sister-in-law; she did not know he had married respondent.

As proof of her assertion that she and decedent were never divorced, appellant offered in evidence letters which she had received from him between the years 1919 and 1944. In February, 1919, decedent wrote her from England and suggested she discuss with a member of the firm by which she was then employed the possibility of a connection for him. In this letter he states: "tell them that your husband is an American lawyer and that through a misunderstanding we separated \* \* \* that we have cleared our misunderstanding up and are going back together \* \* \*." In another letter he stated that he felt better than he had ever felt in his

life and that there "seems to be a load taken off my shoulders that I have been carrying for years—for now I feel that I am doing the right and honorable thing by coming back to you \* \* \* Everything's seems rosy—now that all the strain is over—I am coming back my life during the past eight years hasn't been a bed of roses but—I have had a lot of experience and—am a much wiser man for it \* \* \*." This letter was apparently written about the time decedent's second wife divorced him.

In 1923, when decedent went to Toledo to try a lawsuit, he wrote appellant urging her to join him there. According to his letters written after his return from Toledo, he separated from Carolyn but later went back to her. His letters indicate he had placed himself in a situation from which he was unable to extricate himself and he was fearful of a public scandal. He separated from Carolyn again in 1925 and appellant came to Los Angeles. After her return to New York decedent wrote her, in response to a letter from appellant, that the word which seemed uppermost in all the letters was "divorce"; that he was not interested in the matter at all; that if the family wanted her to get a divorce she should get it in New York; he did not want her to get a divorce in Los Angeles because of the scandal. Decedent wrote: "As for you being in Los Angeles I told you and me<sub>nt</sub> it that I liked to have you here better than I did to have you in New York and the past few weeks have proven just how unpleasant and uncertain it is when you are away. So why not go ahead and get a divorce in New York, and let matters straighten themselves out here, and when you have satisfied everybody you and I will be in a position to do just as we please and we can go off to ourselves and let the rest of the world go bye.

"Now I hope I have made myself clear—as I tried to do when you were here, as for your coming out here to try matters and if after staying here a year they are not entirely to your liking then to get a divorce—I don't just exactly under-



stand what the object is—you know the conditions out here and my proposition. and that is that we are already divorced. if you want to come here I welcome you, and if after staying here we want to live together we will—and if necessary to remarry we will—and that is the only proposition I have to make. \* \* \*

“So try and reason the matter out yourself and do just what you think is best—and I will agree to anything you say except you getting a divorce here.

“From the legal side—you would require a years residence here and new grounds—because you lived with me here. And shurely I would be a boob to give you the grounds upon which to ruin me here. so why thing of such a thing.

“But if you want a New York divorce, just go ahead as if you had never been out here and name who you want to.”

In 1928 decedent wrote appellant that as he understood her offer, he was to give her \$5,000, she was to obtain a divorce and then he would be at liberty to do as he pleased. He stated: “As to the divorce why do you want one. You say I never obtained one and therefore you want it—may I ask for what purpose—you say you do not intend to marry—then why the divorce.” He suggests they go on the same way they had been doing for eighteen years.

In 1932 appellant retained an attorney in Los Angeles. The attorney wrote her that he had talked with decedent over the telephone and that “He declines to state whether he got a divorce from you or not and declines to give me the name of the county where it was obtained, if it was obtained. He refuses to either affirm or deny that he is married to you and says that it is a purely personal matter between you and him and that he intends writing you a personal letter. \* \* \* Personally, I am convinced from his conversation over the phone that he never procured a divorce.”

Decedent wrote appellant the following day and told her of his conversation with her attorney. He stated that he was too

old to seek other employment and if he were denied the right to practice law “from publicity or otherwise” he would be through and she knew it; that he regretted the mistakes he had made and whether he made more seemed to be up to her. In May, 1932, decedent wrote her that they had “hashed and rehashed” the matter until there was nothing left to talk about; that the last time she was in Los Angeles she came with the intention of staying and obtained an apartment but that it did not work, that she went back and at the time they agreed “one and all and forever that the matter was a closed book” and he was to go his way and she was to go hers; that if her desire at that time was to ask him to disappear off the face of the earth, resign from the practice of law, go to jail or suffer any other disgrace, she should write him just what she wanted; that he had been living just from hand to mouth for the past year but with additional effort he could get along and straighten out the tangeled mess” he was in.

Appellant testified that she wrote every county in Texas and was advised decedent had not obtained a divorce. There is no evidence in the record that decedent lived anywhere in Texas except Amarillo and there is in evidence a letter from the county clerk of Potter County that decedent did not obtain a divorce in that county. Appellant also testified that she had written the Hall of Records in Los Angeles in 1931 or 1932 and was informed there was no record of a divorce.

Respondent contends that appellant has failed to sustain the burden of proof since she did not search the records in various places where decedent lived; that he lived in England, New York, New Jersey, Texas, Illinois, Nevada, Tennessee, Ohio and California. There is in the record no evidence that decedent resided anywhere in California except Los Angeles County, nor is there any evidence that he resided in Ohio, Nevada or Illinois. There is no evidence of his residence in Tennessee after his marriage to appellant in 1910. His residence in New Jersey and New

York was at a time when he was living with appellant and his residence in England was during the time he was in the service and following which he lived with appellant.

Appellant testified that at the time of trial she was getting a pension from the United States government as the unmarried widow of decedent and that during his lifetime she received half of his pension.

[1] The correspondence referred to above, together with numerous other letters written by decedent to appellant over a period of years, and which are in evidence, are substantial proof that he never obtained a divorce from her; that having remarried without terminating his first marriage he was constantly worried over the possibility of her filing suit for divorce in Los Angeles and that such action on her part would reflect upon his reputation and ruin him in his practice; that he was very much afraid of having anyone in Los Angeles know that they had not been divorced and for that reason he even went so far as to suggest that if she decided to come to Los Angeles and live with him that they remarry if necessary so the truth would not be known. These letters together with the evidence that appellant had been receiving half of his pension, which must have been with decedent's knowledge, and that he had continued

sending her money even after his child became of age are sufficient to sustain the burden of proof cast upon her that decedent had not obtained a divorce from her and to overcome the presumption of validity of the subsequent marriages.

Appellant asserts that in any event the marriage between decedent and respondent was not legal since there is no evidence of compliance with the provisions of section 79 requiring that the marriage be recorded upon the records of the church; that the statutory provisions relative to solemnization and authentication of marriages are mandatory. This contention is untenable since section 68 of the Civil Code expressly provides that noncompliance with the provisions by others than a party to a marriage does not invalidate it.

As proof of her marriage to decedent respondent introduced into evidence over the objection of appellant a certified copy of the records of the county recorder.<sup>2</sup> This document was recorded upon the acknowledgment of Grace Z. Kirham Cooper, which acknowledgment is dated December 6, 1933. Section 79 of the Civil Code provides: "A certificate of such marriage must, by the clergyman, be made and delivered to the parties, and recorded upon the records of the church of which the clergyman is a representative. No other record need be made." The original marriage certificate was not produced nor

## 2. "Certificate of Marriage

"Whereas, John S. Cooper and Grace Z. Kirkham, both of Los Angeles, California, being unmarried and not minors and having been living together as man and wife and having taken the bonds of matrimony before me a Clergyman of the American Church, I hereby unite them in matrimony under the provisions of Section #79 of the Civil Code of the State of California. Los Angeles, Cal., Oct. 5th, 1929.

"Frank Dyer, D. D.

"John S. Cooper

Grace Z. Kirkham

"State of California, County of Los Angeles,)ss. On this 6th day of December, 1933, before me, Chas. D. Munro, a Notary Public in and for the said County and State, personally appeared Grace Z.

Kirham Cooper,—known to me (or proved to me on the oath of Willedd Andrews) to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same. In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Notarial Seal)

"Chas. D. Munro, Notary Public in and for said County and State. My commission expires February 9, 1937 #556. Copy of original recorded at request of Willedd Andrews Dec. 6, 1933. 9:46 A.M. Copyist #27 Compared C. L. Logan, County Recorder, by

"E. K. Perkins (35) Deputy  
"\$1.00—3.S."

was any valid reason given for not producing it. Respondent testified that the original document was taken up to the recorder's office in 1933 and "it's still up there." No subpoena was served upon the county recorder to produce the original document nor does the evidence show that any search was made of the files of the county recorder or of Willedd Andrews, who had requested that the document be recorded. Also, although counsel for respondent stated that the clergyman who performed the marriage ceremony was available and that he would produce him as a witness, he failed to do so.

[2] Section 10551 of the Health and Safety Code provides: "Any photostatic copy of the record of a birth, death, or marriage, or a copy, properly certified by the State or local registrar to have been registered within a period of one year from the date of the event is prima facie evidence in all courts and places of the facts stated in it." The purported certificate of marriage was not registered within one year from the date of the marriage but four years thereafter. Moreover, the recordation was upon the acknowledgment of Grace Cooper and not that of the minister who performed the marriage. For the

several reasons above stated it was error for the court to admit the document.

[3,4] Respondent contends that under no circumstances is appellant entitled to a family allowance since she was not a member of decedent's family at the time of his death. The court, having found that Grace Zerbe Cooper is the widow of decedent and that Mabel Cooper is not, gave no consideration to the latter's application for such allowance. The granting of an allowance is dependent upon the wife's right to support at the time of her husband's death. In *re Estate of Brooks*, 28 Cal. 2d 748, 755, 171 P.2d 724. Upon a retrial it will be the duty of the court to admit and consider evidence as to whether the separation of appellant and decedent was caused by the latter's acts or whether it was by agreement between the parties and any other proffered evidence relating to appellant's right to support at the time of decedent's death.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



35 Cal.2d 279

**PEOPLE v. RILEY.**

**Cr. 5054.**

Supreme Court of California, in Bank.

April 28, 1950.

Leandress Riley was convicted of robbery and murder in the Superior Court for Sacramento County, Raymond T. Coughlin, J., and an automatic appeal from the judgment imposing the death penalty and from the order denying the motion for new trial was taken. The Supreme Court, Spence, J., held that the offense committed was murder in the first degree and that there were no prejudicial trial errors.

Affirmed.

**1. Homicide ☞18(5)**

Where evidence established that homicide was committed in the perpetration of a robbery the offense was murder in the first degree. Pen.Code, § 189.

**2. Jury ☞131(10)**

Where trial judge's participation in voir dire examination of jurors was directed to ascertainment of whether jurors had any fixed opinions with regard to acting on a case which might involve the imposition of the death penalty, and clarification of questions asked by counsel in connection therewith, remarks of judge in connection therewith were not improper as interfering with exclusive province of the jury in fixing punishment in event of finding defendant guilty of murder in the first degree in view of remarks of judge of duty of the jury to fix the penalty. Pen.Code, §§ 189, 190.

**3. Criminal law ☞1030(1)**

Under ordinary circumstances unless a party aggrieved by a claimed impropriety of the trial judge promptly urges his objection thereto his claims in that regard will not be considered on appeal.

**4. Criminal law ☞720(9)**

In prosecution for murder in connection with a robbery remarks of prosecutor with respect to the prosecution's theory that defendant's killing of deceased was to avoid identification were not improper under the record.

**5. Homicide ☞268**

In prosecution for murder committed during a robbery where prosecution's theory was that defendant killed deceased to avoid identification, defendant's claim that he never saw deceased in his life before was for the jury.

**6. Criminal law ☞824(5)**

Instruction that evidence of oral admissions of defendant should be viewed with caution should be given regardless of the fact that defendant does not request it. Code Civ.Proc. § 2061, subd. 4.

**7. Criminal law ☞1173(2)**

In prosecution for murder committed during robbery failure to instruct jury that evidence of oral admissions of defendant should be viewed with caution was harmless where it was highly improbable that any different verdict would have been returned by the jury had the omission not occurred. Code Civ.Proc. § 2061, subd. 4.

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Rupert Crittenden, Oakland, under appointment by the Supreme Court, for appellant.

Fred N. Howser, Attorney General, and Doris H. Maier, Deputy Attorney General, for respondent.

SPENCE, Justice.

Defendant was charged in separate counts with (1) robbery and (2) murder. He pleaded not guilty and not guilty by reason of insanity to each count. After trial, the jury returned verdicts of guilty on both counts. As to the second count, the jury found the crime to be murder in the first degree and fixed the penalty at death. Defendant was then tried before the same jury on the issue of sanity and was found sane. A motion for a new trial was made and denied. This is an automatic appeal from the judgment imposing the death penalty and from the order denying a motion for a new trial in relation to that count. Pen.Code, sec. 1239(b).

Defendant does not question the sufficiency of the evidence to sustain his con-

viction of murder in the first degree, but he contends that certain alleged prejudicial errors deprived him of a fair trial. His arguments for reversal center on these principal points: (1) the impropriety of interrogatories and statements on the part of the trial court in that they had the effect of restricting the jury's exercise of discretion in fixing the penalty on a finding of murder in the first degree; (2) misconduct by the district attorney in his argument in that he transgressed the scope of the record, and the failure of the trial court to admonish the jury to disregard such remarks; and (3) the omission of a cautionary instruction for guidance of the jury in its consideration of the evidence as to defendant's extra-judicial oral admissions. Careful examination of the record in the light of applicable rules of law clearly demonstrates that defendant's claims of prejudicial error are without merit, and accordingly the judgment of conviction imposing the death penalty must be affirmed.

With the exception of the varying versions of the precise manner in which defendant killed the deceased, the record reveals no conflict in the evidence which established the essential facts. On July 18, 1949, a few minutes past 8:00 o'clock in the morning, defendant entered Bedell's Restaurant in Sacramento, through the rear entrance off the alley, walked down a narrow corridor and knocked on the door of an office wherein Mrs. Gladys Phay and Mrs. Dorothy Paolini, employees of the restaurant, were counting the previous day's receipts. When the door was opened by Mrs. Phay, defendant pointed a pistol at her and stated, "This is a stick-up." He brushed by Mrs. Phay to Mrs. Paolini's desk, "scooped up" all the currency lying thereon, \$926, and a check for \$56.66, and then started to leave. Defendant seemed to be nervous and excited in his actions, according to these witnesses. The office had a glass front and sides, so that what transpired therein could be seen by any one in the outside corridor, and likewise the latter passage would be visible to the occupants of the office.

In the course of the robbery Walter Hills, a laundryman who was making his daily call at the restaurant, walked past the office and glanced through the glass side wall thereof. He was headed down the corridor toward the alley carrying his bundle of laundry. He reached the exit to the alley about the same time as defendant, and as Mrs. Phay stood at her office door calling that "it was a holdup and he had a gun." Defendant fired a single shot at Hills, who died almost instantly as the result of the bullet piercing his back and passing through his heart. It is at this point that the evidence shows the only instance of conflict—whether, as Mrs. Phay and Mrs. Paolini testified, defendant passed Hills in the corridor, then turned and fired his gun, with the bullet entering the victim's back because he had turned to face Mrs. Phay as she cried out the alarm; or whether, as a truck driver, likewise a witness for the prosecution, testified, the pistol was discharged before defendant had overtaken Hills in the corridor, with defendant thereupon jumping over his victim's body and the bag of laundry, and then speeding down the alley.

Defendant was apprehended by the police about an hour and forty-five minutes later that morning as he cowered in the basement of a building which opened off the same alley as Bedell's Restaurant but a few blocks distant therefrom. He offered no resistance to arrest but called out, "I give up. I give up." Defendant was searched by one of the arresting policemen and was found to have \$95 in currency on his person. He then took the police to the basement of the Red Hen Cafe, a few doors down the same alley, where he pointed out a paper bag concealed in the loft and found to contain the balance of the money as well as the gun (a five-chamber pistol, having one expended and four loaded cartridges). At the same time defendant showed the police certain clothing which he had worn in the course of the robbery and homicide at Bedell's Restaurant but which he had later discarded in the basement of the Red Hen

Cafe upon changing to the garments he was wearing when arrested. It appears that defendant had previously worked some five or six months as a kitchen helper at the Red Hen Cafe; that he had been discharged from such work in May, 1949, because business was slack; and that in the early morning of July 18, 1949, when he had applied at the cafe about 7:30 o'clock, he had been offered the opportunity to do some odd jobs beginning later that day. Upon further search of defendant in the cafe basement, the police found a key which, as defendant then stated, fitted a locker at the Greyhound bus depot; and investigation there later revealed a grip packed with defendant's various personal effects. According to the testimony of the police officers, defendant when arrested was nervous and excited, and he stuttered but he was able to answer coherently questions as to his various activities on the morning in question.

Defendant testified in his own behalf at the trial. He did not deny having committed the robbery and the homicide. However, it was his story that he called at Bedell's Restaurant in the course of looking for employment that morning; that when Mrs. Phay opened her office door, he saw the money on the desk and somehow was impelled to grab it; that as he was making his escape down the corridor, he tripped, his gun was discharged, and the bullet entered the body of Hills, who was preceding him down the corridor and who was instantly killed.

It appears that Hills for some nine months had been servicing Bedell's Restaurant as one of the business establishments on his linen supply route and had been regularly calling there each day about 8:00 o'clock in the morning. A cook at the Red Hen Cafe at the time of defendant's employment there testified at the trial that Hills customarily made his daily morning call at the cafe about 9:30 o'clock in the morning; that the laundry pick-up was in the kitchen where defendant worked, and that while defendant's "time of employment" did not begin until 11:30 o'clock in the morning, "he was always to work

\* \* \* earlier than his set time \* \* \* as long as two hours ahead \* \* \* a few times" and that "more than once" defendant was "in the kitchen" at the same time Hills would be there, stopping "five or ten minutes" to "have a cup of coffee." Defendant testified that he had never seen Hills before the day of the homicide.

[1] It was the theory of the prosecution that defendant had planned the robbery, consistent with his having stored his packed suitcase in a locker at the Greyhound bus depot; that he shot Hills because he realized Hills had recognized him in the course of the robbery, and that to avoid apprehension for his crimes, he had changed certain clothing in the basement of the Red Hen Cafe and was awaiting an opportunity to make his escape to the bus depot and leave town when he was arrested. On the other hand, it was defendant's claim that he was in a highly nervous state of mind at the time of the commission of the robbery; that the killing of Hills was accidental; and that there was no question of trying to avoid identification because he did not know and had never before seen Hills. However, regardless of these opposing considerations in the record as to whether the killing was intentional or accidental, it is indisputably established that it was committed in the perpetration of the robbery, so that the offense is murder of the first degree. Pen. Code, § 189; *People v. Williams*, 20 Cal. 2d 273, 283, 125 P.2d 9, and cases there cited; *People v. Rye*, 33 Cal.2d 688, 693, 203 P.2d 748.

[2-4] The first alleged error is concerned with the remarks of the trial judge in the course of the *voir dire* examination as interfering with the exclusive province of the jury under the law in fixing the punishment in the event of a finding of defendant's guilt of the crime of murder in the first degree. It is defendant's contention that such remarks created the impression that only the extreme penalty would be appropriate upon such determination rather than a choice between the alternative punishments of life imprisonment or death:



Pen.Code, § 190. But regardless of the rule that "under ordinary circumstances, unless a party aggrieved by [a] claimed [impropriety] on the part of the trial judge promptly" urges his objection thereto, "his claims in that regard will not be considered on appeal", *People v. Galuppo*, 81 Cal.App. 2d 843, 849, 185 P.2d 335, 338; see also, 8 Cal.Jur. 510, sec. 522; *People v. Savage*, 66 Cal.App.2d 237, 245, 152 P.2d 240, and without quoting the various passages cited by defendant as constituting improper comment by the trial judge, it is sufficient here to say that a fair and complete reading of the entire *voir dire* examination shows that the trial judge's participation therein was directed solely to (1) the ascertainment of whether the jurors had any fixed opinions with regard to acting on a case which might involve the imposition of the death penalty, see *People v. Hoyt*, 20 Cal.2d 306, 318, 125 P.2d 29, and (2) the clarification of various questions asked by counsel in that connection, 50 C.J.S., Juries, § 276d, page 1059, as well as certain applicable legal principles. Moreover, the trial judge prefaced his interrogatories with the general statement to the prospective jurors that "in the event [the jury] should find the defendant guilty of the crime of murder of the first degree, \* \* \* then \* \* \* it [was] the duty \* \* \* [of] the jury [to] fix the penalty at either death or imprisonment for life," and he then queried if "any \* \* \* now in the jury box \* \* \* [were] conscientiously opposed to the imposition of the death penalty?" In addition, at various stages throughout the *voir dire* examination (1) the trial judge repeatedly referred to the "duty \* \* \* of the jury to fix the penalty" as between the alternative choices, and in so doing, to "take into consideration all of the facts and circumstances surrounding [the] slaying"; (2) both counsel as well as the trial judge told the jurors that they would be informed on the law to be applied after they had heard the evidence in the case; and (3) the jury was later plainly instructed on its function to determine from the evidence and within the exercise of its discretion "whether the defendant [if] found guilty of murder of

the first degree [should] be punished by death or imprisonment for life." In the light of such explicit instruction defendant unavailingly cites the case of *People v. Sainz*, 162 Cal. 242, 121 P. 922, where the jury was expressly limited in its consideration of the evidence to a finding of whether or not the defendant was "guilty of the offense with which he [was] charged [murder]" and was told that "it is not for [it] to consider the penalty prescribed for the punishment of the offense at all", 162 Cal. at page 246, 121 P. at page 924, obviously "grave and manifest error" under the law, 162 Cal. at page 247, 121 P. at page 924, and cause for reversal of the judgment of conviction. Likewise wholly distinguishable are the cases cited by defendant where, under the court's charge, the jury's exercise of its discretion, in relieving from the extreme penalty, was correlated with the existence of "some extenuating fact or circumstance in the case." *People v. Bollinger*, 196 Cal. 191, 205, 237 P. 25, 30; *People v. Kolez*, 23 Cal.2d 670, 671, 145 P.2d 580; *People v. Lindley*, 26 Cal.2d 780, 793, 161 P.2d 227; *People v. Williams*, 32 Cal.2d 78, 85, 195 P.2d 393. No such instruction was given in this case. Accordingly, as these observations upon the state of the present record plainly indicate, there is no merit to defendant's challenge of the propriety of the trial judge's remarks in the *voir dire* examination as amounting to an interference with the jury's discretionary power in fixing the punishment.

[5] Nor is there any force to defendant's second alleged error that certain statements made by the district attorney in his argument transcended the scope of the evidence. To this point defendant complains of the district attorney's assertion (1) that "beyond any doubt" defendant and Hills "came to know" one another; and (2) that according to the testimony of one of the employees at the Red Hen Cafe, "there were occasions, many occasions \* \* \* when those men were in the kitchen of that small establishment together." At the trial defendant made no objection to these remarks nor did he re-

quest the court to admonish the jury to disregard them. But irrespective of this consideration, it is clear that the challenged remarks constituted proper argument on the part of the district attorney pursuant to the prosecution's theory that defendant's killing of Hills was "to avoid identification." Thus it appears that while the aforementioned employee at the Red Hen Cafe said that he "could [not] estimate the number of times" that defendant and Hills "were in the kitchen" together, it was "more than once" during the months that defendant worked in that cafe. Such testimony furnished justification for the district attorney's assailed statements coincident with his right "to discuss the merits of [the] case" and "to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom." *People v. Eggers*, 30 Cal.2d 676, 693, 185 P.2d 1, 10; see, also, *People v. Hoyt*, supra, 20 Cal.2d 306, 318, 125 P.2d 29. Of course, such statement by the district attorney was in conflict with defendant's claim that he "never saw [Hills] in [his] life before," but that was an evidentiary consideration for ultimate determination by the jury.

[6,7] Defendant finally complains of the trial court's failure to instruct the jury that "the evidence of the oral admissions" of defendant should be viewed "with caution." Code Civ.Proc. § 2061, subd. 4; *People v. Thomas*, 25 Cal.2d 880, 890, 156 P.2d 7; *People v. Cornett*, 33 Cal.2d 33, 39-40, 198 P.2d 877. While the cited cases hold that such instruction should have been given regardless of the fact that defendant did not request it, see, also, *People v. Koenig*, 29 Cal.2d 87, 94, 173 P.2d 1, the record in this case is such that it is highly improbable that any different verdict would have been returned by the jury had the omission not occurred. *People v. LeTourneau*, 34 Cal.2d 478, 211 P.2d 865. Defendant's identification and his commission of the crimes as charged were established by the prosecution by evidence adduced

from eye-witnesses and independently of his admissions. Moreover, upon apprehension by the police on the morning in question and their search of his person, defendant directed the arresting officers to the place where he had concealed the balance of the stolen money and the gun which he had used as the murder weapon. At the trial one of these officers detailed at considerable length defendant's various admissions made at the time of his arrest, and defendant, upon taking the witness stand, made no attempt to deny these incriminating statements. This latter observation fully distinguishes the present record from the principal cases cited by defendant: *People v. Thomas*, supra, where the defendant's "asserted admission" to a deputy sheriff that "*he had planned to do this before* \* \* \* was the most direct and important evidence in the trial on the question of degree of the offense", 25 Cal.2d at page 891, 156 P.2d at page 13, and *People v. Cornett*, supra, where the prosecution likewise placed strong reliance on certain admissions of the defendant in classification of the degree of the homicide and defendant denied having made such admissions. 33 Cal.2d at pages 38-39, 198 P.2d 877. Furthermore, in both the *Thomas* and *Cornett* cases, several erroneous instructions were given which were deemed to have affected prejudicially the jury's consideration of the evidence in adjudicating the offense to be murder in the first degree; and in view of the cumulative effect of the errors the respective judgments of conviction were reversed.

A reading of the record here shows that defendant had a fair and impartial trial, and that his claims of prejudicial error cannot be sustained.

The judgment of conviction and the order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

**COOPER v. STATE BOARD OF MEDICAL EXAMINERS OF DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS OF CALIFORNIA et al.**

**L. A. 21190.**

Supreme Court of California, in Bank.

April 28, 1950.

Rehearing Denied May 25, 1950.

Proceeding for writ of mandate by William LeGrande Cooper against the State Board of Medical Examiners of the Department of Professional and Vocational Standards of the State of California, Richard O. Bullis, its president, and others, members of said Board, to compel the Board to rescind an order revoking petitioner's license as a drugless practitioner. The Superior Court, Los Angeles County, Henry M. Willis, J., denied the petition, and petitioner appealed. The Supreme Court, Schauer, J., held that participation in a decision by a Board member who considered the evidence, even though he was not present when evidence was produced, did not violate requirements of due process, but that findings did not support conclusion that petitioner was guilty of unprofessional conduct, and returned case to Board to determine penalty for treating a disease without a license to practice medicine.

Judgment reversed.

Edmonds, J., dissented in part and Carter, J., dissented.

Prior opinion, 207 P.2d 844.

**1. Administrative law and procedure** ⇨478  
**Constitutional law** ⇨287  
**Physicians and surgeons** ⇨11(3)

Where statute required that Board of Medical Examiners, consisting of ten members, have a majority of seven members to pass a motion or resolution, and prohibited a member who did not hear evidence from voting in contested case, participation by five members of Board who replaced original members after original hearing on charge against drugless practitioner and who read and considered evidence or a transcript thereof, did not violate requirements of due process, and make void a revocation of license on such charge. Business and Professions Code, §§ 2100, 2119, 2360, 2364, 2376.5; Government Code, §§ 11500, 11501(b).

**2. Administrative law and procedure** ⇨478  
**Physicians and surgeons** ⇨11(3)

Statute providing that if a contested case for revocation of a license to practice medicine is heard by a hearing officer alone, he shall prepare a proposed decision in such form that it may be adopted as decision in case, and that agency itself may adopt proposed decision in its entirety, or reduce proposed penalty and adopt balance of proposed decision, does not require auditory preception of all evidence by each Board member who votes, but a contested case may be heard either before a hearing officer alone or before agency and a hearing officer. Government Code, §§ 11512(a), 11517(b, c).

**3. Physicians and surgeons** ⇨6(1)

Where drugless practitioner held certificate issued under code and was a practitioner, use of prefix "Dr." preceding his name on doorway to his office did not violate statute making any person who uses in any sign or in an advertisement the word "doctor", the letters or prefix "Dr.", the letters "M. D.," or any other term or letters indicating or implying that he is a physician and surgeon guilty of a misdemeanor. Business and Professions Code, §§ 2141, 2142.

**4. Administrative law and procedure** ⇨753  
**Physicians and surgeons** ⇨11(3)

Order by Board of Medical Examiners, revoking license of drugless practitioner, could not be supported on a theory that evidence would support a finding that petitioner violated some statute which Board did not find to have been violated. Business and Professions Code, § 2409.

**5. Physicians and surgeons** ⇨6(1)

Blood transfusion involved penetration of tissue of human being, and administration of transfusion by drugless practitioner constituted practicing of a system of treating the sick which his license did not authorize. Business and Professions Code, § 2409.

**6. Physicians and surgeons** ⇨11(3)

In proceeding before Board of Medical Examiners for revocation of drugless prac-



tioner's license because he performed blood transfusions, evidence sustained conclusion that transfusions were administered in course of treatment of disease, rather than in obtaining of scientific data which could be used as an aid to ascertain presence, progress and source of disease, and were not within activities permitted to practitioner by applicable statutes. Business and Professions Code, §§ 1203, 1205.

#### 7. Physicians and surgeons ☞11(3)

In proceeding before Board of Medical Examiners for revocation of drugless practitioner's license for performing blood transfusions, where recommendation of massage and liniment and delivery of aspirin to patient were related to and formed a part of treatment of patient in connection with transfusions, which were clearly beyond scope of any license held by drugless practitioner, and were unlawful acts, Supreme Court would not consider whether finding of unprofessional conduct would have been supported by evidence as to liniment, massage and aspirin standing alone. Business and Professions Code, § 2138.

#### 8. Administrative law and procedure ☞817 Physicians and surgeons ☞11(3)

Where Board of Medical Examiners made a single order of license revocation of drugless practitioner based on its finding and conclusions that practitioner violated statute prohibiting use of prefix "Dr." before his name, and treated a sick person without a proper license, and findings did not support conclusion of unprofessional conduct with reference to use of term "Dr." before his name, case would be returned to Board for reconsideration of penalty. Business and Professions Code, §§ 2138, 2372.

#### SCHAUER, Justice.

The superior court, pursuant to an alternative writ of mandate issued upon the petition of William LeGrande Cooper (hereinafter called petitioner), reviewed disciplinary proceedings theretofore had before respondent Board of Medical Examiners (hereinafter termed the board) and rendered judgment upholding the findings and conclusions of the board as well as its order revoking petitioner's license as a drugless practitioner (see State Medical Practice Act, Bus. & Prof. Code, Div. 2, Ch. 5). Petitioner has appealed, and as ground for reversal contends that certain acts performed by him (which formed the basis of two counts of the accusation filed against him before the board), upon which the order of revocation was based, did not constitute unprofessional conduct within the meaning of the Medical Practice Act (see Bus. & Prof. Code, §§ 2360, 2361, 2378). He also relies upon various asserted procedural irregularities in the proceedings before the board, and in addition urges that the penalty of license revocation was so disproportionate to the violations involved as to amount to an abuse of discretion on the part of the board (see Code of Civ. Proc. § 1094.5, subs. (b) and (c)). We have concluded that petitioner's conviction of unprofessional conduct cannot be sustained as to one of the two counts upon which the revocation order was based, and that the judgment should be reversed and the matter remanded to the board for reconsideration of the penalty on the other count.

Petitioner does not deny that he performed the acts which the board and the superior court held to constitute unprofessional conduct. They were: (count 7) the use of the prefix "Dr.", with certain descriptive language, while holding licenses as a drugless practitioner and as a clinical laboratory technologist, and (count 9) the penetration of tissue incidental to the giving of a blood transfusion at the direction of a qualified physician as well as the recommendation and delivery of aspirin to the patient and the suggested use of massage and liniment by him following the transfu-

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French & Indovina, F. Walter French and  
Frank J. Indovina, Santa Monica, for ap-  
pellant.

Fred N. Howser, Attorney General, and  
J. Albert Hutchinson, Deputy Attorney  
General, for respondents.

sion.<sup>1</sup> The superior court, after a hearing but with no other evidence than the transcript and record of the proceedings before the board, found and concluded that the "findings and order of respondent Board revoking petitioner's license as a drugless practitioner were \* \* \* supported by the findings of respondent Board; that the findings of respondent Board were, and are, based upon and supported by the weight of the evidence," and that the proceedings before the board were within its jurisdiction and were conducted "without procedural or prejudicial error or abuse of discretion of any kind." Judgment was rendered denying the peremptory writ of mandate and recalling the alternative writ theretofore issued.

Petitioner first contends that the trial court erred in not holding that as to count seven the board committed an abuse of discretion (see Code of Civ.Proc. § 1094.5) in that it violated the provision of section 11517(a) of the Government Code to the effect that "Where a contested case is heard before an agency itself, no member thereof who did not hear the evidence shall vote on the decision." The accusation against petitioner as originally filed with the board contained eight counts, on which the board held a hearing and took evidence in August, 1947. The hearing was then continued, without a decision, to March, 1948. Meanwhile five of the ten members of the board (Bus. & Prof. Code, § 2100) were replaced with five new members. In February, 1948, count nine was filed as an amendment to the accusation and petitioner filed his demurrer and answer to the new count; and in March, 1948, a hearing was held by the board and evidence taken on the new count. Three days later the board rendered its decision holding petitioner guilty of unprofessional conduct as charged in counts seven and nine. The other counts were dis-

missed and, therefore, cannot be relied upon to support the order or judgment.

An affirmative vote of seven members of the board is required for license revocation (Bus. & Prof. Code, § 2119, see also, § 2376.5). Administrative procedure provisions of the Government Code apply to disciplinary proceedings before the board (Bus. & Prof. Code, §§ 2360, 2364; Govt. Code, §§ 11500, 11501(b)).

[1] In *Hohreiter v. Garrison* (1947), 81 Cal.App.2d 384, 339-401, 184 P.2d 323, it was commented that "Due process requires a fair trial before an impartial tribunal and that requires that the person or body who decides the case must know the evidence, but due process is not interested in mere technical formalism. It is the substance that is determinative of whether due process has been afforded. \* \* \* The Supreme Court stated [in *Morgan v. United States*, 298 U.S. 468, 480, 56 S.Ct. 906, 80 L.Ed. 1288] \* \* \* 'the officer who makes the determinations must consider and appraise the evidence which justifies them. \* \* \* The "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.'" In that case it was held that an insurance agent whose license was revoked had not been denied due process by reason of the fact that under the permissive provisions of subdivision (b) of section 11517<sup>2</sup> of the Government Code the insurance commissioner adopted the findings and proposed decision of a hearing officer, without reading or hearing the evidence produced before that officer. (See also *California Shipbuilding Corp. v. Industrial Accident Comm.* (1946), 27 Cal.2d 536, 544, 165 P.2d 669.) We conclude here that participation in a decision by a board member who has read and considered the

1. Other counts of the accusation against petitioner were dismissed by the board.
2. That subdivision provides as follows: "If a contested case is heard by a hearing officer alone, he shall prepare a proposed decision in such form that it may

be adopted as the decision in the case. A copy of the proposed decision shall be filed by the agency as a public record. The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision."

evidence, or a transcript thereof, even though he was not physically present when the evidence was produced, does not violate the requirements of due process.

[2] We are of the view that the Legislature did not, by the provision of subsection (a) of section 11517 of the Government Code, relied upon by petitioner, intend to require auditory perception of all the evidence by each board member who votes. A contested case may be heard either before a hearing officer alone or before the agency and a hearing officer (Govt. Code, § 11512 (a)). If the hearing is held before a hearing officer alone, the agency may adopt the officer's "proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision" (Govt. Code, § 11517(b)), without reading the record (*Hohreiter v. Garrison* (1947), supra, 81 Cal.App.2d 384, 397, 184 P.2d 323); or may adopt a different decision "upon the record, including the transcript, with or without taking additional evidence" (Govt. Code, § 11517(c)). It thus seems that the Legislature simply intends that an agency member who exercises his own independent judgment on the case, as distinguished from adopting a hearing officer's decision either in its entirety or with a reduced penalty, must be acquainted with the record but need not be physically present when the evidence is produced. Such a holding also appears to comport with the purpose of the Judicial Council of California (see Tenth Biennial Report, p. 24) whose "tentative proposals [for the Administrative Procedure Act] were designed to require actual familiarity with the case on the part of the person having the power to decide \* \* \*."

Moreover, as in the *Hohreiter* case, petitioner's contentions that as to count seven both due process and legislative intention were violated, are further met by the fact that the trial court here was "authorized by law to exercise its independent judgment on the evidence." (*Moran v. State Board of Medical Examiners* (1948), 32 Cal.2d 301, 308, 196 P.2d 20, and cases there cited.) That court did exercise its judg-

ment upon the evidence and has made its decision, and petitioner has thus been accorded a full and fair judicial hearing which he does not even suggest did not comply with all requirements of due process. Arguments made by petitioner as to other claimed procedural irregularities before the board are likewise answered by the fact that he received a full hearing in the superior court.

Petitioner makes no contention that the evidence does not support the findings of fact made by the board, which were in effect adopted by the trial court also, but does urge that such findings do not as to either count seven or count nine support the conclusion of law that petitioner violated the statutory provisions cited by the board in its decision and order revoking petitioner's license.

From the findings it appears that at the time of the acts performed by petitioner, upon which the order of revocation is based, he was licensed both as a clinical laboratory technologist under the provisions of chapter 3, division 2, of the Business and Professions Code, and as a drugless practitioner under the provisions of article 7, chapter 5, division 2, of the same code. (Unless otherwise stated, section numbers mentioned hereinafter will refer to the Business and Professions Code.) For "some years prior to the filing of the Accusation" before the board, petitioner and one King "maintained their offices and laboratories in the same premises" in Los Angeles; King "maintained his office as a physician and surgeon and X-ray laboratory in a portion of said premises" and petitioner "maintained his offices and clinical laboratory in another portion of said premises." A "common receptionist was used" by petitioner and King. "[U]pon the exterior portion of the street entrance to said premises [petitioner] \* \* \* maintained a sign reading as follows: 'Dr. Wm. L. Cooper Clinical Pathology'." Also "for some considerable time prior to the filing of the accusation" petitioner and King "caused to be \* \* \* distributed to other clinical laboratories, hospitals and to licentiates in the healing arts a form of order for work



to be done or performed \* \* \* [which] contained in the heading thereof the following designations \* \* \*

|                 |                     |
|-----------------|---------------------|
| "Dr. C. V. King | Dr. Wm. L. Cooper   |
| X-Ray-Radium    | Clinical Pathology" |

It was held (count seven) that petitioner's use of the prefix "Dr." preceding his name on the doorway constituted a violation of section 2142,<sup>3</sup> and that his use of the same prefix on the order form and price list constituted a violation of section 2141.<sup>4</sup>

[3] It will be noted that the declarations of both section 2141 and 2142 that commission of the acts therein specified will constitute a misdemeanor apply only to those who do not "at the time of so doing" hold "a valid, unrevoked certificate as provided in this chapter," and who are not (§ 2142) "entitled to practice hereunder." Since petitioner did hold such a certificate as a drugless practitioner, issued under the provisions of the chapter referred to (chapter 5 of division 2 of the Business and Professions Code) and was a practitioner and entitled to practice thereunder, it appears that the acts done by him, as set forth hereinabove in relation to count seven, did not constitute a violation of either section 2141 or 2142, and that the board and the trial court erred in holding to the contrary.

[4] It is noted that count seven of the accusation as filed with the board also charged that petitioner had violated section

2409.<sup>5</sup> The evidence shows that petitioner's use of the prefix "Dr." preceding his name was followed by the words "Clinical Pathology." Whether such descriptive words sufficiently meet the requirements of the statute as "indicating the type of certificate he holds" we need not now determine because it appears that in any event the board did not hold him guilty of violating that section (§ 2409; cf. *King v. Board of Medical Examiners* (1944), 65 Cal.App.2d 644, 151 P.2d 282) and its order, of course, cannot be supported in this proceeding on a theory that the evidence would support a finding that petitioner violated some section which the board did not find to have been violated.

The facts forming the basis of count nine are as follows: One Dr. Couturier, a licensed osteopathic physician and surgeon, decided to treat one of his patients, named Toros, who was suffering from "a condition of eyeritis," by "blood transfusions for the purpose of eliminating a latent infection," and requested petitioner to perform the transfusions. Toros requested that the transfusions take place on a Friday afternoon or a week-end. On August 11, 1944, and again on August 25, 1944, petitioner, at Dr. Couturier's request, administered a transfusion to Toros at the latter's residence in Los Angeles. At the time of the second transfusion Dr. Couturier was at his residence at Lake Arrowhead, some 100 miles from Los Angeles. Shortly after the

3. Section 2142 reads as follows: "Any person, who uses in any sign or in an advertisement the word 'doctor,' the letters or prefix 'Dr.,' the letters 'M.D.,' or any other term or letters indicating or implying that he is a physician and surgeon, physician, surgeon, or practitioner under the terms of this or any other law, or that he is entitled to practice hereunder, or under any other law, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, is guilty of a misdemeanor."

4. Section 2141 reads as follows: "Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this State, or who diagnoses, treats,

operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, is guilty of a misdemeanor."

5. Section 2409 reads as follows: "Unless a person licensed and authorized under this chapter or any preceding medical practice act to use the title 'doctor' or the letters or prefix 'Dr.,' holds a physician's and surgeon's certificate, the use of this title or these letters or prefix without further indicating the type of certificate he holds, constitutes unprofessional conduct within the meaning of this chapter."

second transfusion the patient "complained of suffering pains in his back and \* \* \* legs," and petitioner thereupon directed the patient's wife to "procure some liniment and apply the same by massaging the legs of" the patient. Toros became worse and petitioner then delivered "six capsules" of aspirin to the wife "with directions as to how to administer the same."

It was held that the above acts by petitioner "constituted the practicing of a system or mode of treating the sick or afflicted by treating and prescribing for an ailment, disease or disorder for which \* \* \* [petitioner] was not licensed as provided in Section 2141," already quoted herein, and rendered petitioner "guilty of unprofessional conduct as provided" in section 2378.<sup>6</sup>

[5] Sections 2137 and 2138 define the scope of treatment which may be administered by a physician and surgeon and by a drugless practitioner, respectively, and section 2394<sup>7</sup> specifies that "The use of drugs or what are known as medicinal prepara-

tions \* \* \* or the severing or penetrating of the tissues of any human being by the holder of a drugless practitioner's certificate in the treatment of any disease \* \* \* constitutes unprofessional conduct" by such drugless practitioner. Inasmuch as the performing of a blood transfusion clearly involves the "penetrating \* \* \* of the tissues of human beings," it appears that the administration of such transfusion by petitioner did constitute the practicing of a system of treating the sick or afflicted which petitioner's drugless practitioner's license did not authorize. (See *People v. Nunn* (1944), 65 Cal.App.2d 188, 194-195, 150 P.2d 476).

Petitioner urges that he was not treating Toros as his own patient, but was merely performing, under the direction of a licensed physician and surgeon, a "routine procedure" authorized by his certificate as a clinical technologist. We are satisfied that this argument lacks merit. The definition of "clinical laboratory technologist," contained in sections 1203 and 1205,<sup>8</sup> dis-

6. Section 2378 reads as follows: "The violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter constitutes unprofessional conduct within the meaning of this chapter."

7. Those sections read as follows: Section 2137: "The physician's and surgeon's certificate authorizes the holder to use drugs or what are known as medical preparations in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, or other physical or mental conditions."

Section 2138: "The drugless practitioner's certificate authorizes the holder to treat diseases, injuries, deformities, or other physical or mental conditions without the use of drugs or what are known as medical preparations and without in any manner severing or penetrating any of the tissues of human beings except the severing of the umbilical cord."

Section 2394: "The use of drugs or what are known as medicinal preparations by the holder of a drugless practitioner's certificate in or upon any human being or the severing or penetrating of the tissues of any human being by

the holder of a drugless practitioner's certificate in the treatment of any disease, injury, or deformity, or other physical or mental condition of the human being, except the severing of the umbilical cord, constitutes unprofessional conduct within the meaning of this chapter."

8. Those sections read as follows: Section 1203: "As used in this chapter, 'clinical laboratory technologist' means any person who engages in the work and direction of a clinical laboratory."

Section 1205 (before 1949 amendment): "As used in this chapter, 'clinical laboratory' means any place, establishment or institution organized and operated for the practical application of one or more of the fundamental sciences by the use of specialized apparatus, equipment and methods for the purpose of obtaining scientific data which may be used as an aid to ascertain the presence, progress and source of disease." In 1949 the following sentence was added to section 1205: "A duly licensed clinical laboratory technologist or clinical laboratory technician may perform venipuncture or skin puncture for test purposes, upon specific authorization from any person licensed under any provisions of law relating to healing arts."

closes that the acts performed by petitioner upon Toros were beyond the scope of his license as a technologist (see also sections 1240, 1288<sup>9</sup>) and no claim is made that he was proceeding under the provisions of section 2144 to the effect that "Nothing in this chapter prohibits service in the case of emergency \* \* \*."

[6] Petitioner also attempts to compare the giving of a blood transfusion to the piercing of tissue to withdraw blood as specimen for a test (see *King v. Board of Medical Examiners* (1944), *supra*, 65 Cal. App.2d 644, 151 P.2d 282). Although it would appear from the *King* case and from sections 1203 and 1205 that either a drugless practitioner or a technologist may lawfully withdraw blood for such a purpose, we are persuaded that the record here supports the conclusion that the blood transfusions were administered in the course of treatment of disease rather than in the "obtaining [of] scientific data which may be used as an aid to ascertain the presence, progress and source of disease" (§ 1205) and were not within the activities permitted to petitioner by the applicable statutes.

It may further be noted that we have not discovered in the 850-page transcript herein, nor has either party pointed out any testimony, or cited any law (other than the code sections discussed hereinabove), to the effect that a technologist is or is not authorized to or customarily does or does not administer blood transfusions, either independently or under the supervision of a licensed physician or surgeon.

[7] It is urged by the state that, independently of any other acts, unprofessional conduct is established by the evidence showing that petitioner recommended a massage with liniment and, in accordance with the previous instructions of Dr. Couturier, delivered the six aspirin capsules to the patient; countering, on behalf of peti-

tioner, it is argued that no license is needed or is violated by such simple acts. We conclude that since the recommendation of the massage and liniment and the delivery of the aspirin were related to and formed a part of the treatment of the patient in connection with the giving of the blood transfusions, and since the administering of a blood transfusion clearly was beyond the scope of any license held by petitioner and was an unlawful act, it is unnecessary to consider whether the finding of unprofessional conduct would have been supported by the evidence as to the liniment and massage and aspirin standing alone.

Petitioner's final contention is that the penalty of revocation of license is so disproportionate to the offenses held to have been committed by him, as to amount to an abuse of discretion on the part of the board. Section 1094.5 of the Code of Civil Procedure provides, so far as here material, that the court's inquiry into the proceedings before the board "shall extend to the questions whether \* \* \* there was any prejudicial abuse of discretion \* \* \* [which] is established if \* \* \* the order or decision is not supported by the findings \* \* \*."

"(e) The court shall enter judgment either commanding respondent [board] to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent."

[8] The board made a single order of license revocation based on its findings and conclusions that both count seven and count nine had been violated. Inasmuch

9. Those sections read as follows: Section 1240: "This chapter [on Clinical Laboratory Technology] does not authorize any person to practice medicine and surgery or to furnish the services of physicians for the practice of medicine and surgery. This chapter does not repeal or in any manner affect any pro-

vision of this code relating to the practice of medicine."

Section 1288: "It is lawful for any person conducting or operating a clinical laboratory to accept assignments for tests from any person licensed under any provision of law relating to the healing arts."



as we hold that the findings do not support the conclusions of unprofessional conduct as to count seven, and since license revocation is in any event a drastic penalty, and, furthermore, in consideration of the fact that we have no means of knowing whether the board itself would have imposed so severe a penalty for violation of count nine alone, we are of the view that the judgment should be reversed with directions to the trial court to set aside the order and send the matter back to the board for reconsideration of the penalty. (See Bus. & Prof.Code, § 2372;<sup>10</sup> *King v. Board of Medical Examiners* (1944), supra, 65 Cal. App.2d 644, 652, 151 P.2d 282; see also *Fuller v. Board of Medical Examiners* (1936), 14 Cal.App.2d 734, 737, 59 P.2d 171).

The judgment is reversed and the trial court is directed to enter judgment commanding respondent board to set aside its order of revocation and further directing the board to reconsider the case and redetermine its order in the light of this court's opinion and judgment.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concur.

EDMONDS, Justice (concurring and dissenting).

I cannot agree that the decision of the superior court upon the record of the hearing held by the Board of Medical Examiners excused the failure of the administrative body to comply with the statute. Section 11517(a) of the Government Code provides: "Where a contested case is heard before an agency itself, no member thereof who did not hear the evidence shall vote on the decision." In the present case, five members of the board did not "hear the evidence". A majority of the court have held that the word "hear" is not to be given its usual or common meaning, which

is, "To apprehend by means of the ear. \* \* \*" Funk & Wagnalls New Standard Dictionary, p. 1129. As now defined, "to hear" means to have "actual familiarity with the case on the part of the person having the power to decide."

Despite the statement of the majority, such a holding is not in accordance with the purpose of the Judicial Council of California as stated in its Tenth Biennial Report commenting upon its proposed statute which subsequently became section 11517. The recommendation of the council was that the decision of an administrative agency, "in every case", should be made "by someone familiar with the proceedings and before whom an opportunity to argue the case is afforded. \* \* \*" (P. 24.) (Emphasis added.) Certainly the new procedure enacted in 1945 does not sanction a procedure whereby one-half of the board acts as a hearing officer and the other members reach a decision upon a record of the testimony taken by the "hearing group".

Moreover, the constitutional right to be "heard by counsel" has been held to mean the effective right to presentation of the case by counsel addressing auditory faculties of a jury. *Messer v. State*, 120 Fla. 95, 162 So. 146. The word "hearing" is stated to mean "the listening to the arguments of counsel on both sides if oral arguments are made. \* \* \*" *West Chicago Park Commissioners v. Riddle*, 151 Ill.App. 487. To hear does not mean to read.

It cannot be said that the failure of the board to comply with section 11517 of the Government Code did not prejudice the rights of the petitioner. Had the members of the board who were not present at the hearing listened to Dr. Cooper's testimony and the evidence adduced in his behalf, they might have evaluated it quite differently than they did upon reading the record. Section 1094.5 of the Code of Civil Procedure provides that failure of

10. That section reads as follows: "the board shall discipline the holder of any certificate, whose default has been entered or who has been heard by the board and found guilty, by any of the following methods:

"(a) Suspending judgment.

"(b) Placing him upon probation.

"(c) Suspending his right to practice for a period not exceeding one year.

"(d) Revoking his certificate.

"(e) Taking such other action in relation to disciplining him as the board in its discretion may deem proper."

the administrative board to proceed "in the manner required by law" is a ground for commanding the board to set aside its order or decision. Action in excess of jurisdiction, lack of a fair trial, and insufficient evidence to support the findings are separate grounds for setting aside the board's order. The fact that the superior court exercised its "independent judgment on the evidence" does not rectify the board's failure to proceed "in the manner required by law".

It seems clear that the Legislature, in fixing the requirements for a hearing and decision by the Board of Medical Examiners and other administrative agencies enumerated in section 11501 of the Government Code, laid down a more strict rule than it has required in connection with a hearing before the Industrial Accident Commission. Labor Code, sec. 115. The clear statement of section 11517(a) that "no member thereof who did not hear the evidence shall vote on the decision" makes certain that it was the intention of the Legislature to limit participation in a decision of the Board of Medical Examiners accordingly.

For these reasons, I would reverse the judgment and direct the trial court to issue a writ of mandate commanding the respondent board to set aside its order of revocation and to hear and consider, in accordance with the statutory requirements, all evidence pertinent to the issues presented by the charges against Dr. Cooper.

CARTER, Justice.

I dissent.

The majority opinion holds that members of an administrative board may join to make the necessary quorum in deciding a case before it although they were not present at the hearing and thus did not hear the witnesses testify. It is reasoned that such is not necessary for due process if the absent members read the evidence and that the statute does not require it; that "to hear" means only to examine the evidence. I do not question the due process holding, but the statute here by express terms requires the deciding

board members to receive the evidence from the witnesses by their auditory and visual faculties.

It should first be noted that this is *not* a case where a hearing officer made findings and a decision, which were adopted by the board. There was a hearing officer present to conduct the hearing, but the board itself made the decision on its own without any recommendation by the hearing officer. There are several situations presented. (1) If a contested case is heard by the hearing officer *alone*, he may make a decision and the board may adopt it. Gov.Code, sec. 11517(b). That is not this case. (2) If his decision is not adopted the "agency itself may decide the case upon the record." Id., sec. 11517(c), with or without taking additional evidence. That was not done here but it is to be noted that even in such circumstances, where "additional oral evidence is introduced before the agency itself no agency member may vote unless he *heard the additional oral evidence.*" Id., sec. 11517(c). Emphasis added. The third situation is *the one we have here*, and the statute expressly states when the case is heard before the *agency itself*, that is, not before a hearing officer alone, the officer must assist and advise, but he need not make a decision, and in such case "no member \* \* \* who did not *hear* the evidence shall vote on the decision." Id., sec. 11517(a). If he must hear the evidence, it is surely not enough that he merely read it after it has been given. Every definition of "hear" embraces the thought of "to perceive *by the ear.*" Webster's Int. Dict., 2d Ed., p. 1150. Perceiving by the ear is not receiving a communication by the eye. The other provisions of the administrative procedural law are in full accord with that conclusion. When the "word 'agency' *alone* is used the power to act *may be delegated* by the agency and wherever the words 'agency itself' are used the power to act shall *not be delegated* \* \* \*," Id., sec. 11500. (Emphasis added.) In the instant case, words "agency itself" are used. Thus there can be no delegation which in effect there would be if some of the board members could listen to the evidence for

the others. And, keeping in mind the meaning of "agency itself", it is provided: "When the agency itself hears the case the hearing officer shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law; *the agency itself shall exercise all other powers relating to the conduct of the hearing* but may delegate any or all of them to the hearing officer. \* \* \*" Id., sec. 11512(b). (Emphasis added.) Thus, when the power is not delegated to a hearing officer, the board *must* exercise *all* powers in conducting the hearing. Hence it must itself exercise the power of receiving personally the evidence, and it must be a quorum that does that. Here there was no quorum of the same members who were personally present at the hearing and received the evidence. Further, in regard to rehearings: "If oral evidence is introduced before the agency itself, no agency member may vote unless he *heard* the evidence." Id., sec. 11521(b). (Emphasis added.)

It is no answer to suggest, as does the majority opinion, that, inasmuch as petitioner had a hearing in the trial court, he is not injured, for he was entitled to a determination by the board which had initial jurisdiction. If they had seen and heard the witnesses, they might have imposed a lesser penalty than license revocation.

I cannot agree that the giving of the transfusions was a violation of the law. Petitioner had nothing to do with the diagnosis, medical instruction or treatment of the patient. All that was done by a licensed physician and surgeon, who requested that petitioner perform the mere mechanical act involved in a transfusion. Petitioner was only carrying out the *medical* orders of a licensed physician. It will be noted that the statute, Bus. & Prof. Code, secs. 2138, 2394, says that a drugless practitioner may not in *treating* patients penetrate the tissue. As we have seen, petitioner *was not treating the patient*. The licensed physician was doing that. Under these circumstances, the principles enunciated in *Chalmers-Francis v. Nelson*, 6

Cal.2d 402, 57 P.2d 1312, 1313, where a nurse administered the anesthetic to a patient undergoing an operation, are appropriate. The court said:

"The findings, which are amply supported by the testimony in this case, show conclusively that everything which was done by the nurse, Dagmar A. Nelson, in the present instance, and by nurses generally, in the administration of anesthetics, was and is done under the immediate direction and supervision of the operating surgeon and his assistants. Such method seems to be the uniform practice in operating rooms. There was much testimony as to the recognized practice of permitting nurses to administer anesthetics and hypodermics. One of plaintiffs' witnesses testified to what seems to be the established and uniformly accepted practice and procedure followed by surgeons and nurses, and that is that it is not diagnosing nor prescribing by nurses within the meaning of the Medical Practice Act. We are led further to accept this practice and procedure as established when we consider the evidence of the many surgeons who supported the contention of the defendant nurse, and whose qualifications to testify concerning the practice of medicine in this community and elsewhere were established beyond dispute. *That such practice is in accord with the generally accepted rule is borne out by the decided cases.* *Frank v. South*, 175 Ky. 416, 194 S.W. 375, Ann.Cas. 1918E, 682; *Underwood v. Scott*, 43 Kan. 714, 23 P. 942. While these two cases construe provisions of statute law specifically relating to the practices and duties of registered nurses, they are in agreement with the definitely established rule relating to the subject. *Frank v. South*, supra: *In re Carpenter's Estate*, 196 Mich. 561, 162 N.W. 963.

"Aside from the proposition that nurses in the surgery during the preparation for and progress of an operation are *not diagnosing or prescribing* within the meaning of the Medical Practice Act, it is the legally established rule that *they are but carrying out the orders of the physicians to whose authority they are subject.* The



surgeon has the power, and therefore the duty, to direct the nurse and her actions during the operation." (Emphasis added.)

Practicality and common sense must be employed when these statutes are interpreted. Many common practices may be noted which, while technically a violation of the Medical Practice Act, are not so considered. Take, for example, the case of the playground supervisor, or school teacher, who renders first aid to her charges, such as the removal of a splinter which calls for a penetration of tissue; the manicurist who cuts fingernails (tissue); the barber who cuts hair (tissue); the nurse, or even a mere office attendant employed by a doctor who gives hypodermic injections for the prevention of various diseases, or in treatment of different ills, diseases or conditions, where the doctor is not in the same room, or even in the immediate vicinity. While all of the above-mentioned acts are technical violations of the Medical Practice Act, reason and common sense tell us that the Legislature in adopting the Medical Practice Act did not intend that any of these acts should constitute a crime.

It would seem to me that the doctor who gives the orders to a person in the category of appellant is equally guilty, if appellant is guilty, of unprofessional conduct. He, too, must be cognizant of the limitations of the license held by such a drugless practitioner or laboratory technician. Nurses and laboratory technicians are taught to give hypodermics, and the intricacies of giving transfusions, and yet, under the holding of this case, are guilty of unprofessional conduct if they carry out orders of a licensed physician in so doing. It is a physical impossibility for a doctor performing an operation to give a transfusion at the same time to a patient who needs it; it is equally impossible for a doctor to see and give "shots" to every patient who comes to his office for that type of treatment—it is necessary for him to delegate some of his duties to technicians trained to do just that sort of thing. Are we to hold all these trained persons guilty of unprofessional conduct and do nothing about the one who gives

the orders, or, are we likewise to hold the physicians who employ them guilty of unprofessional conduct for aiding and abetting an unlicensed person? These technicians earn their livelihood by carrying out the orders of their superiors in the medical field. But because the majority of this Court considers that appellant was himself treating the patient when he was only doing what he was told to do by one qualified to tell him to do it, he is guilty of unprofessional conduct and may have his license revoked without a hearing that satisfies the most meager requirements of due process of law. I cannot agree that we are required to place such an unreasonable construction upon the provisions of the Medical Practice Act, or that the State Board of Medical Examiners would have done so had they considered the implications which must flow therefrom.

I would, therefore, reverse the judgment with direction to the trial court to grant the writ of mandate prayed for by petitioner.

Rehearing denied; EDMONDS, CARTER, and SPENCE, JJ., dissenting.



Ex parte KIMLER,  
Cr. 5046.

Supreme Court of California, in Bank.  
April 28, 1950.

Rehearing Granted May 25, 1950.\*

Original proceeding in the matter of the application of Charles Walker Kimler for a writ of habeas corpus. The Supreme Court, Carter, J., held that where same issues were involved in habeas corpus proceedings in Missouri, petitioner's discharge by Missouri court was res judicata of issue whether there was any basis for California to imprison the petitioner upon his conviction in California.

Writ of habeas corpus issued, and petitioner discharged.

\* Subsequent opinion 233 P.2d 902.

**1. Judgment ☞956(1)**

In referring to judgment of another jurisdiction, Supreme Court could presume that judgment was based upon claims made in the pleadings, rather than an unmentioned ground.

**2. Extradition ☞29**

In extradition proceedings, a parol violator will be treated as a person charged with a crime.

**3. Habeas corpus ☞117(2)**

Where California designated agent to receive petitioner in extradition proceedings in Missouri, and agent was active and participated in habeas corpus proceedings in Missouri, although he did not have actual custody of petitioner, and agent was named a respondent in habeas corpus proceedings and joined in stipulation of facts and testified at hearing, California was adequately represented in habeas corpus proceedings in Missouri.

**4. Habeas corpus ☞117(2)**

Where petitioner was discharged in Missouri on habeas corpus proceedings, upon finding that circumstances were not sufficient to justify surrender and extradition of petitioner, issue that there was no longer any basis for California to imprison petitioner on his conviction was res judicata, and petitioner in habeas corpus proceeding in California involving same issues would be discharged.

**5. Habeas corpus ☞117(2)**

Discharge upon habeas corpus operates as a bar and estoppel only as to the particular proceeding or process under review, and it is res judicata only upon the same question presented under the same state of facts.

**6. Judgment ☞822(1)**

It is general policy of California to give conclusive effect to judgments of sister states.

**7. Habeas corpus ☞117(2)**

Where issues in habeas corpus proceedings in California were identical to issues in prior proceedings in Missouri, Missouri court applied proper law, and California was adequately represented

therein, California would give conclusive effect to Missouri judgment granting the writ.

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Ernest Spagnoli, San Francisco, at request of petitioner appointed by Supreme Court, and Horace T. Beverly, San Francisco, ordered associated at the request of Mr. Spagnoli, for petitioner.

Fred N. Howser, Attorney General, and Clarence A. Linn, Deputy Attorney General, for respondent.

CARTER, Justice.

In 1936 petitioner was convicted in this state on several counts of extortion and kidnapping for the purpose of extortion and sentenced to three life terms to run concurrently. He served in a prison in this state until November, 1943. When he was convicted here, he was under parole commencing December, 1928, from Illinois, having been convicted of forgery in that state. The Illinois authorities had revoked his Illinois parole and filed a detainer request with the California prison authorities, inasmuch as his Illinois term had not been completely served. In March, 1943, the California authorities decided to parole petitioner, and in November did so, to the custody of Illinois, where he would continue to serve the Illinois term. The condition of the parole was that upon release by Illinois, petitioner would contact the California parole officer and abide by his instructions. Petitioner signed a ticket of leave or consent to parole, but there is a dispute between him and the state as to whether he voluntarily consented to the above mentioned condition. The state does not deny that no detainer of petitioner was filed with the Illinois prison authorities. Petitioner was released by Illinois in 1947, and upon his refusal to submit himself to California parole officers, his parole was revoked. He went to Missouri where, after being taken into custody pursuant to extradition proceedings instituted by California, he was ordered released from custody by a Missouri court in habeas corpus proceedings. (Those proceedings are later discussed herein.) He went to Oregon, then to Washington, from which

state he was finally extradited to California where he is now held to complete his term since he violated his parole.

In connection with the Missouri habeas corpus proceedings, it would appear that the same issues were involved as are now presented, that is, the waiver by California of further jurisdiction over petitioner, rather than, as claimed by the state; the sufficiency of the warrant in the Missouri extradition proceedings.

In the Missouri case, petitioner alleged in his application that he was being held on a warrant for violation of his California parole; that the Governor had issued a warrant for his arrest pursuant to extradition proceedings on the basis that petitioner was a fugitive from justice; that he was not a fugitive from justice for he was convicted and imprisoned in California, then he was granted what was "termed" a parole into the custody of the Illinois authorities and taken by them to Illinois; that no "hold order" was placed by California with the Illinois authorities; that when California "attempted to parole him into the custody of the Illinois authorities, that this act upon their part operated as a complete pardon for the crime he was sentenced for in California and served 7 years thereof, and that they have no right or authority under the law or under the Constitution of the United States to extradite him as a fugitive from justice; that he has committed no crime since his release from the California State Penitentiary or the Illinois State Penitentiary, and is living the life of a clean, honest citizen, and for the State of California to be permitted to bring him back there and serve in the Penitentiary for the rest of his natural life would be cruel and inhuman punishment after once having pardoned him for his offense." No contention was made that the request or warrant in the extradition proceedings was insufficient.

The return to the application for the writ rested on the extradition papers and that Kimler was a fugitive from justice.

The stipulated facts joined in by the extradition agent for California set forth

the events heretofore mentioned including the parole papers. They show that Kimler was convicted and imprisoned in California; that he signed the parole ticket of leave to Illinois; that thereafter he "was taken by officers and agents of \* \* \* Illinois who handcuffed him and took him from the California State Prison at Folsom, with the consent and acquiescence of the parole authorities of California and returned him to \* \* \* Illinois where he was again incarcerated in the Illinois State Penitentiary at Joliet until about the 9th day of July, 1947, when he had completed his sentence and was then discharged by the State of Illinois"; that he refused to submit to the parole officers in Missouri or accept a California parole.

[1,2] At the hearing it was shown that Kimler had already been convicted of the crime in California, rather than being merely charged with it; that a detainer notice had been filed by Illinois with the California prison authorities and no parole could be granted when such was the case. The judge questioned the California agent in regard to whether Kimler was only charged or had already been convicted, asking:

"So he has already been tried and there has been a judgment on him, and the parole was based on that? From this Warrant it would appear there was a new charge against him \* \* \* I suppose there is not any question but that this is not a new requisition on a new complaint, but a requisition on this old matter?"

"Mr. Brennan (California agent): That is right.

"Mr. Hough: That is agreed, your Honor. There is nothing pending against him in the State of California, except that which has already been adjudicated.

"The Court: The Court orders the discharge of the petitioner from custody."

The plain inference is that the judge wanted to make clear that there was not a charge against Kimler other than the one of which he was convicted, thus indicating that he felt Kimler's claim that California had waived any further claim over him under the conviction was well taken, and, as there was no new charge, the pris-



oner should be discharged for he was not a fugitive from justice. This is further evinced by the judge's judgment of discharge where he stated: "The Court finds that the *facts and circumstances* are not sufficient to justify the surrender and extradition of the petitioner to the State of California and no sufficient *cause for the detention* of the said petitioner appearing, it is ordered by the Court that the Writ of Habeas Corpus be sustained and made permanent, and that the petitioner, Charles Walker Kimler be, by Arthur Mosely, Sheriff of St. Louis County and Joseph B. Brennan, Agent of the State of California, discharged from imprisonment and detention for the cause aforesaid." [Emphasis added.] The "facts and circumstances" referred to in the judgment indicate more the delivery of Kimler to Illinois without any detainer than some defect in the extradition warrant, and the judgment presumably is responsive to the claim made in the application. We may presume that the judgment was based upon the claims made in the pleadings rather than an unmentioned ground. See, *Woolverton v. Baker*, 98 Cal. 628, 33 P. 731. Moreover, in considering the queries by the judge concerning whether the extradition was based on an old or new charge, it has long been the practice to treat a parole violator as a person charged with a crime in extradition proceedings. See, *In re McBride*, 101 Cal.App. 251, 281 P. 651; cases cited 78 A.L.R. 424; 22 Am.Jur., Extradition, sec. 25.

Thus we have presented and decided in favor of Kimler in the Missouri proceedings the question of whether the delivery of Kimler to the Illinois authorities by California under the circumstances established that California had relinquished any further claim over Kimler even though he signed the ticket of leave. See similar question considered: *In re Marzec*, 25 Cal.2d 794, 154 P.2d 873; *In re Whittington*, 34 Cal.App. 344, 167 P. 404; and *People ex rel. Barrett v. Bartley*, 383 Ill. 437 50 N.E.2d 517.

[3] The agent designated by California to receive Kimler in the Missouri extradition proceedings was active and par-

ticipated in the habeas corpus matter. Although he did not have actual custody of Kimler (he was being held by a Missouri sheriff), he was named a respondent therein. He joined in the stipulation of facts and testified at the hearing. Under these circumstances, California was adequately represented in the habeas corpus cause.

[4,5] The discharge of Kimler in Missouri must be treated as *res judicata* on the issue above mentioned, that is, that there is no longer any basis for California to imprison Kimler arising from his conviction here, and therefore he is entitled to a discharge in this proceeding. The general policy of treating a discharge in habeas corpus as final has been established. "No person who has been discharged by the order of the court or judge upon habeas corpus can be again imprisoned, restrained, or kept in custody for the same cause, except in the following cases; 1. If he has been discharged from custody on a criminal charge, and is afterwards committed for the same offense, by legal order or process; 2. If, after a discharge for defect of proof, or for any defect of the process, warrant, or commitment in a criminal case, the prisoner is again arrested on sufficient proof and committed by legal process for the same offense." Penal Code, sec. 1496. "Every person who either solely or as a member of a court knowingly and unlawfully recommits, imprisons, or restrains of his liberty, for the same cause, any person who has been discharged upon a writ of habeas corpus, is guilty of a misdemeanor." Penal Code, sec. 363. This court has said on the subject: "A judgment of discharge upon habeas corpus may or may not be *res adjudicata*, but this will depend wholly upon the questions necessarily determined in the decision upon the writ. The rights of prisoners under the writ of habeas corpus were first crystallized in the English Habeas Corpus Act of 31 Car. II, C. 2. By section 6 of that act for the prevention of unjust vexation by reiterated commitments for the same offense it was enacted 'that no person or persons which shall be delivered or set at large upon any habeas corpus, shall at any time hereafter be again

imprisoned or committed for the same offense by any person or persons whatsoever, other than by the legal order and process of such court wherein he or they shall be bound by recognizance to appear, or other court having jurisdiction of the cause.' In this there was not only no recognition of the principle here contended for by petitioner, but there was a distinct recognition of the contrary, in that it is declared merely that he cannot be again imprisoned for the same offense 'other than by the legal order and process of such court,' etc. And in the Attorney-General (etc.) v. Kwok-Ah-Sing, L.R. 5 P.C. 179, where a Chinese coolie was discharged the second time upon habeas corpus, solely upon the ground that he had been committed a second time for the same offense, contrary to the sixth section of 31 Car. II, C. 2, the privy council, speaking by Lord Justice Mellish, said they could not agree with the construction which the chief justice put upon this section of the statute: 'The principal object of the section seems to have been to prevent persons who had been brought upon a writ of habeas corpus, and discharged on giving bail and entering into their own recognizance, from being again arrested for the same offense and obliged to sue out a second writ. This appears from the provision by which the person discharged may be again arrested by the order of the court, wherein he shall be bound by recognizance to appear \* \* \* Though I think, however, it (section 6) can only apply when the second arrest is substantially the same cause as the first, so that the return to the second writ of habeas corpus raised for the opinion of the court the same question with reference to the validity of the grounds of detention as the first.' This is but another way of stating the proposition that the discharge upon habeas corpus operates as a bar and estoppel only as to the particular proceeding or process under review, and it is *res adjudicata* only upon the same question presented under the same state of facts. Thus it has been held that a discharge upon habeas corpus for failure of proof does not bar further prosecution upon another indictment. In

Re Crandall, 59 Kan. 671, 54 Pac. 686, it is accordingly held that, where a court discharges a petitioner because no offense was alleged for which he could be prosecuted, its order not only restores him to liberty, but terminates pending proceedings against him, and he cannot be again arrested or held in custody unless a new prosecution is instituted against him. So, in *State v. Holm*, 37 Minn. 405, 34 N.W. 748, it was held that a discharge upon habeas corpus for defect of proof merely terminates the particular proceeding, so that the party cannot be further prosecuted except by a new proceeding instituted upon sufficient evidence. And in the case of *In re White*, (C.C.), 45 F. 237, it is said: 'To support the plea of *res adjudicata*, the burden was upon the relator to show that some issue had been heard and determined in his favor in the prior (habeas corpus) proceeding, of such nature as to constitute an estoppel upon a reinvestigation of the same question. \* \* \* In the absence of evidence, either upon the face of the record or from extrinsic sources, showing the prior discharge from arrest granted the relator was based upon a hearing and determination of some material issue, like that of identity, it cannot be held that anything is shown creating an estoppel against the proceeding now pending for the arrest and removal for trial of the relator.'" In *re Begerow*, 136 Cal. 293, 297, 68 P. 773, 775, 56 L.R.A. 528. A similar view has been expressed in other jurisdictions, including Missouri. See, *Ex parte Messina*, 233 Mo.App. 1234, 128 S.W.2d 1082; *United States v. Chung Shee*, 9 Cir., 76 F. 951; *In re Crandall*, 59 Kan. 671, 54 P. 686; 25 Am.Jur., Habeas Corpus, sec. 157; 2 Freeman on Judgments, sec. 827, p. 1761, et seq. For illustration, in *Ex parte Messina*, supra, the Missouri court was concerned with a prisoner who was held pursuant to extradition proceedings by the Missouri police on warrant of the Governor of that state at the request of the Governor of Kansas. The Kansas agent appeared. The prisoner sought habeas corpus and pleaded a release on a writ obtained eight years previous on similar extradition proceedings where it was found the

prisoner was not a fugitive from justice for he had not been in Kansas at the time of the crime. His plea was upheld, no new facts appearing.

We conclude, therefore, that a discharge in habeas corpus under the circumstances here presented, if made either in California or Missouri, would be *res judicata* in another proceeding in the same state.

[6] It is the general policy of this state to give conclusive effect to the judgments of sister states. "The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced here by an action or special proceeding \* \* \*." Code of Civ.Proc., sec. 1913. See, *Biewend v. Biewend*, 17 Cal.2d 108, 109 P.2d 701, 132 A.L.R. 1264; *Gilmer v. Spitalny*, 84 Cal.App.2d 39, 189 P.2d 744. And the writ of habeas corpus is the writ of freedom and where there has been a discharge thereunder, the prisoner should not be further harassed under the same set of circumstances. The state of California actively participated in the Missouri court proceedings and we assume that court applied California law in arriving at its conclusion. There is, therefore, no reason why the Missouri judgment should not be given binding effect.

There are cases which have said that a discharge through habeas corpus in another state will not be given effect in the state where the accused is charged with a crime. See, *In re Silverman*, 69 Ohio App. 128, 42 N.E.2d 87; *State ex rel. Shapiro v. Wall*, 187 Minn. 246, 244 N.W. 811, 85 A.L.R. 114; *Letwick v. State*, 211 Ark. 1, 198 S.W.2d 830. In the *Silverman* and *Letwick* cases, the question of waiver of further right to punish the prisoner was not involved. The issue in the asylum state habeas corpus proceedings was whether under the conditions *then* existing the prisoner was lawfully in custody. They did not concern a situation such as we have here where the conditions and issues are identical. Nor were the same issues presented in the *Wall* case where the court relied on the premise that the discharge would not be *res judicata* in the asylum

state. As we have seen, it would be *res judicata* in Missouri, the asylum state here, as well as in California, the demanding state.

[7] Similar comments are applicable to the general rule that a discharge on habeas corpus from custody grounded on extradition proceedings does not bar subsequent arrest, for in those cases the release is bottomed on some defect in the extradition proceedings such as the warrant or otherwise, and naturally when those defects are corrected, the second habeas corpus proceedings involve new issues and different facts. Whatever may be the usual rule, we see no valid reason for not giving conclusive effect to the Missouri judgment here where the issues are identical, the proper law was applied, and this state was adequately represented.

Petitioner has made application for the appointment of a referee to receive evidence in support of his application for a writ of habeas corpus, but in view of the conclusion we have reached herein, there is no necessity for the appointment of a referee and petitioner's application is therefore denied.

Upon the filing of petitioner's application herein for a writ of habeas corpus, we issued an order to show cause why said writ should not issue, a return was filed thereto and a hearing had. It is now ordered that a writ of habeas corpus issue forthwith, that the return filed to the order to show cause be considered as the return to said writ, and that the petitioner be discharged.

GIBSON, C. J., and SHENK, TRAYNOR and SCHAUER, JJ., concur.

EDMONDS, Justice (concurring).

I concur in the judgment, but not upon the ground that the Missouri judgment is *res judicata*. Under fundamental principles, certain findings in the Missouri action are *res judicata*, although a foreign judgment rendered upon a petition for a prerogative writ, in and of itself, does not have that finality.



In considering the effect to be given to a foreign judgment, the first question for determination concerns the jurisdiction of the court to render it. *Loranger v. Nadeau*, 215 Cal. 362, 10 P.2d 63, 84 A.L.R. 1264; *Inga v. Blum*, 134 Cal.App. 398, 25 P.2d 473; Rest., Conflict of Laws, sec. 74, p. 110. Kimler was freed in Missouri in a habeas corpus proceeding by a court generally competent to decide the matter. It had jurisdiction over him as he was present in that state. *Britton v. Bryson*, 216 Cal. 362, 14 P.2d 502; Rest., Conflict of Laws, sec. 78, p. 116. The court also had jurisdiction over the agent representing California authorities, since he was present and actively participated in the prosecution of the case, upon the merits. *Harrington v. Superior Court*, 194 Cal. 185, 228 P. 15, Rest., Conflict of Laws, sec. 81, p. 121; See Rest., Conflict of Laws, sec. 82, p. 125. The record shows that in addition to these fundamental jurisdictional requirements the judgment was rendered by an impartial tribunal after a reasonable notice and an opportunity to be heard was afforded the parties, see Calif. C.C.P. sec. 1915; Rest., Conflict of Laws, sec. 429, p. 508, and the matter was decided upon the merits. *Estate of Hancock*, 156 Cal. 804, 106 P. 58, 134 Am.St.Rep. 177; Rest., Conflict of Laws, sec. 432, p. 515.

California courts will give the same effect to a judicial record of a sister state as it is entitled to in the state where it was made, but it can be enforced here only by an action or special proceeding. Calif. C.C.P. sec. 1913; *Brown v. Campbell*, 100 Cal. 635, 35 P. 433, 38 Am.St.Rep. 314; Rest., Conflict of Laws, sec. 434 et seq., pp. 517 et seq. However, the general rule as to a foreign judgment rendered upon a petition for a prerogative writ is somewhat different. Rest., Conflict of Laws, sec. 448, p. 529. By statute such a judgment rendered in this state is final, Penal Code, secs. 363, 1496, excepting under certain circumstances. However, in the Restatement, Conflict of Laws, sec. 448, *supra*, a different rule is laid down governing the effect to be given to the judgment rendered by a sister state in a habeas corpus proceeding. Although the Restate-

ment declares that "A judgment rendered upon a petition for a prerogative writ will not be enforced in another state by an action on the judgment", it adds (Comment: a.) that an "\* \* \* action might be brought on a foreign judgment rendered in a habeas corpus proceedings; but in that case the second state would insist upon exercising discretion on the facts in its own way, without regard to the action of the first state, and would not enforce the foreign judgment as such, *though it would give effect to the findings of fact which had become res judicata.*" [Italics added.] The theory behind the conflict of laws rule that a judgment in a habeas corpus proceeding will not be enforced, as such, seems to be that "\* \* \* they have to do with official action, with which another state will not concern itself \* \* \*." Rest., Conflict of Laws, sec. 448, p. 529, Comment: a.

Apparently, up to this time, the exact question presented by Kimler has not come before the courts of this state. California Annotations to the Rest., Conflict of Laws, sec. 448, p. 154. However, in the light of California's domestic policy as expressed in the cited Code sections, there is no good reason why the rule of the Restatement should not be followed.

Applying that rule to the facts shown by the record in the present case, the Missouri judgment in and of itself is not *res judicata*. However, the implied findings of fact inherent in that judgment are binding upon this court. A court of competent jurisdiction in Missouri decided two basic questions of fact which are identical with those here presented by the same parties. Implicit in the decision are findings that California has waived its jurisdiction over Kimler and he was not a fugitive. To reach these two determinations, the affirmative allegations of Kimler in that proceeding must have been resolved in his favor. These necessarily included matters dealing with the conditions of parole, if any, the lack of a "hold order" placed by California with the Illinois authorities, and other details concerning Kimler's release from imprisonment in this state.

Accepting these implied findings of fact as *res judicata*, under sections 363 and 1496 of the Penal Code declaring this state's general policy in regard to a judgment in a habeas corpus proceeding, Kimler is entitled to be discharged from custody. The same conclusion would be required if this were not a judgment upon a petition for a prerogative writ. In that event, the law of the sister forum would determine the effect to be given to its own judgment. C.C.P. § 1913; Rest., Conflict of Laws, sec. 450, p. 533. Applying that law to the facts here shown, the judgment in Kimler's favor is *res judicata* in Missouri, Ex Parte Messina, 233 Mo.App. 1234, 128 S.W.2d 1082, and would compel the same decision in the present proceeding.

SPENCE, J., concurs.



35 Cal.2d 263

VERIDDO et al. v. RENAUD et al.

Sac. 6098.

Supreme Court of California, in Bank.

April 28, 1950.

Action by A. Veriddo and Santina Gallo against Harold R. Renaud and others, for personal injuries sustained in an automobile collision. The Superior Court of Sonoma County, Hilliard Comstock, J., entered judgment for defendants, and plaintiffs appealed. The Supreme Court, Schauer, J., held that filing of claims by plaintiff with defendant, who was a state officer, or the Governor, was a prerequisite to bringing the action.

Judgment affirmed.

Prior opinion 211 P.2d 894.

#### I. States ⇐197

Statute requiring filing of claims for injuries or property damage resulting from

1. That section reads as follows: "Whenever it is claimed that any person has been injured or any property damaged as a result of the negligence or carelessness

negligence of public officer or employee with the officer or employee and the clerk or secretary of the legislative body of public agency is a valid requirement to maintenance of an action against a state officer. Government Code, §§ 1953, 1953.5, 1954, 1955, 1956, 1981, 2000, 2001, and (b) (1), 2002, 1950-2002; Const. art. 1, § 21, art. 4, § 25, subd. 32.

#### 2. States ⇐197

Failure of plaintiffs to file claims with state officer or Governor precluded maintenance of suit against state officer for personal injuries sustained in collision between automobile in which plaintiffs went riding and a state automobile, operated by officer with state's permission, while acting within scope and course of his employment, although plaintiffs sought to hold state officer liable personally. Government Code, §§ 1950-2002.

DeMeo & DeMeo, Santa Rosa, Charles N. Douglas, M. K. Taylor, San Francisco, and J. N. DeMeo, Santa Rosa, for appellants.

Geary & Tauzer and Winfield Achor, Santa Rosa, for respondents.

SCHAUER, Justice.

Plaintiffs seek damages because of a collision on November 8, 1945, between an automobile driven by plaintiff Veriddo and one operated by defendant. The accident assertedly was caused by defendant's negligence. The complaint as amended alleges that at the time of the collision defendant was an employe of the State of California and that the automobile he was driving was owned by and being driven with the consent of the state, within the scope and course of defendant's employment. Defendant demurred on the ground that the complaint, as amended, did not state a cause of action in that it failed to allege compliance with the claim provisions of section 1981<sup>1</sup> of the Government Code. The demurrer

of any public officer or employee occurring during the course of his service or employment or as a result of the dangerous or defective condition of any

was sustained without leave to amend, and plaintiffs appeal from the judgment in defendant's favor which was thereafter entered. We conclude that the trial court correctly held the claim statute to be applicable, and the judgment must be affirmed.

Division 4 of Title 1 of the Government Code deals with "Public Officers and Employees" and Chapter 6 of Division 4 treats of the "Liability of Officers and Employees." Study of the sections (1950-2002) which make up Chapter 6, and of the prior statutes upon which such sections are based, clearly indicates the intention of the Legislature to (1) define certain conditions of, and to prescribe procedural requirements for enforcing, the liability of public officers and employees for acts performed or damages arising in connection with performance of the duties of their office or employment (see §§ 1953, 1953.5, 1954, 1955, 1981); (2) permit the public agencies involved (the state, school districts, counties and municipalities) to provide liability insurance to officers and employees at agency expense (§ 1956); (3) specifically, to require the filing of a claim with the public officer or employee and with the public agency (in the case of a state employee the filing is to be with the employee and with the Governor) in the cases specified in section 1981, quoted hereinabove; and (4) provide for the defense at public expense of certain damage actions brought against specified public officers and employees (§§ 2000, 2001, 2002), including this action against the state employee who is defendant here (sub. (b) (1) of § 2001).

Plaintiffs do not allege filing of a claim with either the defendant state employee or with the Governor and they frankly state in their petition for a hearing by this court that no claim was filed. They contend that the claim provisions of section 1981 "provide certain safeguards for the protection of the government agency," and urge that a claim is not necessary where it is sought to

hold the employee on his personal liability. However, as specifically held in *Ansell v. City of San Diego* (1950), Cal.Sup., 216 P.2d 455, and cases there cited, the claim provisions of section 1981 do not apply to claims against the public agency, but only to those against public employees and officers themselves.

In *Huffaker v. Decker* (1946), 77 Cal. App.2d 383, 175 P.2d 254, defendant was sued for damages allegedly caused by his negligent driving of an automobile owned by the city of Redding, and driven within the scope of defendant's employment by the city. It was squarely held that failure of plaintiff to allege compliance with the claim provisions of section 1981 was fatal to his cause of action against the allegedly negligent driver, and judgment entered upon the sustaining of a demurrer without leave to amend was affirmed. Plaintiffs urge that neither the reasoning of the *Huffaker* case nor the authorities upon which it relies are sound. We are satisfied, however, that the *Huffaker* decision is sound law and is consistent with the settled case law as well as with the language of the statute involved.

As already pointed out, section 1981 falls within a chapter of the Government Code dealing with the liability of officers and employees, and if compliance with its provisions is not a prerequisite to suit against such persons on account of the claims specified in that section, then the section appears to be wholly meaningless, since it is not applicable to claims against a public agency. Such a viewpoint does not overlook the common law liability of an employee as an individual for his own negligence (see *Mock v. City of Santa Rosa* (1899), 126 Cal. 330, 344, 58 P. 826; *Payne v. Baehr* (1908), 153 Cal. 441, 444, 95 P. 895; *Moore v. Burton* (1925), 75 Cal.App. 395, 401, 242 P. 902), but simply recognizes that the Legislature has extended to public officers and employees, who incur liability in the

public property, alleged to be due to the negligence or carelessness of any officer or employee, within 90 days after the accident has occurred a verified claim for damages shall be presented in writing and filed with the officer or employee and

the clerk or secretary of the legislative body of the school district, county, or municipality, as the case may be. In the case of a State officer the claim shall be filed with the officer and the Governor."



performance of government service, the protection of a claims statute and the privilege of having defended at public expense those damage suits which are enumerated in Chapter 6. The Huffaker case treats of this point and also disposes of plaintiffs' argument based on section 21 of article I and subsection 32 of section 25 of article IV of the California Constitution that the claims statute constitutes an unconstitutional classification (see pp. 387-389 of 77 Cal. App.2d, pages 256, 257 of 175 P.2d). As stated 77 Cal.App.2d at page 389, 175 P.2d at page 257, "It should be noted that the statute does not deprive the injured person of his cause of action against the employee. That remains as it was before the statute was enacted. He is not denied due process. (*Young v. County of Ventura*, 39 Cal.App.2d 732, 104 P.2d 102. The statute merely places upon him a reasonable procedural requirement to the maintenance of his action. \* \* \* [p]laintiff claimed that section 1980 is unconstitutional as special legislation in so far as it requires the filing of such claims for damages as a prerequisite to suit against an officer or employee. \* \* \* The principles under which the state may provide procedure applicable alone to public employees and officers for the collection of judgments against them are equally applicable here. (*Ruperich v. Baehr*, 142 Cal. 190, 75 P. 782; *Lawson v. Lawson*, 158 Cal. 446, 111 P. 354)."

Plaintiffs further urge that *Von Arx v. City of Burlingame* (1936), 16 Cal.App.2d 29, 60 P.2d 305, and *Johnson v. County of Fresno* (1944), 64 Cal.App.2d 576, 149 P.2d 38, cited in the Huffaker case, do not support the holding of that case. Those cases are not cited as direct support, however, but are accurately analyzed and discussed therein. (See page 387 of 77 Cal.App.2d page 256 of 175 P.2d.)

Further support for the Huffaker case holding and for our conclusion here is found in *Artukovich v. Astendorf* (1942), 21 Cal.2d 329, 332-333, 131 P.2d 831, in which it was held that although the li-

ability of a county (the County of Los Angeles, respondent on appeal) for the negligent driving of a truck by one of its employees is established by section 400 of the Vehicle Code, nevertheless the claim provisions of former section 4075<sup>2</sup> of the Political Code to the effect that "All claims against any county \* \* \* shall be presented to the board of supervisors as herein provided before any suit may be brought on any such claim, and no suit shall be brought on any such claim until said claim has been presented as herein provided," applied. Judgment of dismissal following the sustaining of demurrers to the complaint as amended, on the ground that no claim had been presented, was affirmed.

*Powers Farms v. Consolidated Irr. Dist.* (1941), 19 Cal.2d 123, 129, 131, 119 P.2d 717, also is consistent with defendant's position that he is entitled to the protection of the claim statutes. In the Powers case this court, in considering the claim provisions of the Irrigation District Liability Law (Stats. 1935, p. 2250; *Deering's Gen. Laws, Act 3886*, § 2<sup>3</sup>), held, (19 Cal.2d at page 129, 119 P.2d at page 721), that "the procedural requirement for the filing of a verified claim \* \* \* is incident to and within the general subject of the liability of the district, its officers and employees, in that it provides a method of procedure by which such liability may be established." That case further holds, (19 Cal.2d at page 131, 119 P.2d at page 722) that the liability law under discussion was not unconstitutional as special or class legislation. (See also *Yonker v. City of San Gabriel* (1937), 23 Cal.App.2d 556, 73 P.2d 623.)

[1, 2] We find no valid constitutional basis for holding the statute to be either void or inapplicable to this case. The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the judgment of affirmance, but in doing so, I do not wish to be under-

2. Now found in the Government Code, see §§ 29700-29721.

217 P.2d—41½

Cal.Rep. 217-218 P.2d—19

3. Now found in sections 22725-22732 of the Water Code.

stood as giving my approval to the decisions of this Court in *Artukovich v. Astendorf*, 21 Cal.2d 329, 131 P.2d 831, and *Powers Farms v. Consolidated Irr. Dist.*, 19 Cal.2d 123, 119 P.2d 717, cited in the majority opinion. I filed a dissenting opinion in both of the last mentioned cases, which, in my opinion, correctly stated the law applicable thereto. I do not consider either of these cases authority for the position taken by the majority in the case at bar, and my concurrence in the result reached in the majority opinion in this case is based solely upon my interpretation of the statute here involved (Gov. Code, section 1981) which compels the conclusion here reached.



35 Cal.2d 287

**QUADER-KINO A. G. v. NEBENZAL et al.**  
L. A. 20897.

Supreme Court of California, in Bank.  
May 2, 1950.

*Quader-Kino A. G.*, a corporation, brought suit against *Seymour Nebenzal*, also known as *Seymour Nebenzahl*, and *Nero Films, Inc.*, also known as *Nero Films Company*, to enjoin defendants from interfering with the exhibition by plaintiff of a moving picture in the French language and to restrain prosecution of French suit against plaintiff by defendants. The Superior Court of Los Angeles County, *Clarence L. Kincaid, J.*, rendered a judgment for the defendants, and the plaintiff appealed. The Supreme Court, *Schauer, J.*, held that under the evidence and under contracts the plaintiff no longer had right to use the picture anywhere in the world.

Affirmed.

Traynor, J., dissented.

Prior opinion 208 P.2d 422.

**1. Appeal and error** ⇨931(1)

On appeal by plaintiff from a judgment for defendants, evidence was required to be viewed by Supreme Court in light most favorable to defendants.

**2. Literary property** ⇨6

Where French talking picture based on novel which was 95 per cent history and 5 per cent original was produced under license from novelist which would expire on October 8, 1945, and owner-licensee sold rights in and to such picture not based on original part of such novel and reserved right to exploit original French version in such language, and gave buyer option to purchase any rights based on the novel and owned by owner-licensee if exercised by July 8, 1945, in which event owner-licensee would endeavor to procure extension of license at buyer's expense, and option provided that "under all circumstances" owner-licensee should be entitled to use "rights dealt with herein" for its own purposes in conformity with such reservations, court properly held, under the evidence, that purchase of novelist's rights by buyer after expiration of such license was valid and that owner-licensee was not thereafter entitled to use such French talking picture.

**3. Appeal and error** ⇨1010(1)

Where evidence supported decision of Superior Court, Supreme Court on appeal would adhere to the interpretation placed by the Superior Court on the writings and conduct of the parties.

**4. Appeal and error** ⇨1071(1)

Where evidence sustained finding of trial court that plaintiff failed to establish fraud or injustice, and plaintiff conceded that the doctrine of alter ego arises only to prevent fraud or injustice, alleged erroneous finding by the trial court that defendant corporation was not the alter ego of the individual defendant was not prejudicial as to plaintiff.

**5. Judgment** ⇨251(1)

Where plaintiff in suit to enjoin interference by defendants with exhibition of moving picture in the French language alleged that it was the owner of the world rights to the picture, and the defendants denied such allegation, trial court correctly defined the rights of the parties by statement in judgment that ever since certain date plaintiff had no right to distribute, ex-

plot, or exhibit the picture anywhere in the world.

Herzbrun & Chantry and David Mellinkoff, Beverly Hills, for appellant.

Fred Horowitz, Los Angeles, for respondents.

SCHAUER, Justice.

In 1946 defendants began suit in a French court to prevent plaintiff from further exhibiting the French language motion picture "Mayerling." Plaintiff thereupon instituted this suit for an injunction against interference with exhibition of the picture and against prosecution of the French suit, and for damages; and from an adverse judgment has taken this appeal. We have concluded that the decision of the trial court (sitting without a jury) that plaintiff's right to exhibit the picture expired in October, 1945, and that plaintiff is entitled to no recovery in this suit, must be upheld.

[1] Resolution of the controversy turns upon the interpretation, with the aid of parol evidence, of two written contracts entered into between the parties hereto in 1944. In the discussion which follows the evidence is viewed in the light most favorable to defendants (respondents), as is required on appeal.

Plaintiff is a corporation formed under the laws of Switzerland. Defendants are Seymour Nebenzal and Nero Films, Inc., a California corporation of which Nebenzal is a stockholder, a director, and the president; unless otherwise indicated, however, the designation "defendant" will hereinafter refer to Nebenzal only. Also, unless otherwise stated "Mayerling" will refer to the French language picture involved in this litigation.

Nebenzal has been in the motion picture business in Germany, France and the United States for some twenty-five years. In 1935 he produced Mayerling in France for the Concordia Company, the stock of which was owned by Nebenzal, Emile Natan, and Chiel Weissman. The picture in the French language stars Charles Boyer

Danielle Darrieux, and is "the story of Crown Prince Rudolph of Austria who in 1889 committed suicide." It is based approximately 95% upon historical matter in the public domain and upon "certain features original to the script expressly written for the picture," and 5% upon original material (hereinafter termed the "Anet material") taken from a novel also entitled Mayerling, authored by the late Claude Anet. The Anet material was used pursuant to a five-year license (hereinafter termed the "Anet rights"), due to expire in October, 1940, purchased from the author or his heirs. The picture was released in 1935 or 1936.

Thereafter Nebenzal disposed of his interest in the Concordia company, the company was liquidated, and plaintiff became the owner of Mayerling. In 1940 Natan secured an extension of the Anet rights for a five-year period expiring October 8, 1945;—lacking those rights the picture could not be shown unless Anet material was eliminated. In 1942 Natan transferred his Anet rights to plaintiff.

In 1943 Nebenzal, then in America, inquired by mail of William M. Gruess, who was plaintiff's attorney-in-fact in New York, concerning possible acquisition of remake rights of Mayerling. After extended correspondence Gruess wrote Nebenzal in January, 1944, that he was authorized to sell the English language remake rights for \$20,000, that the Anet rights were extended to October, 1945, and that plaintiff would agree to do its best to secure a further extension at Nebenzal's expense. In March, 1944, Gruess wrote Nebenzal that (because of the war) it was impossible to cable plaintiff in Switzerland or to have plaintiff contact the Anet heirs, as the territory was then occupied by the enemy. Because of the uncertainty as to "when France would be liberated" and contact established with the Anet heirs Nebenzal informed Gruess that he wished to "separate myself from" the Anet rights and would eliminate Anet material from the intended remake of Mayerling, thereby freeing himself from the necessity of securing an extension of the Anet rights in order to show the picture after October,



1945, and that the new picture would be based solely on historical material and on material original to the script of the French Mayerling.

Thereafter by two contracts<sup>1</sup> (hereinafter termed the "main contract" and the "option agreement") dated July 25, 1944, but not delivered or effective until September, 1944, when the cash price of \$20,000 was paid, plaintiff (acting through Gruess) sold to Nebenzal all of plaintiff's rights to Mayerling, including remake rights in English, but excepting the Anet material and excepting plaintiff's right to exploit the French Mayerling; and also granted Nebenzal an option to purchase prior to July 8,

1945, plaintiff's Anet rights, and agreed to assist Nebenzal in obtaining at his own expense an extension of the Anet rights beyond their expiration date of October 8, 1945. These are the two contracts differing interpretations of which give rise to this litigation.

Nebenzal, who was not then seeking the Anet rights, did not request the option agreement and when it was presented to him personally by Gruess in New York on July 26 or 27, 1944, he pointed out to Gruess that "I was not interested, for very good reasons, that is why I had them [Anet rights] eliminated from the main contract, in which he was willing to give them to me,

1. The contracts, so far as here material, provide as follows: *Main Contract*:

"\* \* \* Whereas, the Purchaser [Nebenzal] does not desire to use the features peculiar to the Claude Anet novel but base the story on the new production on historical facts, on features original with the script of the Motion Picture \* \* \* and on such new features as he may deem fit to introduce \* \* \*

"*First*: For Value received the Owner [plaintiff] hereby sells, assigns, quitclaims and grants to the Purchaser all the Owner's rights in and to the Motion Picture to the extent that it owns those rights itself, including the right to make and produce a motion picture in English based thereon, as well as the right to use the title 'Mayerling' \* \* \* but excluding those rights expressly excepted and/or reserved herein, Provided, however, that the right to use the novel by Claude Anet or the name of the author thereof is not being transferred. But nothing herein contained shall be deemed to prevent the Purchaser from using any material in said novel which may be in public domain and/or historical in source \* \* \*.

"*Third*: [Nebenzal agreed not to exploit the new motion picture in ten Central European countries until three years after the cessation of hostilities therein.] \* \* \*

"*Fifth*: The unqualified right of the Owner to exploit the original French version in the original French language under the title 'Mayerling' is hereby expressly reserved \* \* \*.

"*Eleventh*: It is agreed that all questions arising on a disagreement, including all questions relating to the construction, performance and enforcement there-

of, shall be determined in accordance with the laws of the State of New York \* \* \*

#### Option Agreement:

The option agreement recites execution of the main contract, and then provides that in consideration of one dollar it is agreed that:

"*First*: In case the Purchaser should in the future, for any reason whatever, desire to acquire the rights based on the Claude Anet novel, the Owner grants to the Purchaser the option to acquire those rights to the extent the Owner owns them itself and for the time the Owner owns those rights \* \* \* for the price of One Hundred \* \* \* Dollars,

"Provided, the Purchaser exercises the option \* \* \* within three (3) months after the Armistice concluding the present war in Europe, however, at the latest by July 8, 1945.

"*Second*: In the event the Purchaser should exercise the option, the Owner also agrees, upon express request to be made by the Purchaser, to try to the best of the Owner's abilities to obtain an extension of the Claude Anet rights which \* \* \* expire on October 8, 1945, for another five (5) years, provided that the Purchaser \* \* \* furnishes the consideration to be paid the heirs of Claude Anet for that extension \* \* \*.

"*Third*: Under all circumstances, and without having to make any contribution to the price to be paid to the heirs \* \* \* for the extension \* \* \* the Owner shall be entitled to the use and exploitation of the rights dealt with herein for its own purposes in accordance with the reservations made in the agreement signed simultaneously \* \* \*."

and I said I didn't want them. And he said '\* \* \* it doesn't cost you anything, you might as well take them and if you want to take up the option you can take it up; if you don't have to, you don't have to.' \* \* \* I said '\* \* \* I have no intention of using the Claude Anet rights in the remake of the picture.' He insisted, however, it might be useful, so I signed it in view of the fact it was an option, it didn't mean anything to me. I had no intentions of picking up the option \* \* \* [A]s it was an option, which I felt I could pick up or not pick up, I accepted \* \* \*." Nebenzal did not exercise the option and did not request plaintiff to secure an extension of the Anet rights. Subsequently Nebenzal contributed an additional sum of \$7500 to obtain a release to himself of Mayerling from the United States office of Alien Property, which agency was then claiming title to the picture.

In September, 1944, one Marcel Hellman, of London, who was a friend of Nebenzal and of Natan, arrived in New York, where he learned of Nebenzal's intention to remake Mayerling. Hellman then proceeded to Hollywood, where in October, 1944, he and Nebenzal discussed Mayerling and the Anet rights. Nebenzal told Hellman of Nebenzal's acquisition from plaintiff of the remake rights to Mayerling and showed Hellman certain recitals set forth in the main agreement between plaintiff and Nebenzal stating that the Anet rights had been transferred to plaintiff for the period expiring October 8, 1945; and Hellman stated that he had negotiated through his lawyer in Paris for an option to himself acquire motion picture rights in the Anet material for a five or seven year term beyond October, 1945, as he also intended to remake Mayerling; Hellman's proposed option had no connection with the Anet rights formerly held by Natan, which expired in October, 1945. While Hellman was still in Los Angeles he promised to assign to Nebenzal without profit to himself, Hellman (i. e., at Hellman's cost price of between \$1000 and \$2000), the license for Anet rights beyond October, 1945, but stated that he wanted Nebenzal to pay an additional sum of money therefor to Natan,

who "was coming back from the wars"; after further discussion Nebenzal agreed to pay Hellman's costs and to give Natan \$2000. Subsequently, while in New York en route to London, Hellman promised Nebenzal's lawyer to make the assignment of his Anet rights to Nebenzal "without any benefit or profit" to Hellman as soon as Hellman reached London and "received the documents."

Hellman returned to Europe, learned that the Anet heirs had declined to grant the option he sought but instead wished to sell outright a license to use the Anet material for a fixed term. He and Natan thereupon purchased in Hellman's name, from the Anet heirs, for between \$1500 and \$3000, a license to use the Anet material for a period of ten years (to October 8, 1955), and (in about March, 1945) decided to ask Nebenzal \$10,000 therefor. After some delay and objections to the price Nebenzal paid the \$10,000 to Hellman's attorney in New York and on or about October 31, 1945, the assignment (dated July 9, 1945) of the Anet rights from Hellman to Nebenzal was consummated. Nebenzal, who had believed that he had acquired the Anet rights from Hellman in the fall of 1944, had informed plaintiff's agent Gruess of the fact as he believed it in the early spring of 1945.

In the spring of 1946 defendants "heard" that Mayerling was being shown in France or Alsace Lorraine, and in the fall of that year they instituted suit in France to stop exhibition of the picture, on the theory that inasmuch as plaintiff's Anet license had expired and that all Anet rights to use such material in any motion picture for the ten year period had been independently acquired by defendants, plaintiff could no longer exhibit or "exploit" the French language Mayerling. In July, 1947, plaintiffs filed this suit, the purpose of which is, as stated hereinabove, to enjoin defendants from interfering with exhibition of the French picture and from further prosecuting the suit in France, and to recover damages.

Plaintiff contends that under the provisions of paragraph numbered Fifth of the main agreement and that numbered Third



in the option agreement it had the right, as against Nebenzal, to continue exploiting Mayerling. Plaintiff asserts in this connection that the option agreement describes "the only manner in which the defendant Nebenzal might acquire the Anet rights," and alleges that Nebenzal "and his agents, servants, and employees - \* \* \* secretly, maliciously and fraudulently" acquired the Anet license without telling plaintiff, and thereby rendered "it impossible for plaintiff to secure an extension of the Anet rights as provided" in the option agreement "or at all." Plaintiff further argues, in effect, that the option agreement which ostensibly runs in favor of Nebenzal in reality places upon Nebenzal a greater burden or obligation than upon plaintiff; i. e., plaintiff was required only, upon request of Nebenzal, to "try to the best of" its "abilities" to secure extension of the Anet rights beyond October 8, 1945, whereas Nebenzal was absolutely obligated, if by his own enterprise and at his own expense he acquired an Anet license, to deliver such license, or permission to operate under it, to plaintiff.

The court, however, found contrary to plaintiff's allegations of secrecy, malice and fraud, and further found that neither Nebenzal nor any person acting for him "did anything to render it impossible for plaintiff to secure an extension of the Anet rights," and that "the plaintiff since October 8, 1945, has no right to distribute or exploit or exhibit \* \* \* Mayerling anywhere in the world." In an oral decision delivered at the conclusion of the trial, the trial judge declared his view of the evidence and of the contracts between the parties, as follows: By the main contract plaintiff "reserved to itself the right to exploit the original French version of Mayerling, and while it does not say so, it must be construed to be to the extent that the plaintiff owned or continued to own those rights.

"Now it is conceded by all concerned that the right to exhibit or exploit, as is the term used throughout here, a motion picture, ends in any country with the termination of the contractual rights between the author and the producer which, in this case, was October 8, 1945 \* \* \* Now

\* \* \* all \* \* \* [the option agreement] amounted to was giving him [Nebenzal] an option to their [plaintiff's] Anet rights to October 8, 1945, if he desired to purchase them, and they agreed to use their best efforts to get an extension for him without additional cost excepting the cost they were put to following that date. They didn't bind themselves to do anything in particular in that regard excepting to use their best offices.

"Now the effect of all this, it seems to the Court, is that Quader-Kino expected, during this difficult war period, that at the conclusion of hostilities they would be able to readily get an extension of these Anet rights from the heirs of Claude Anet. They did not contemplate, apparently, that anyone else might negotiate for them, or, if they did, that they were not bound in any event under this option agreement to deliver anything additional in such a contingency. Had they desired to bind Nebenzal in the particular in which they have sought to construe these documents, they should have included in their contract some provision to the effect that he would look entirely to them and to no one else for any Anet rights extension, and that he waived any right he might have to such rights subsequent to October 8, 1945, excepting through them. \* \* \* [T]he Court finds that there has been no fraud established in this case on the part of the defendants \* \* \* And \* \* \* finds that under the \* \* \* option agreement \* \* \* there is no requirement reserved whereby the defendant had to \* \* \* refrain from preventing the plaintiff from securing the extension of the Anet rights, or that inhibited the defendant from taking the steps which he did in this case."

[2, 3] It is apparent that the evidence hereinabove summarized supports the court's decision and the written findings based thereon. As declared in *Edwards v. Billows*, 1948, 31 Cal.2d 350, 359, 188 P.2d 748 (see also cases cited therein), "Under such circumstances this court will adhere to the interpretation placed by the trial court on the writings and the conduct of the parties."



Plaintiff urges, however, that under New York law, which was to control construction of the main agreement (see paragraph numbered Eleventh), that agreement either imposed on Nebanzal an "*express duty* to permit plaintiff to continue the exhibition of 'Mayerling' beyond October 8, 1945," or else bound Nebanzal by an "implied covenant" not to interfere with plaintiff's acquisition of an extension of Anet rights and not to use his own independently acquired Anet license to prevent plaintiff from exploiting Mayerling. On this point plaintiff relies first on a statement in *Kirke La Shelle Co. v. Paul Armstrong Co.*, 1933, 263 N.Y. 79, 87, 188 N.E. 163, that "In the last analysis those cases only apply the principle that in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing," and upon statements from other cases to the effect that good faith and honest dealing are required between contracting parties. Here, however, plaintiff as the party who was selling the Mayerling remake rights received "the fruits of the contract" in the form of the \$20,000 paid it by Nebenzal; so far as Nebenzal's contractual obligations to plaintiff are concerned Nebenzal had by such payment performed his part of the contract and nothing further remained to be done. Moreover, as found by the trial court, there is no evidence of any but fair and honest dealing on his part. Certainly he had no obligation under the main contract—or under the option agreement either, for that matter—to sit idly by and do nothing when he was told in the fall of 1944 that Hellman had acquired the license or "extension" of Anet rights beyond October 8, 1945. He was as free as any other would-be purchaser of those rights to negotiate with Hellman to secure them. Moreover, as found by the trial court and as shown by the evidence, he informed plaintiff's agent Gruess as early as the spring of 1945 that he was acquiring the

so-called "extension" or new license which Hellman had secured.

*Underhill v. Schenck*, 1924, 238 N.Y. 7, 143 N.E. 773, 33 A.L.R. 303, also relied upon by plaintiff, involves facts and contracts differing materially from those in this case, and consequently is not persuasive to plaintiff's view. Suffice it to say that that action was between a licensor and a licensee, who were to share jointly in the profits of a stage production, and did not involve an outright cash sale such as that from plaintiff to Nebenzal.

Plaintiff further urges that attempts admittedly made by Nebenzal, subsequent to the execution of the two contracts here involved, to purchase from plaintiff all of its rights in the French Mayerling, amounted to a practical construction of the contracts by the parties and a concession by Nebanzal that plaintiff still continued to possess the right to exploit the picture even after plaintiff's Anet rights expired in October, 1945. However, Nebenzal testified that his efforts in this direction, which failed because of lack of agreement on the price to be paid, were for the purpose of acquiring the French negative and prints and of removing "from circulation entirely the old Mayerling \* \* \* In my negotiations with Mary Pickford, \* \* \* my negotiations before that and after that with Selznick and others, I found that it was most desirable to have the old negative and old prints, and that is, in fact, customary in the industry, that when a remake of an old picture is contemplated, that the major studios do not like to see prints or negatives of the former picture around if it can be avoided. This is customary to such an extent that in every sales contract when you grant a license to a buyer for a limited period of time there is always included a paragraph whereby the license holder is obliged to return to you the prints which he is holding, at the expiration of the license period. Also negatives if he should have any, original or dupe negatives." Any conflict in the evidence on this point was resolved in defendant's favor by the trial court, whose determination in this respect is conclusive on appeal.

[4] Plaintiff attacks a finding by the trial court that defendant Nero Films, Inc., is not the alter ego of defendant Nebenzal. However, plaintiff concedes in its brief that the court so found "Since the doctrine of alter ego arises only to prevent fraud or injustice, and the trial court felt there was neither." Inasmuch as the court's finding that plaintiff had failed to establish fraud or injustice is supported by the evidence, it is obvious that plaintiff is not prejudiced by the finding of which it complains.

Plaintiff next urges that a finding that Nebenzal assigned to defendant Nero Films, Inc., the Mayerling remake and the Anet rights, and that Nero Films, Inc. reassigned to Nebenzal, is not supported by the evidence. In view of the finding against fraud and injustice on Nebenzal's part it is apparent that this finding likewise is not prejudicial to plaintiff. However, the record reveals both oral and documentary evidence unnecessary to relate here which support it. There is an obvious clerical error in another finding (No. XI, in which the phrase "which the *defendant* had advised the defendant" was meant to read "which Hellman had advised the defendant," but it furnishes no ground for reversal.

[5] Finally, plaintiff contends that the court erred in including in the judgment a statement "that ever since October 8, 1945, the plaintiff, Quader-Kino A.G., a corporation, did not have and does not now have any right to distribute, exploit or exhibit the motion picture Mayerling anywhere in the world." Plaintiff in its complaint alleged that it is "owner of the world-wide" rights to Mayerling, and defendants denied the allegation. In order to completely determine the rights of the parties the court by its judgment correctly defined those rights according to the findings. See *O'Melia v. Adkins*, 1946, 73 Cal.App.2d 143, 148, 166 P.2d 298.

The judgment is affirmed.

GIBSON, C. J., and SHENK, ED-MONDS, CARTER and SPENCE, JJ., concur.

TRAYNOR, Justice.

I cannot agree that the contracts between Quader-Kino and Nebenzal do not give Quader-Kino the right to enjoin Nebenzal's interference with the exploitation of their motion picture.

Defendant Nebenzal acquired by purchase the right to produce a remake of plaintiffs "Mayerling" in English. To get that right Nebenzal had to pay \$20,000 and to agree not only that plaintiff retained "the unqualified right" to exploit its original French version of "Mayerling" without restriction as to time, but also that Nebenzal's remake would not compete with the French version in certain countries until 3 years after the cessation of hostilities. These conditions in plain language assured plaintiff the right to continue the exploitation of "Mayerling" without interference from Nebenzal.

Nebenzal now attempts to prevent that exploitation notwithstanding that his promise not to interfere therewith was part of the consideration for the sale of the remake rights. Defendant seeks to justify his action on the ground that he now owns the Anet rights on which 5% of "Mayerling" is based and that, since the Anet heirs or any third person acquiring the rights could prevent the exhibition of the picture so long as it incorporates the Anet material, Nebenzal may also prevent its exhibition. So far as Nebenzal is concerned, however, his ownership of the Anet rights is immaterial. The reservation of the "unqualified right" to which Nebenzal agreed does not admit of the qualification "if Quader-Kino acquires an extension of the Anet rights before Nebenzal beats them to it." As between Nebenzal and Quader-Kino, the latter's reserved right was "unqualified", as the contract stated.

Upon the granting of the remake rights to Nebenzal the most serious threat to plaintiff's exploitation of its picture was that of competition or interference from Nebenzal. It therefore demanded and received from Nebenzal contractual assurances that he would not interfere with the exhibition of "Mayerling" at any time and



would not compete with it in certain countries. It was entitled to rely on those assurances.

Another risk confronting plaintiff was the possibility of its not securing an extension of the Anet rights. War conditions made it impossible to secure that extension at the time the contracts were executed, but Quader-Kino was justifiably convinced that it could secure the extension when communication with occupied Europe was re-established. The rights were excluded from the grant of the remake rights but were covered by a simultaneously executed supplemental agreement. Nebenzal was given the option to acquire "those rights to the extent the Owner [Quader-Kino] owns them itself" and it was agreed that if he exercised the option Quader-Kino would use its best efforts to secure their extension. The supplemental agreement makes it plain that if Nebenzal purchased the Anet rights "to the extent the owner owns them himself" or if plaintiff acquired an extension of the rights for Nebenzal, they were to be held for their mutual benefit. "Under all circumstances, and without having to make any contribution to the price to be paid to the heirs of Claude Anet for the extension of the rights, [Quader-Kino] shall be entitled to the use and exploitation of the rights dealt with herein for its own purposes in accordance with the reservations made in the agreement signed simultaneously, and those reservations are hereby expressly made part of this agreement." It is true that Nebenzal did not agree not to purchase the rights independently. He knew, however, that the Anet rights would soon expire and that plaintiff's reservation of the unqualified right to exploit the picture and the limitation on the exhibition of the English remake would be valueless to plaintiff unless an extension of the Anet rights was obtained.

The negotiations for the sale of the remake rights were begun when Hitler's European fortress had been dented only at Salerno and the cessation of hostilities seemed remote. When the contracts were executed the Allied armies were still contained in the Cherbourg Peninsula and had

not penetrated farther east than St. Lo. It would have been absurd at that time to contract so carefully about rights that would expire shortly and would have no value before their expiration. The Anet rights at that time had only fourteen months to run. The exhibition of "Mayerling" in continental Europe before October 8, 1945 was virtually impossible. It is hardly conceivable that plaintiff would have insisted on reserving rights that would be virtually useless to it. The contracts have meaning only if they are construed as providing for the acquisition of the Anet rights for the mutual benefit of Quader-Kino and Nebenzal.

The supplemental agreement was based on the understanding that Quader-Kino would eventually secure an extension of the Anet rights. Nebenzal was given the opportunity to share in those rights by paying the costs that Quader-Kino would incur in their acquisition. Nebenzal in turn agreed that "Under all circumstances, and without having to make any contribution to the price to be paid to the heirs of Claude Anet for the extension of the rights," Quader-Kino would be entitled to their concurrent use. These mutual obligations are clear even without express words of promise. *Atwater & Co. v. Panama R. R. Co.*, 246 N.Y. 519, 524, 159 N.E. 418.

Although it is true that Nebenzal did not expressly agree not to purchase the rights independently and use them to prevent plaintiff's exploitation of its picture, "we think \* \* \* that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed." *Cardozo, J., in Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91, 118 N.E. 214; *Moran v. Standard Oil Co. of New York*, 211 N.Y. 187, 197-198, 105 N.E. 217; *Murphy v. North American Light & Power Co.*, 2 Cir., 106 F.2d 74, 80-81; *Coghlan v. Stetson*, 2 Cir., 19 F. 727, 730; *De Cesare v. Occhiuto*, Sup., 64 N.Y.S.2d 675, 677; *McCall Co. v. Wright*, 133 App.Div. 62, 68,



117 N.Y.S. 775. The contracts carry the inescapable implication that the parties contemplated that the extension of the Anet rights would be secured for their mutual benefit. New York law, in such cases, implies in the contract a "covenant of good faith and fair dealing," that neither party shall take any action that may destroy or impair the right of the other party to receive the anticipated fruits of the contract. *Kirk La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 87, 188 N.E. 163; *Underhill v. Schenck*, 238 N.Y. 7, 15, 143 N.E. 773, 33 A.L.R. 303, *Price v. Spielman Motor Sales Co.*, 261 App.Div. 626, 26 N.Y.S.2d 836, 839; *Genet v. Delaware & Hudson Canal Co.*, 136 N.Y. 593, 608, 611-612, 32 N.E. 1078, 19 L.R.A. 127; *Uproar Co. v. National Broadcasting Co.*, 1 Cir., 81 F.2d 373, 377; *Frohman v. Fitch*, 164 App.Div. 231, 149 N.Y.S. 633, 634; *Goldberg*, 168-05 Corp. v. Levy, 170 Misc. 292, 9 N.Y.S.2d 304, 306; *Guardino Tank Processing Corp. v. Olsson*, Sup., 89 N.Y.S.2d 691, 696-697; *Bennett v. Vansyckel*, 11 N.Y.Super.Ct. 462, 4 Duer 462, 472. Nebenzal breached that implied covenant when he purchased and used only for his own purposes rights in which both parties were given a concurrent interest.

The majority opinion states that "plaintiff \* \* \* received 'the fruits of the contract' in the form of the \$20,000 paid it by Nebenzal; so far as Nebenzal's contractual obligations to plaintiff are concerned Nebenzal had by such payment performed his part of the contract and nothing further remained to be done." That statement overlooks the fact that the reservation of Quader-Kino's "unqualified right" to continue the exploitation of its picture was part of the consideration in addition to the \$20,000 paid for the grant of the remake rights. Moreover, the New York courts include as "fruits of the contract" any benefit that either party expects to derive from the subject of the contract when that expectation appears from its terms. Rights reserved under a contract of license or sale are as much the fruits of that contract as rights initially created thereunder. *Manners v. Morosco*, 252 U.S. 317, 327, 40 S.Ct. 335, 64 L.Ed. 590; *Harper Bros. v. Klaw*,

D.C., 232 F. 609, 613; *Uproar Co. v. National Broadcasting Co.*, 1 Cir., 81 F.2d 373, 377. Thus, plaintiff reserved as fruits of its contract with Nebenzal the unqualified right to continue the exploitation of "Mayerling" and the right to use the Anet rights for that purpose. Nebenzal impliedly covenanted not to do anything to impair the value of those rights. He breached the covenant, not when he purchased the Anet rights but when he used those rights to restrain plaintiff's exhibition of its motion picture.

The facts of this case are analogous to those of *Bennett v. Vansyckel*, supra, 11 N.Y.Super.Ct. 462, 4 Duer 462. Defendant therein assigned a lease for a term of years to the plaintiff. At its expiration, defendant obtained a new lease from the lessor to the exclusion of his assignee. The court decreed that defendant held the new lease as a constructive trustee for the benefit of the plaintiff, on the ground that defendant breached his implied covenant of fair dealing by acting adversely to plaintiff's expectation that he would obtain a renewal of the lease for his own benefit. By the same reasoning, Nebenzal clearly breached his implied covenant not to secure and use adversely to plaintiff, rights that both parties contemplated plaintiff would attempt to secure for their mutual benefit.

The failure of the majority opinion to adhere to the rule of the New York cases is not justified by its statement that "as found by the trial court, there is no evidence of any but fair and honest dealing on [Nebenzal's] part." If in fact a contract has been breached, the good faith of the defendant or his belief in the legal rectitude of his action is immaterial. The requirement of fair dealing, as the New York court has specifically held, is not dependent upon the presence or absence of intentional bad faith. The gravamen of a plaintiff's cause of action is the fact that its contractual expectations have been destroyed, and not the intention with which defendant has destroyed them. *Bennett v. Vansyckel*, 11 N.Y.Super.Ct. 462, 4 Duer 462, 472; *Kirk La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 89, 188 N.E. 163; *Harper Bros. v.*

Klaw, D.C., 232 F. 609, 613; Ward v. Whitney, 8 N.Y. 442, 446. The converse result reached by the majority opinion can be supported only if the applicable New York law is disregarded; that cannot be done in view of the express provision that New York law should govern "all questions relating to the construction, enforcement and performance" of the contracts. *Boole v. Union Marine Ins. Co.*, 52 Cal.App. 207, 209, 198 P. 416; *Mutual Life Ins. Co. of New York v. Cohen*, 179 U.S. 262, 267, 21 S.Ct. 106, 45 L.Ed. 181; *Duskin v. Pennsylvania-Central Airlines Corp.*, 6 Cir., 167 F.2d 727, 730; *Hurwitz v. Hurwitz*, 216 App.Div. 362, 215 N.Y.S. 184, 189.

The majority opinion seeks to justify its interpretation of the contract on the ground that "this court will adhere to the interpretation placed by the trial court on the writings and the conduct of the parties." The interpretation of a contract or other written instrument, however, if there is no extrinsic evidence thereon or if the evidence is without conflict and not susceptible of conflicting inferences, is a question of law, and the finding of the trial court thereon is not conclusive on appeal. *Estate of Platt*, 21 Cal.2d 343, 352, 131 P.2d 825; *Jones v. Pollock*, 34 Cal.2d 863, 215 P.2d 733; *Western Coal & Mining Co. v. Jones*, 27 Cal.2d 819, 826-827, 167 P.2d 719, 164 A.L.R. 685; *Union Oil Co. of California v. Union Sugar Co.*, 31 Cal.2d 300, 306, 188 P.2d 470; *Trubowitch v. Riverbank Canning Co.*, 30 Cal.2d 335, 339, 182 P.2d 182; *Brant v. California Dairies, Inc.*, 4 Cal.2d 128, 133, 48 P.2d 13; *Estate of Norris*, 78 Cal.App.2d 152, 159, 177 P.2d 299; *Estate of O'Brien*, 74 Cal.App.2d 405, 407, 168 P.2d 432; *First Trust & Savings Bank of Pasadena v. Costa*, 83 Cal.App.2d 368, 372, 188 P.2d 778. The only evidence the

majority opinion invokes to support the trial court's erroneous interpretation is the testimony of Nebenzal that he did not want the Anet rights and that he signed the supplemental agreement under the impression that "it was an option, which I felt I could pick up or not pick up." Conceding that the trial court could believe Nebenzal's statement that he did not want the Anet rights in view of his payment of more than \$10,000 for them six months later, I find nothing in his testimony to indicate that the parties gave the third clause of the agreement any construction other than its patent implication. The agreement was in part an option, as Nebenzal stated; nonetheless by signing it he bound himself to its provisions, including their express recognition of Quader-Kino's intention to continue exhibiting the old picture under an extension of the Anet rights and the protection of its interest in those rights. Nothing in the testimony casts doubt on the clear agreement in the main contract on Quader-Kino's reservation of rights. Finally, even if Nebenzal's testimony disclosed a secret intention not to be bound by that agreement, that intention is irrelevant. "It is now a settled principle of the law of contract that the undisclosed intentions of the parties are \* \* \* immaterial; and that the outward manifestation or expression of assent is controlling." *Brant v. California Dairies, Inc.*, 4 Cal.2d 128, 133, 48 P.2d 13, 16; 1 Rest., Contracts, § 20.

I would therefore reverse the judgment and remand the cause with directions to the trial court to grant the injunction as prayed and to determine the amount, if any, of damage suffered by Quader-Kino as a result of Nebenzal's breach of their contract.

**PACKER v. BOARD OF RETIREMENT OF  
LOS ANGELES COUNTY PEACE OFFI-  
CERS' RETIREMENT SYSTEM et al.**

L. A. 21038.

Supreme Court of California, in Bank.

April 25, 1950.

Hearing Denied May 25, 1950.

Proceeding in mandamus by Della Mae Packer, also known as Mrs. Glen J. Packer, also known as Mrs. Della Packer, against Board of Retirement of the Los Angeles County Peace Officers' Retirement System for the County of Los Angeles, State of California, and the members thereof to compel payment of a pension to petitioner. The Superior Court, Los Angeles County, Frank G. Swain, J., sustained a demurrer to petition and entered a judgment of dismissal and petitioner appealed. The Supreme Court, Gibson, C. J., held that widow acquired no such separate vested right to pension as could not be eliminated by permissible modification of pension system before husband's death and that deletion by 1941 revision of county peace officers' retirement act of provisions under which widow would have been entitled to a pension did not constitute an unconstitutional impairment of contractual obligation of county.

Judgment affirmed.

Prior opinion 203 P.2d 784.

**1. Counties** ⇨69(3)

The 1941 amendment of county peace officers' retirement act applied to all officers who were then in active service and not eligible for retirement. Gen.Laws, Act 5848, § 11.5.

**2. Constitutional law** ⇨102(2)

A public employee, as a part of his compensation, obtains a vested right to pension upon entering upon his duties under a pension law containing no express reservation of right to repeal or modify existing pension plan, and such right, once acquired, cannot be wholly destroyed by repeal of pension law prior to time for his retirement, though reasonable modifications in system may be made.

**3. Officers** ⇨94

Pensions for public employees are based upon the theory that such a pension

is an integral part of employee's compensation under contract of employment and one of the primary purposes of offering a pension is to induce competent persons to enter and remain in public service.

**4. Officers** ⇨94

A pension to public employee's widow is not given because of services rendered by her to governmental body but is one of the elements of compensation held out to her husband to induce competent persons to enter and remain in public service.

**5. Constitutional law** ⇨102(2)

Under provisions for pensions to widows of public employees widow's interest prior to husband's death is not a separate vested right but merely a part of husband's pension benefits and as such is subject to being wholly eliminated, provided total change in husband's pension rights does not exceed the permissible bounds of modification.

**6. Officers** ⇨94

Any of the benefits offered under a pension system for public employees, including interests created for third persons, may be wholly eliminated prior to time they become payable, provided the employee retains the right to a substantial pension.

**7. Constitutional law** ⇨102(2)

Wife of county peace officer did not acquire under 1937 amendment of county peace officers' retirement act any such separate vested right to a pension upon death of husband after retirement as could not be eliminated by reasonable modification of pension system before husband's death. Gen.Laws, Act 5848, §§ 11, 11.5.

**8. Constitutional law** ⇨140(2)

**Counties** ⇨69(3)

The 1941 revision of county peace officers' retirement act constituted a permissible modification of pension rights of officers then in active service and deletion thereby of provision for pension to widow of officer retired for age and service and substitution of option to officer to allot part of his pension to widow is not an unconstitutional "impairment of contractual



obligation" of county. Gen.Laws, Act 5848, §§ 11, 11.5, 12.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Impairment of Contractual Obligations".

Gordon M. Snyder, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Edward H. Gaylord, Deputy County Counsel, Los Angeles, for respondents.

GIBSON, Chief Justice.

The widow of Glen J. Packer, a retired peace officer, brought this proceeding in mandamus to compel respondent board to pay her a pension. She has appealed from the judgment of dismissal entered upon the sustaining of a demurrer to her petition.

The County Peace Officers' Retirement Law, enacted in 1931, provided for a widow's pension if the officer had been disabled in the line of duty. Stats. 1931, ch. 268, § 11, Deering's Gen. Laws 1931, Act 5848, § 11. The Retirement Law is now a part of the Government Code, § 31900 et seq. In 1937 it was amended to extend pension rights to the widow or children of any peace officer who died after retire-

ment.<sup>1</sup> The law was again amended in 1941 to provide that an officer might obtain a pension for his widow by exercising an option to take a lesser pension for himself during his life, and all other provisions for a widow's pension were eliminated except where the officer died as a result of a service-connected disability or was retired for such a cause.<sup>2</sup> The Packers were married in 1905, and in 1926 he commenced working as a deputy sheriff for Los Angeles County. He retired in 1946 at the age of sixty-three after serving the number of years required to entitle him to a pension. It is not claimed that Packer ever exercised the option which would have entitled his widow to a pension, or that his retirement was due to a service-connected disability, or that his death, which occurred in 1947, was the result of such a disability.

[1] The 1941 amendment was part of a substantial revision of the Retirement Law which, as we shall see, embraced both advantages and disadvantages to county peace officers. It applied to all officers, who, like Packer, were then in active service and not eligible for retirement. Although it was held in *Chaney v. Los Angeles County Peace Officers' Retirement Board*, 59 Cal.App.2d 413, 138 P.2d 735, that a widow was entitled to a pension under the 1937

1. The 1937 amendment to section 11 of the act provided that, with certain limitations not pertinent here, the flat sum of \$75 per month should be paid to the widow or children of a peace officer who "shall be killed, or die, as a result of any injury received during the performance of his duty, or from sickness caused by the discharge of such duty, or *after retirement*, or while eligible to retirement on account of years of service \* \* \*." [Italics added.] Stats.1937, ch. 303, pp. 664-665.

2. The portion of section 11 pertaining to widows' pensions was amended to read, in part: "Whenever any member shall be killed, or die, as a result of any injury received during the performance of his duty, or from sickness caused by the discharge of such duty, or *after retirement for service connected disability*, an annual pension shall be paid in equal monthly installments to his widow, or child or children, in an amount equal

to one-half of such member's terminal salary; provided, that such pension shall in no case be more than one hundred fifty dollars (\$150) per month. \* \* \*"  
[Italics added.] Stats.1941, ch. 745, pp. 2271-2272.

Section 11.5, enacted in 1941, reads: "At any time before the first payment on account of any pension is made, or within 60 days after the effective date of this section, a member or beneficiary may elect to receive the actuarial equivalent at that time of his pension in a lesser pension payable throughout his life and that of his widow, if she survives him, in accordance with one or the other of the following options: Option 1: Upon his death, such lesser pension shall be continued throughout the life of and paid to his widow. Option 2: Upon his death one-half of such lesser pension shall be continued throughout the life of and paid to his widow." Stats.1941, ch. 745, p. 2273.

act where her husband retired before and died after the effective date of the 1941 amendment, such is not the case here.

If the act as amended in 1937 had remained unchanged, petitioner would clearly be entitled to a pension, and the question is whether application to petitioner of the 1941 amendment constituted an impairment of the county's contractual obligations. The determination of this question depends upon the nature and extent of the contractual obligations arising out of Packer's continued employment after the enactment of the 1937 statute.

[2] The general problem of the power of a governmental body to revise its pension system was recently considered in *Kern v. City of Long Beach*, 29 Cal.2d 848, 179 P.2d 799, where, as here, the pension law in effect at the time the employee performed his duties contained no express reservation of the right to repeal or modify the existing plan. We there held that a public employee, as a part of his compensation, obtained a vested right to a pension upon entering his duties under such a statute and that the right, once acquired, could not be wholly destroyed by repeal of the pension law prior to time for his retirement. It was recognized, however, that the employee was not entitled to any fixed or definite benefits, but only to a substantial pension, and that the statutory language was subject to the implied qualification that the governing body may make reasonable modifications and changes in the system. *Kern v. City of Long Beach*, 29 Cal.2d 848, 855, 179 P.2d 799. As stated in the *Kern* case: "The ruling permitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficial policy." 29 Cal.2d at pp. 854-855, 179 P.2d at page 803.

Petitioner does not dispute these principles but asserts, first, that her husband's service under the 1937 provision gave her, as a third party beneficiary, a *separate*, vested right to a widow's pension which the 1941 amendment wholly destroyed, con-

trary to the decision in the *Kern* case, and, second, that even if she did not have a separate right, the 1941 amendment exceeded any permissible modification of her husband's pension rights.

*Did petitioner have a separate vested right to a pension?*

[3, 4] It may be conceded that a widow's rights are vested after her pension becomes payable and that she may then maintain an action to enforce the obligation of the governmental body. *Kavanagh v. Board of Police Pension Fund Comm'rs*, 134 Cal. 50, 66 P. 36. It does not necessarily follow, however, that petitioner had a separate right which vested prior to the 1941 amendment. As stated above, the decisions make it clear that pensions for public employees are based upon the theory that such a pension is an integral part of the employee's compensation under his contract of employment, and that one of the primary purposes of offering a pension, as additional compensation, is to induce competent persons to enter and remain in public service. *Kern v. City of Long Beach*, 29 Cal.2d 848, 851-853, 855, 856, 179 P.2d 799; *French v. French*, 17 Cal.2d 775, 777, 112 P.2d 235, 134 A.L.R. 366; *Dryden v. Board of Pension Com'rs of City of Los Angeles*, 6 Cal.2d 575, 579, 59 P.2d 104. A pension to an employee's widow, however, is not given because of services rendered by her to the governmental body but is one of the elements of compensation held out to her husband.

In *Sweesy v. Los Angeles County Peace Officers' Retirement Board*, 17 Cal.2d 356, 363, 110 P.2d 37, the granting of a pension to the widow of an officer who had previously retired was upheld on the ground that the widow's pension was merely an increase of benefits to the officer who already had a pensionable status. Although the court in that case recognized that the retired employee had vested pension rights, 17 Cal.2d at page 361, 110 P.2d at page 39, the status of the widow's right was carefully distinguished, 17 Cal.2d at page 362, 110 P.2d at page 40: "It is not to be understood from the foregoing, however, that the provision for an increase in benefits



to the retired member by means of a pension to his widow becomes a vested right prior to the happening of a contingency upon which the payment of the widow's pension depends. As aptly shown by the decision in *Jordan v. Retirement Board*, supra [35 Cal.App.2d 653, 96 P.2d 973], the grant of a pension to the member's widow is an increase of benefits which may be taken away before the right vests by the happening of the event of calling for the fulfillment of the grant. In this case the provision for pensions to members' widows benefits all members, whether on active or retired duty; but as to any prospective grantee of the pension it is an inchoate right which may be taken away at any time before it becomes vested in her."

The *Jordan* case, cited in the *Sweesy* opinion, held that a provision for a widow's pension, adopted after retirement of her husband, could be repealed prior to his death. In answer to the widow's contention that the provision for a pension to her became a part of her husband's contract of employment and could not be taken away, the court stated that "a pensioner has no vested right to a specific sum as a pension, but that sum may be increased or decreased according to correspondent increases or decreases in the salary of the rank upon which the pension is based." 35 Cal.App.2d at page 658, 96 P.2d at page 976. Another line of cases upheld revision of a pension system although the substituted plan, by eliminating a lump sum payment to legal representatives, constituted a complete repeal of benefits to certain classes of persons who would have received money under the former provision. *Pennie v. Reis*, 80 Cal. 266, 22 P. 176, affirmed in 132 U.S. 464, 10 S.Ct. 149, 33 L.Ed. 426; *Clarke v. Reis*, 87 Cal. 543, 25 P. 759; *Clarke v. Police & Health Ins. Board*, 123 Cal. 24, 55 P. 576.

[5] It is apparent, therefore, that the cases have not treated provisions for pensions to widows of public employees as separate, vested rights. Rather, a widow's interest, prior to her husband's death, has been considered to be merely a part of the husband's pension benefits and as such subject to being wholly eliminated, provided, of

course, that the total change in the husband's pension rights does not exceed the permissible bounds of a modification. It may be conceded that the husband's pension rights derived from his employment during marriage are community property, but this does not furnish any basis for the claim that the widow has a separate, vested right to a pension that is different from her community interest in her husband's pension rights.

Petitioner argues that her claim to a separate, vested right finds support by analogy in the cases construing life insurance policies which hold that the named beneficiary obtains a vested right upon delivery of the policy. The rule of construction pointed to by petitioner has been adopted with respect to ordinary life insurance when the policy contains no reservation of the power to change the beneficiary. *Morrison v. Mutual Life Ins. of New York*, 15 Cal.2d 579, 582, 103 P.2d 963; see *Vance on Insurance* (2d ed., 1930), §§ 144-146; 2 *Appleman, Insurance Law and Practice* (1941), §§ 911, 913. The opposite rule is applied to insurance contracts of mutual benefit associations, and with respect to these it is held that the beneficiary obtains no rights until the insured's death in the absence of restriction by statute, by-laws, or other specific provision or the giving of consideration by the beneficiary. *Vawter v. Purdy*, 29 Cal.App. 623, 157 P. 556; see *Phoenix Mutual Life Ins. Co. v. Birkelund*, 29 Cal.2d 352, 360, 175 P.2d 5; *Vance on Insurance*, (2d ed., 1930), § 153; 2 *Appleman, Insurance Law and Practice* (1914), §§ 902, 912; 2 *Williston on Contracts* (Rev. ed., 1936), § 396-A. The text writers have found difficulty in explaining the different treatment accorded to the two types of insurance, but it has been suggested as the basis of distinction that the primary purpose of a mutual benefit association is benevolent, that only members have the privilege of securing insurance therein, and that membership can be acquired only upon complying with the requirements of the association. See *Vance on Insurance* (2d ed., 1930) § 153. Some of these factors are present in an employees' pension system. In any event, however, the insurance cases are not controlling here. It has been said that "the



insurance decisions form a class by themselves, and but little reference is made in them to the general law of contracts." 2 Williston on Contracts (Rev. ed. 1936) § 369; see also, Vance on Insurance (2d ed. 1930), § 146; 12 Col.L.Rev. (1912), §§ 551, 552.

We can find no reason for departing from the decisions which have stated that the wife of a public employee does not acquire a vested interest in a pension until it becomes payable to her. A different rule, in fact, would remove a considerable amount of the flexibility necessary for operation of pension systems, because it would mean that provisions benefiting any third person would be frozen into the law with respect to all employees then in service and that these interests could not be removed regardless of the consent of the employee and regardless of whether the employee was given other pension benefits which might be of greater value to him than the one sought to be eliminated. Thus, although all pension rights are earned by the employee and are part of his compensation, the rule urged by petitioner could operate to the disadvantage of the employee by making it impossible or impracticable for the governmental body to substitute a new system, designed to meet changing conditions, which would furnish a greater total benefit to the employee than he formerly had.

[6,7] It appears, therefore, that both the cases and the policy underlying pensions for public employees indicate that any one or more of the various benefits offered, including interests created for third persons, may be wholly eliminated prior to the time they become payable, provided, of course, the employee retains the right to a substantial pension. Accordingly, it must be held that petitioner did not obtain a separate, vested right under the 1937 statute.

*Were Packer's pension rights unreasonably modified by the 1941 amendment?*

The next question is whether the 1941 revision of the Retirement Law constituted a permissible modification of the pension rights of county peace officers, such as Packer, who were then in active service.

A comparison of the statutes shows that under certain circumstances the 1941 law would give county peace officers and their families greater benefits than they had before, and the changes, considered as a whole, did not exceed the bounds of a reasonable modification. For example, under the 1937 provision the flat sum of \$75 per month was payable to any widow entitled to a pension, or, if there were no eligible widow, to any child or children under the age of eighteen. Under the 1941 statute, however, the widow or children of an officer who had died as a result of injury or sickness resulting from his service, or who had died from any cause after he had been retired because of a service-connected disability, would receive an amount equal to one-half of the officer's terminal salary but not to exceed \$150 per month, which is double the amount provided in the former law. Further, as we have seen, petitioner could have had a pension, although reduced in amount, if Packer had elected to avail himself of the option afforded by the 1941 amendment which in effect gave any member of the system the right to have his pension payments divided between himself and his widow, the amounts payable to each being reduced according to actuarial principles.

The basic conditions under which a county peace officer could obtain a pension were substantially unchanged. Both before and after 1941 he could retire and receive payments amounting to half his terminal salary, not exceeding \$150 per month, if his retirement was due to a service-connected disability or if he had served for twenty years and reached the required age. Retirement Law, §§ 11, 12. Likewise, in both cases he could receive a pension after ten years' service if his retirement resulted from a nonservice disability, although the amounts were reduced by the 1941 amendment. Retirement Law, § 11.

[8] Because of the nature of the changes made in 1941 it would be difficult, if not impossible, to determine whether, as to an employee still on active duty, the total value of all pension rights, considered together, had been reduced and, if so, to what monetary extent. It is reasonably clear

from the foregoing, however, that the employees, including Packer, retained rights to substantial pension benefits and, accordingly, that the 1941 revision did not exceed the scope of a permissible modification. We hold, therefore, that deletion of the provision under which petitioner would have been entitled to a pension was not an unconstitutional impairment of the county's obligation and that the trial court correctly concluded that her petition did not state facts entitling her to a writ.

The judgment is affirmed.

**SHENK, EDMONDS, CARTER,  
TRAYNOR, SCHAUER, and SPENCE,  
JJ., concur.**



35 Cal.2d 220

**HOLLOWAY et al. v. PURCELL, Director  
of Department of Public Works et al.**

Sac. 6039.

Supreme Court of California, in Bank.

April 25, 1950.

Rehearing Denied May 22, 1950.

Frank H. Holloway and others, taxpayers, for themselves and all other taxpayers, and others, sued C. H. Purcell, as Director of the Department of Public Works and ex-officio Officer and Chairman of the California Highway Commission and others, to enjoin relocation of a section of a state highway. From a judgment of the Superior Court, Sacramento County, B. F. Van Dyke, J., sustaining defendants' demurrer to the complaint, without leave to amend, and dismissing the complaint, plaintiffs appealed. The Supreme Court, Traynor, J., held that the State Highway Commission has authority to relocate parts of state highways and construct freeways or limited access highways.

Judgment affirmed.

#### 1. Highways ⇨103

A statutory provision, designating state highway route only by its termini and one point along route, did not prohibit relocation of a section thereof by State

Highway Commission, as authorized by another statutory provision and Federal Highway Act, in absence of contention that all access to any person's property would be cut off thereby. Streets and Highways Code, §§ 71-73, 75, 90, 193, 303, 820, 835; Federal Highway Act, § 6, 23 U.S.C.A. § 6.

#### 2. Statutes ⇨150

The statutes authorizing relocation of state highways, constructed or acquired under 1909 State Highways Act, before payment of indebtedness authorized by such act, are not invalid as repealing provisions thereof in violation of constitutional provision that legislature shall not create debts exceeding specified sum, unless authorized for distinctly specified single object or work by law, which shall be irrepealable until indebtedness is paid. Streets and Highways Code, §§ 71-73, 75, 90, 193; St.1909, p. 647, § 1 et seq.; Const. art. 16, § 1.

#### 3. Highways ⇨103

The provision of State Highways Act that highways constructed or acquired thereunder shall be permanent in character and finished with oil, macadam, or other material most suitable and best adapted to particular locality in engineering department's judgment, does not preclude State Highway Commission from relocating or realigning highway to meet changing traffic needs, but specifically relates permanence to character of construction, not location. St.1909, pp. 647, 651, §§ 1 et seq., 8.

#### 4. Highways ⇨103

The provision of State Highways Act that all highways constructed or acquired thereunder shall be permanently maintained and controlled by state does not preclude State Highway Commission from relocating portion of state highway specified as part of highway system described in such act and thereafter maintaining it as relocated. St.1909, pp. 647, 650, 651, §§ 1 et seq., 4, 8.

#### 5. Highways ⇨97½

The sections of 1907 act authorizing state engineering department, created thereby, to acquire land and rights of way

for construction and relocation of roads declared state highways, were not repealed by general repealing provision of 1909 State Highways Act, authorizing department to construct and maintain state highway system and do all things necessary and proper in construction and maintenance thereof. St.1909, pp. 647, 649, 650-652, §§ 1, 4, 8, 14; Gen.Laws, Act 7972, §§ 9, 10.

#### 6. Administrative law and procedure ⚡330 Statutes ⚡219

Contemporaneous administrative construction of statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction, unless it is clearly erroneous or unauthorized.

#### 7. Highways ⚡103

The constitutional provision, authorizing legislature to establish system of state highways and pass all laws necessary and proper to construct and maintain them, does not preclude legislature from authorizing State Highway Commission to relocate highway established under such provision. Const. art. 4, § 36.

#### 8. Highways ⚡103

The constitutional provision, authorizing legislature to establish system of state highways adequate to meet state's needs and pass all laws necessary or proper to construct and maintain them, does not prohibit State Highway Commission's construction of super highways, parkways and freeways, or limited access highways, as authorized by statutes, because there was no need for such highways when provision was adopted. Streets and Highways Code, §§ 100.1-100.3; Const. art. 4, § 36.

#### 9. Constitutional law ⚡280

Construction of freeway by State Highway Commission does not necessarily constitute taking of private property rights of access without due process of law, in view of statute providing that construction of freeways shall not affect private property rights of access and that any such rights taken or damaged within eminent domain provision of Constitution shall be acquired in manner provided by law. Streets and Highways Code, § 100.3; Const. art. 1, § 14.

#### 10. Eminent domain ⚡19

In construction of freeway, State Highway Commission may take or damage rights of access for which compensation is paid. Streets and Highways Code, § 100.3; Const. art. 1, § 14.

#### 11. Constitutional law ⚡92

Construction of state highway past certain places of business gives owners thereof no vested right to insist that highway remain there, but another nearby road may be constructed and included in state highway system by State Highway Commission in interest of state, though traffic to such owners' properties may be diverted and incidental loss occasioned thereby. Streets and Highways Code, §§ 71-73, 75, 90, 193, 835.

#### 12. Administrative law and procedure ⚡202 Constitutional law ⚡62

The legislature may establish a broad statutory rule and delegate to administrative agency duty of specifically applying statute within framework of sufficiently definite primary standard.

#### 13. Administrative law and procedure ⚡202 Constitutional law ⚡62

An administrative agency may properly be authorized by statute to construct and maintain or abandon and relocate highways, build freeways or limited access highways, and do anything else necessary to maintenance of state highway system. St.1909, p. 647, § 1 et seq.; Streets and Highways Code, § 71-73, 75, 90, 100.1-100.3, 193, 835.

#### 14. Constitutional law ⚡62 Highways ⚡97¾

The statutes authorizing State Highway Commission to designate and construct freeways on such terms and conditions as will best subserve public interest in its opinion provide adequate standard to guide Commission, and hence are not unconstitutional as delegating legislative power to administrative agency. Streets and Highways Code, §§ 100.1-100.3.

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E. Vayne Miller, George W. Artz, Jr., and H. D. Jerrett, all of Sacramento, for appellants.

Fred N. Howser, Attorney General, Timothy W. O'Brien, Deputy Attorney



General, C. R. Montgomery, Robert E. Reed, Russell S. Munro and Harry S. Fenton, all of Sacramento, for respondents.

TRAYNOR, Justice.

Plaintiffs appeal from a judgment for defendants entered after a demurrer to their complaint was sustained without leave to amend.

This action was brought by plaintiffs as taxpayers to enjoin the proposed relocation of a section of Route 3, part of the state highway system extending from Sacramento to the Oregon state line via Yreka. Streets & Highways Code § 303. The complaint alleged that defendants, the Director of the Department of Public Works and members of the California Highway Commission, intend to abandon the part of Route 3 that runs along Auburn Boulevard between the cities of Roseville and Sacramento past the places of business of plaintiffs, and to establish a "proposed new substitute highway \* \* \* over an entirely new location from the established Route 3" by the construction of a freeway about a mile and a half to the northwest, connecting with the North Sacramento freeway at its present terminus. It was alleged that none "of said defendants acting in a representative capacity, or otherwise acting in any manner whatsoever, have or has, the power or authority to change, alter, relocate, re-route or substitute said State Highway Route 3, or any portion thereof as aforesaid, or to abandon or relinquish, or to do any of the things hereinbefore charged against said aforementioned defendants." An injunction was sought "restraining the defendants and each of them from acquiring real property for, and from performing any engineering work on, and from entering into any contract or contracts for, and from preparing, acknowledging, or approving any schedules relating to, and from preparing or honoring any warrants in relation to, and from performing any day labor or administrative work for, or on the construction of said proposed new supposed substitute highway in lieu of a portion of said Route 3 of the Cali-

fornia State highway System as alleged and described herein." The trial court in a memorandum opinion held that the proposed relocation was within the statutory and constitutional authority of the state highway commission, and entered a judgment sustaining defendants' demurrer without leave to amend and dismissing the complaint.

[1] There is ample statutory authority for the state highway commission to relocate any part of the state highway system. Streets & Highways Code section 71 provides: "The commission may alter or change the location of any State highway if in the opinion of the commission such alteration or change is for the best interest of the State." See also, Streets & Highways Code §§ 72, 73, 75, 90, 193. In doing so, "the commission may retain or may summarily vacate and abandon any portion of a State highway which portion has been superseded by relocation, except in case such abandonment would cut off all access to the property of any person which, prior to such relocation, adjoined the highway. The commission shall either retain such highway or relinquish it to the county." Streets & Highways Code § 835. It is not contended that, even if the state highway commission were summarily to abandon the old highway, all access to the property of any person would be cut off. The proposed relocation by the commission is not prohibited by Streets & Highways Code section 303, which designates only the termini of Route 3 (Sacramento and the Oregon state line), and one point along the route (Yreka). The commission may properly relocate any part of the highway within the designated points when in its opinion "such alteration or change is for the best interest of the State." Streets & Highways Code § 71; *People v. Gianni*, 130 Cal.App. 584, 586, 20 P.2d 87. The Federal Highway Act, to the provisions of which the state has assented (Streets & Highways Code § 820), expressly provides for the revision or relocation of state highways, such as Route 3, that are a part of the primary Federal Aid System, by the state highway commission with the approval of

the Federal Bureau of Roads. 23 U.S. C.A., § 6; *Singeltary v. Heathman*, Tex. Civ.App., 300 S.W. 242, 245.

[2] Plaintiffs contend, however, that the location of Route 3 is fixed by the terms of the State Highways Act of 1909, Stats. 1909, c. 383, pp. 647-652, under which it was acquired by the state in 1915, and cannot be changed until the principal and interest on the indebtedness authorized by that act has been paid. In their view the statutes authorizing the relocation of state highways constructed or acquired under the 1909 act are unconstitutional on the ground that they accomplish a repeal of the provisions of that act in violation of Article XVI, section 1 of the California Constitution.\* This contention is without merit.

[3] The State Highways Act of 1909 provided for the construction and maintenance of "a continuous and connected state highway system running north and south \* \* \* traversing the Sacramento and San Joaquin valleys \* \* \* by the most direct and practicable routes" at a total cost of eighteen million dollars to be financed by the issuance and sale of state highway bonds. Bonds in the amount of five million dollars issued under the 1909 act have not yet been paid and discharged. Although the 1909 act prescribed only the termini of the highway system and not the location of any of the highways, plaintiffs rely on two sentences in section 8 of the act, the first of which provides:

"The highway constructed or acquired under the provisions of this act shall be *permanent in character* and be finished with oil or macadam or \* \* \* both, or of such other material as in the judgment of the said department of engineering shall be most suitable and best adapted to the particular locality traversed." (Italics added.)

Plaintiffs interpret permanence to preclude changes from established routes. There is no support for so narrow a con-

struction. The sentence specifically relates permanence to character of construction, not to location as is evident from the words "finished with oil or macadam or a combination of both, \* \* \* as in the judgment of the said department of engineering shall be most suitable and best adapted to the particular locality traversed." In specifying hard surface materials it envisages highways that are built and maintained to endure. There is no implication that the site selected will remain forever. *Trippeer v. Couch*, 110 Or. 446, 454-457, 220 P. 1012; *Stoppenback v. Multnomah County*, 71 Or. 493, 500, 142 P. 832. A duty to construct and maintain highways "permanent in character" does not preclude relocation or realignment of highways to meet the changing needs of traffic. The sense of "permanent" in the statute is durable, not perpetual. No one can predict how long a highway will serve the purposes for which it was constructed. The first sentence in section 8 upon which plaintiffs rely requires that highways be constructed of durable materials to insure a free flow of traffic over highways that are adequate to carry it, not to compel the perpetuation of routes that have outlived their original usefulness.

[4] The second sentence of section 8 on which plaintiffs rely provides: "All highways constructed or acquired under the provisions of this act shall be *permanently maintained and controlled by the State of California.*" (Italics added.)

The requirement of permanent maintenance is not one of permanent location. The purpose of this requirement is obviously to insure state maintenance of the highways so that the burden of maintenance will not fall upon the counties. This provision must be read in connection with the preceding sentence, to the effect that the counties are responsible for the interest on the bonds issued by the state. After the relocation of the part of Route 3 now proposed has been concluded the state will still be controlling and maintaining the highway speci-

\* "The Legislature shall not, in any manner create any debt or debts \* \* \* which shall \* \* \* exceed the sum of three hundred thousand dollars \* \* \* unless the same shall be authorized

by law for some single object or work to be distinctly specified therein which law shall \* \* \* be irrevocable until the principal and interest thereon shall be paid and discharged."



fied as part of the system described in section 4 of the 1909 act, namely, "a continuous and connected state highway system running north and south \* \* \* traversing the Sacramento and San Joaquin valleys \* \* \* by the most direct and practicable routes." The requirement of permanent maintenance does not preclude the state from relocating a highway and thereafter maintaining it as relocated. Thus, the Maryland Court of Appeals, interpreting a statute requiring the state to maintain a highway bridge, held that the state could relocate the bridge to meet changed conditions. The "obvious purpose [of the statute] was to provide that, so long as the bridge at that point was used as a connection between state highways, the commission should keep it in safe repair, but it did not mean that, when in the judgment of the commission, acting in the public interest, it became desirable to relocate the highway approaches to it, and to connect those approaches by a bridge, they could not abandon the old and useless bridge and make that change." *Huffman v. State Roads Comm.*, 152 Md. 566, 581, 137 A. 358, 364; *Texas & Pacific Ry. Co. v. City of Marshall*, 136 U.S. 393, 403, 10 S.Ct. 846, 34 L.Ed. 385; *Raines v. Terrell County*, 169 Ga. 725, 151 S.E. 509, 611; *Rode v. State Highway Comm.*, 58 N.D. 249, 225 N.W. 801, 803.

[5] The 1909 act provided that a system of state highways "shall be constructed and acquired as and in the manner provided by law by the department of engineering of said state", § 1, that the department of engineering should select the routes of highways to be constructed, § 4, procure land and rights of way therefor by donation, dedication, lease, or condemnation, and should "have full power and authority to purchase all supplies, material, machinery, and to do all other things necessary and proper in the construction and maintenance" of the state highway system. § 8. The 1909 act did not create the state Department of Engineering. That agency was created by the Legislature in 1907 and was expressly given the authority to acquire land and rights of way for the construction and relocation of "roads which

have been declared state highways." Stats. 1907, c. 183, pp. 215, 218, 219, §§ 9, 10, Gen. Laws, Act 7972. The department had the power to relocate state highways under the 1907 act when the 1909 act was passed authorizing it to construct and maintain a state highway system "as and in the manner provided by law" and "to do all \* \* \* things necessary and proper in the construction and maintenance" of that system. There can be no question that the express authority to relocate state highways when necessary in the public interest is one of the "things necessary and proper" to the maintenance of the highway system authorized by the 1909 act. It is contended that sections 9 and 10 of the 1907 act were repealed by the provision of section 14 of the 1909 act that "all acts and parts of acts in conflict with the provisions of this act are hereby repealed." It is clear, however, that the requirement of permanent maintenance and control is in no way inconsistent with the express authority to relocate state highways when necessary in the public interest. *Huffman v. State Roads Comm.*, 152 Md. 566, 581, 583, 137 A. 358; *State ex rel. Sullivan v. Carrow*, 57 Ariz. 434, 439, 114 P.2d 896; *Wilkinson County v. State Highway Comm.*, 191 Miss. 750, 755, 4 So.2d 298.

[6] This interpretation of the 1909 act is in accord with the administrative, legislative, and judicial interpretation that it has always been given. "The contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." *Coca-Cola Co. v. State Board of Equalization*, 25 Cal.2d 918, 921, 156 P.2d 1, 2; *Mudd v. McColgan*, 30 Cal.2d 463, 183 P.2d 10; *California Drive-In Restaurant Ass'n v. Clark*, 22 Cal. 2d 287, 294, 140 P.2d 657, 147 A.L.R. 1028; *County of Los Angeles v. Superior Court*, 17 Cal.2d 707, 712, 112 P.2d 10; *City of Pasadena v. Railroad Commission*, 192 Cal. 61, 65, 218 P. 412. The Attorney General's office has frequently interpreted the 1909 act as not prohibiting the relocation of highways constructed or acquired under its provisions. The California Highway Com-



mission has uniformly interpreted the act as permitting such relocation whenever required by the public interest. A notable example of this interpretation is the 1931 relocation of the northern half of the Ridge Route by which more than 40 miles of highway between Grapevine Station and Castaic originally constructed under the 1909 act were abandoned and replaced by an entirely new 29-mile section. If plaintiffs are correct in their contention, the new Ridge Route should be closed and traffic rerouted over the tortuous curves and dangerous grades of the old road. A large part of Route 3 in Shasta County was relocated by the state in order to run clear of Shasta Dam. Under plaintiffs' theory the road would have to be reconstructed over the old route, which has since been flooded by the dam. See also, Stats., 1947, c. 19, p. 3824, authorizing the relocation of Route 5 to run clear of the proposed reservoir of the Santa Clara Valley Water Conservation District.

Legislative interpretation of the 1909 act has likewise been uniform. A 1915 statute provided that "the advisory board of the state department of engineering shall have the power to abandon portions of routes of state roads and highways under its jurisdiction, when, in its opinion such abandonment shall be necessary by reason of alterations or revisions in alignment of portions of routes of state roads and highways by said advisory board and shall be for the best interests of the state." Stats. 1915, c. 398, p. 640. Streets & Highways Code section 71, passed in 1921 as Political Code section 363b, and 835, added in 1935, gave the commission express authority to relocate and abandon state highways. The Legislature has repeatedly altered statutory designations of state highway routes and termini, exercising a power that under plaintiffs' construction of the 1909 act it would not have. See Streets & Highways Code, §§ 311, amended 1947, 316, amended 1939, and 323, amended 1935.

Although this court has not heretofore interpreted section 8 of the 1909 act, it has consistently upheld the authority of the commission to relocate parts of the state highway system. *Rose v. State of California*, 19 Cal.2d 713, 732, 123 P.2d 505;

*People v. Gianni*, 130 Cal.App. 584, 586, 20 P.2d 87; *People v. Ricciardi*, 23 Cal. 2d 390, 144 P.2d 799. Nothing in that section necessitates a departure from this uniform interpretation of the act.

The cases from other jurisdictions cited by plaintiffs involved attempted administrative relocations of highways contrary to specific routes prescribed by statute (*Boykin v. State Highway Dept.*, 146 S.C. 483, 144 S.E. 227; *Rowland v. McBride*, 35 Ariz. 511, 517, 281 P. 207), or an attempted use of funds from bond issues contrary to the purpose prescribed in the authorizing statute. *Harner v. Monongalia County Court*, 80 W.Va. 626, 92 S.E. 781; *Jarrell v. Board of Education*, W.Va., 50 S.E.2d 442. The relocation of Route 3 will not be financed by funds derived from the issuance of bonds under the 1909 act; moreover, even if it were, it will be within the termini and general route prescribed by the 1909 act.

[7] Plaintiffs also contend that the provision of article IV, section 36 of the California Constitution that "The Legislature shall have power to establish a system of State highways \* \* \* and to pass all laws necessary and proper to construct and maintain the same" precludes the Legislature from authorizing the relocation of any highway once established under that section. This provision is designed solely to authorize the establishment of a state highway system; it cannot be construed as including an unwritten provision that the highways once established can never be relocated even though relocation is required by changed conditions.

[8] The second count of plaintiffs' complaint alleged that part of the proposed new highway will be a freeway or limited access highway, and that the construction of such freeway is invalid in that it "tend[s] to create a new and different type of State highway \* \* \* than is provided for in Article IV, section 36, of the Constitution of the State of California." The construction of freeways or limited access highways is within the statutory authority of the state highway commission and the department of public works. Streets &

Highways Code section 100.1 provides: "The department is authorized to do any and all things necessary to lay out, acquire and construct any section or portion of a State highway as a freeway or to make any existing State highway a freeway." See also, Streets & Highways Code §§ 100.2, 100.3. Plaintiffs contend, however, that the only type of highway authorized by article IV, section 36 is one providing unlimited "rights of access, light, view and ingress and egress inherent in a public State Highway or any public highway common to the use of all the people of a free government, as public highways were understood and used prior to and at the time Section 36, Article IV of the Constitution of California was added thereto by the people of said State." In their view, the constitution prohibits the construction of any type of highway not in general use in 1902, when article IV, section 36 was added to the constitution. It is contended that inasmuch as freeways and limited access highways cut off access from cross streets and highways, statutes purporting to authorize their construction are unconstitutional. That contention is without merit; it attributes to the California Constitution a rigidity that would freeze the highway system into routes that in time might bear no relation to traffic.

The Constitution authorizes the Legislature to establish a system of state highways adequate to meet the needs of the state, "and to pass all laws necessary or proper to construct and maintain the same." The type of highway that is adequate to meet traffic needs necessarily varies with the character and extent of those needs. Highways adequate for the horse and buggy traffic of 1902 are not adequate for the high-speed motor traffic of 1950. Highways that satisfactorily connected rural communities have been replaced by super-highways, parkways, and freeways designed to meet the needs of heavy interurban automobile, truck, and bus traffic. See, *Stock v. Cox*, 125 Conn. 405, 415, 6 A.2d 346; *Burnquist v. Cook*, 220 Minn. 48, 65-71, 19 N.W.2d 394; *State ex rel. State Highway Comm. v. James*, 356 Mo. 1161, 205 S.W.2d 534, 537. Their construction

is not constitutionally prohibited by a provision authorizing the establishment of a state highway system merely because there was no need for them when the provision was adopted. *California Toll Bridge Authority v. Kelly*, 218 Cal. 7, 21 P.2d 425; *California Toll Bridge Authority v. Wentworth*, 212 Cal. 298, 298 P. 485. We conclude that the construction of freeways and limited access highways is "necessary or proper to construct and maintain" a modern state highway system.

[9-11] The construction of a freeway does not, as plaintiffs contend, necessarily constitute a taking of private property rights of access without due process of law. We are not here concerned with the question whether the state can restrict abutting owners' rights of ingress and egress without compensation therefor. Streets & Highways Code section 100.3 expressly provides that the construction of freeways "shall not affect private property rights of access, and any such rights taken or damaged within the meaning of Article I, section 14, of the State Constitution for such freeway shall be acquired in a manner provided by law." Rights of access restricted by the construction of freeways are taken or damaged by the state under its power of eminent domain and their taking is compensable under article I, section 14. This court has repeatedly held that it is permissible to take or damage rights of access for which compensation is paid in the construction of a freeway. *Rose v. State of California*, 19 Cal.2d 713, 728, 123 P.2d 505; *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818; *Beals v. City of Los Angeles*, 23 Cal.2d 381, 144 P.2d 839; *People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799. The relocation of Route 3 and the construction of the freeway may, as plaintiffs assert, injure their business. They are not, however, deprived of rights of access as abutting owners, and the construction of the highway past their places of business gives them no vested right to insist that it remain there. "Though appellants for the ensuing twenty-five years have enjoyed the benefits of a greater volume of traffic by their lands and business establishments, than may travel thereby after the new road



is opened \* \* \* they now insist upon an extension and perpetuation of those rights and advantages so that they may have a changeless road in a changing world. In our opinion, the \* \* \* statute [does not] prevent the construction and inclusion in the State highway system of another nearby road deemed by appellees to be in the interest of the State \* \* \* though \* \* \* the traffic to appellants' property may be diverted and incidental loss thereby occasioned." *McMinn v. Anderson*, 189 Va. 289, 52 S.E.2d 67, 71; *State ex rel. Sullivan Carrow*, 57 Ariz. 434, 440-441, 114 P.2d 896; *People v. Gianni*, 130 Cal.App. 584, 587-588, 20 P.2d 87; *Ritzmann v. City of Los Angeles*, 38 Cal.App.2d 470, 476, 101 P.2d 541; *Spinks v. City of Los Angeles*, 220 Cal. 366, 31 P.2d 193.

[12, 13] Plaintiffs also contend that sections 100.1, 100.2, and 100.3 of the Streets and Highways Code, giving the highway commission the authority to designate and construct freeways on "such terms and conditions as in its opinion will best subserve the public interest" Streets & Highways Code § 100.2, improperly delegate legislative power to an administrative agency. The Legislature, however, may establish a broad statutory rule and delegate to an administrative agency the duty of specifically applying that statute within the framework of a sufficiently definite primary standard. "The practice of delegating to administrative officers or boards powers which were originally performed directly by the legislature is of long standing and has met the approval of the highest courts in this state as well as in other jurisdictions." *Jersey Maid Milk Products Co. v. Brock*, 13 Cal.2d 620, 658, 91 P.2d 577, 597; *Ray v. Parker*, 15 Cal.2d 275, 285, 287, 101 P.2d 665; *Opp Cotton Mills, Inc., v. Administrator*, 312 U.S. 126, 144, 657, 61 S. Ct. 524, 85 L.Ed. 624; *United States v. Rock Royal Co-Op*, 307 U.S. 533, 574-577, 59 S.Ct. 993, 83 L.Ed. 1446. An administrative agency may properly be given the authority to construct and maintain or to abandon and relocate highways, to build freeways or limited access highways, and

to do anything else necessary to the maintenance of a state highway system. *Huffman v. State Roads Comm.*, 152 Md. 566, 583, 137 A. 358; *Rowland v. McBride*, 35 Ariz. 511, 521-522, 281 P. 207; *Burnquist v. Cook*, 220 Minn. 48, 59, 19 P.2d 394; *Heavner v. State Road Comm.*, 118 W.Va. 630, 633, 191 S.E. 574; *Nairn v. Bean*, 121 Tex. 355, 360, 48 S.W.2d 584; *State ex rel. Coyle v. Superior Court*, 128 Wash. 460, 467, 223 P. 3.

[14] The statutes in question require the commission to exercise its authority only on "such terms and conditions as in its opinion will best subserve the public interest." That requirement provides an adequate standard to guide the commission. This court and the Supreme Court of the United States have repeatedly held it sufficient that the authority be exercised as "necessary or advisable to effectuate the purpose" of the statute (*Ray v. Parker*, 15 Cal.2d 275, 287, 289, 101 P.2d 665, 670; *United States v. Rock Royal Co-Op*, 307 U.S. 533, 574-577, 59 S.Ct. 993, 83 L.Ed. 1446), or when "in the public interest it deems it necessary in order to protect the consumer" (*Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398, 60 S.Ct. 907, 914, 84 L.Ed. 1263), or as the agency deems it to be "in the public interest" to so act. *National Broadcasting Co. v. United States*, 319 U.S. 190, 225, 226, 63 S.Ct. 997, 87 L.Ed. 1344; *Yakus v. United States*, 321 U.S. 414, 423-427, 64 S.Ct. 660, 88 L.Ed. 834; *Jersey Maid Milk Products Co., Inc., v. Brock*, 13 Cal.2d 620, 641-632, 91 P.2d 577. The Legislature has adopted a policy of freeway construction in the public interest. It has properly delegated to the highway commission the authority to determine when and where freeways will be constructed, and it has properly required that the authority be exercised in accord with the needs of the public interest. Such a delegation of legislative power is valid.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.



97 Cal.App.2d 264

**CONTINENTAL NUT CO. v. SLATE et al.****Civ. 17207.**District Court of Appeal, Second District,  
Division 3, California.

April 28, 1950.

Action for damages for alleged breach of contract for sale of almonds by the Continental Nut Company, a corporation, against Louis L. Slate, individually, and Louis L. Slate and others, as copartners doing business under the fictitious firm name and style of Slate Almond Company, and California Almond Orchards, Inc., a corporation. The Superior Court of the County of San Luis Obispo, Ray B. Lyon, J., entered a judgment of dismissal upon an order sustaining a demurrer to the amended complaint without leave to amend, and the plaintiff appealed. The District Court of Appeal, Wood, J., held that the amended complaint did not sufficiently allege a written confirmation of the oral agreement to sell almonds to the plaintiff and did not allege sufficient facts to show that defendants waived their rights under the provisions of the statute of frauds, Civ. Code, § 1724(1), or to show that they were estopped to rely on such provisions.

Judgment affirmed.

**1. Frauds, statute of ☞149**

Defendants' alleged former oral agreements to sell almonds to plaintiff suing defendants for breach of subsequent alleged oral agreement to sell almonds to plaintiff were insufficient to show that defendants waived rights under statute of frauds or were estopped to rely on statute, in absence of allegations that alleged former agreements were for sale of almonds for value of \$500 or more. Civ.Code, §§ 1624a, 1724(1); Code Civ.Proc. § 1973a.

**2. Pleading ☞291(1)**

Writing set forth in full in original complaint can be considered in construing unverified amended complaint omitting the writing, notwithstanding that original complaint was not verified.

**3. Frauds, statute of ☞103(1)**

Plaintiff's writing which was an order for or an offer to buy almonds as therein specified of approximate value of \$28,500 and which was not accepted by defendants

and which was at variance with alleged oral agreement to buy almonds was insufficient memorandum of alleged oral contract to satisfy statute of frauds. Civ. Code, § 1724(1).

J. Oscar Goldstein, Marvin E. Lewis, P. M. Barceloux, Burton J. Goldstein, Goldstein, Lewis & Barceloux, San Francisco, for appellant.

Tuttle & Tuttle, Edward W. Tuttle, Edward E. Tuttle, Los Angeles, for respondents.

WOOD, Justice.

Plaintiff appeals from a judgment of dismissal entered upon an order sustaining a demurrer to his amended complaint without leave to amend.

It was alleged in the amended complaint as follows: On October 23, 1946, one Gerhard W. Stiefvater was doing business under the fictitious name of Continental Nut Company at Chico, California. On November 22, 1946, he assigned his interest in said business to the Continental Nut Company, a corporation, and assigned to said corporation all the outstanding claims and debts due said Stiefvater. On October 23, 1946, defendant Louis L. Slate was a general partner of defendant Slate Almond Company, a copartnership. Slate became the president and general manager of defendant California Almond Orchards, Inc., a corporation, some time in April or May, 1946. In April or May, 1946, defendant California Almond Orchards, Inc., a corporation, "succeeded to the business and assets" of Slate Almond Company, a copartnership, and said corporation conducted its business in substantially the same manner and through the same persons "as had the said Slate Almond Company, a copartnership." Slate Almond Company, a copartnership, remained in existence during all times referred to therein and said Slate continued to be a general partner therein. Slate was authorized generally to carry on the business of defendant California Almond Orchards, Inc., a corporation, and to make the contract thereafter referred to. For a number of years prior

to October 23, 1946, said Stiefvater was engaged in the wholesale business of buying and selling almonds and walnuts. For many years prior to said date said Stiefvater made purchases of shelled almonds from the Slate Almond Company, a copartnership, "through said Louis L. Slate representing said copartnership, by oral agreements by telephone or oral conversations, and which said oral agreement was considered to be and constituted the agreement between the parties." In several transactions consummated between said Stiefvater and said Slate prior to October 23, 1946, there "was no written memoranda" or written agreement setting forth the terms of the purchase but "the same was made solely through oral conversations had on the telephone." During that time said Stiefvater agreed to buy almonds and said Slate agreed to sell almonds, and deliveries were made under the oral agreement, and "the same" was recognized by said Stiefvater and said Slate as a sufficient contract "to consummate a purchase and sale agreement," and such transactions were accepted by them "as the mode, system and custom of doing business for the purchase of shelled almonds and like commodities without any further written contract being made between the parties." For the period commencing in April, 1946, to and including October 23, 1946, the defendant California Almond Orchards, Inc., a corporation, "permitted and held out said Louis L. Slate, its president, as the person with whom such oral contracts of purchase and sale of shelled almonds may be made by said Gerhard W. Stiefvater." Such purchases had been made for a period of approximately two years prior to October 23, 1946, and "the condition, method and system of making purchases" remained the same and was followed by said Stiefvater on October 23, 1946, when he made an oral contract with said Slate, "as president of defendant California Almond Orchards, Inc., and also as representing the Slate Almond Company, a copartnership" for the purchase of "600/100#" bags of sheller run almonds at 48 cents per pound to be shipped by said California Almond Orchards, Inc., and Slate Almond Company

in December, 1946, or January, 1947, at the option of said Stiefvater. That "the oral agreement for the purchase of the same was made by long distance telephone at Oakland," and in said telephone conversation the defendants agreed with said Stiefvater that "they then and there sold to him 600/100 pound bags" of sheller run shelled almonds at 48 cents per pound, and that said purchase and sale was "then and there completed under the oral agreement then made," and it was further agreed that by reason of the fact that said Stiefvater made the purchase "over the telephone at Oakland," he was privileged "to further confirm said purchase and sale" by letter and memorandum after his return to Chico, and it was then agreed that "it would be some time around October 30th or 31st 1946." It was further orally agreed in said telephone conversation that since said Stiefvater was in Oakland no written agreement or present written confirmation of sale was required, but that "it would be understood between them that said sale was then and there made," and that Stiefvater "could confirm the agreed terms of the purchase and sale and furnish shipping instructions after his return to Chico"; that in said telephone conversation it was understood and agreed, and Stiefvater so advised said Slate, that "he desired the said almonds then purchased by him to fill a definite commitment and order for almonds of that type and description with one of his own customers," that said Slate in making the oral contract knew and understood that said Stiefvater intended to use said almonds for the fulfillment of said commitment, and he represented to Stiefvater that it was "a firm and present sale to him" of said almonds, and that "the same would definitely be made available to him by defendants for the fulfillment of his said commitment" for the price and on the conditions then orally agreed upon.

It was further alleged therein that Stiefvater, pursuant to the agreement, did on October 30, 1946, "mail to defendants a written confirmation for the purchase of said almonds"; Stiefvater relied upon the representations and agreements of Slate and upon the mode, system and custom of

doing business with Slate, and agreed to and did purchase said almonds at said price, and Slate agreed to deliver the same as per the oral agreement.

It was also alleged therein that at the time of said purchase and the mailing of the written confirmation said Slate had not advised Stiefvater that the name of the seller had been changed to California Almond Orchards, Inc., a corporation, but that Stiefvater was advised by Slate that the sale "was being consummated by him acting both in behalf of the partnership known as 'Slate Almond Company' and the corporation, the name of which was subsequently ascertained" by Stiefvater to be the California Almond Orchards, Inc., a corporation.

It was also alleged therein that after the confirmation was mailed by Stiefvater to defendants none of the defendants recognized said oral agreement, but repudiated the oral contract and refused after repeated demands to deliver the almonds to plaintiff; that prior to the repudiation of the oral contract by defendants, Stiefvater, relying upon the oral agreement, resold in the course of his business to one of his customers "the said 600/100#" bags of almonds purchased by him from defendants; said resale was the commitment for the almonds referred to in the telephone conversation and was a binding obligation upon plaintiff to deliver the almonds to his customer; plaintiff was obliged to and did deliver to said customer "600/100#" bags of almonds of the same variety "obtained by plaintiff by purchase in the open market."

It was also alleged therein that at the time of making the oral contract said Slate was the president and general manager of the California Almond Orchards, Inc., and was also "the general partner and general agent" of the Slate Almond Company, a copartnership, and that he made the oral agreement pursuant to his status as president of said corporation and as general partner in the copartnership, and "in line with his general authority and accepted practice, mode and custom in connection with making oral sales of almonds with

\* \* \* Stiefvater, and recognizing and fulfilling such obligations without any written contract \* \* \* or any such sale and purchase reduced to writing, and further in keeping with his representations to \* \* \* Stiefvater that no written confirmation of said sale was necessary excepting the confirmation of \* \* \* Stiefvater hereinabove referred to." It was also alleged therein that Stiefvater fully complied with the requirements set up as the general practice, mode and custom of defendants in making sales of almonds to him; that by reason of all the foregoing circumstances the defendants "waived the provisions requiring written memoranda of the contract to be signed by the parties to be charged, and that \* \* \* defendants are estopped from claiming any benefit by or through the provisions of" the statute of frauds; that by reason of the refusal of defendants to fulfill the terms of said oral agreement of sale of "600/100 pound bags of almonds," the plaintiff was obliged to buy the same "in the open market to fulfill the resale commitment" with the result that plaintiff sustained a net loss of \$15,500; that by reason of the circumstances alleged, plaintiff fully complied with the requirements set up as the general practice, mode and custom of Stiefvater and Slate in making oral agreements for the purchase and sale of almonds by telephone, and complied with "the requirement that written confirmation of the said oral agreement of purchase and sale be made on or about October 30th or 31st, 1946," and complied with the oral contract; and defendants were under a duty to act upon said purchase and sale "as had been done in similar instances for several years prior thereto by said defendants with said Gerhard W. Stiefvater."

[1] Section 1724, subdivision (1), of the Civil Code (statute of frauds) provides: "A contract to sell or a sale of any goods \* \* \* of the value of five hundred dollars or upwards shall not be enforceable by action unless \* \* \* some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf." See also Civ.Code, sec. 1624a, and Code



Civ.Proc. sec. 1973a. The value of the almonds was more than \$500, and no memorandum of the alleged sale was signed by any of the defendants, the parties to be charged. Appellant asserts that the allegations of the amended complaint show that the defendants, by their conduct, waived their rights under the provisions of the statute of frauds and also that they are estopped to rely on those provisions. The allegations so referred to by appellant are to the effect that over a period of years appellant had purchased almonds from said copartnership and Slate under oral agreements, and that there had grown up between the parties an accepted mode, system and custom of buying and selling almonds under oral agreements. There was no allegation, however, that the former agreements were for the sale of almonds of the value of \$500 or more. If the former oral agreements involved values less than \$500, those agreements of course would not indicate waiver or estoppel. Also, it is to be noted there is an allegation that in the telephone conversation appel-

lant told Mr. Slate that he (appellant) desired the almonds to fill a *definite* commitment and order with one of his customers. If appellant at the time of said conversation had already made a definite commitment or agreement to sell the almonds, it would seem that he did not rely upon any statements of Mr. Slate when he made the sale to his customer. The amended complaint did not allege sufficient facts to show that defendants waived their rights under the provisions of the statute of frauds or to show that they were estopped to rely on those provisions.

It was alleged in the original complaint that on October 23, 1946, the parties made an oral agreement for the purchase and sale of almonds in the same amount, at the same price, and under the same general circumstances as alleged in the amended complaint. In the original complaint, after having alleged the oral agreement, it was alleged that on October 30, 1946, the plaintiff mailed "a confirmation purchase order for said almonds to defendant Slate Almond Company," which was as follows:

"Continental Nut Co.  
Eleventh and Esplanade  
Chico, California

Purchase Order No. 295 P

Date October 30, 1946

Slate Almond Company  
Paso Robles, California  
Ship via

Acknowledge this order immediately. Send invoice to Continental Nut Co. Advise immediately when you will ship. Show order number on invoice. Carrier's receipt must accompany invoice

| Quantity                                                                                                          | Description                      | Price            |
|-------------------------------------------------------------------------------------------------------------------|----------------------------------|------------------|
| 600/100#                                                                                                          | Bags Sheller Run Shelled Almonds | 48¢<br>per pound |
| Buyer will accept straight car either Mission, Drake, Neplus or Nonpariel varieties. No I X L will be acceptable. |                                  |                  |
| Buyer will furnish bags and seller will allow usual bag differential.                                             |                                  |                  |

Terms of Payment ———

Shipment December or January, Buyer's Option

F.O.B. ———

Continental Nut Co.  
By G. W. Stiefvater"

Defendants demurred generally and specially to the complaint. The demurrer was sustained.

[2,3] In the amended complaint, the plaintiff omitted the writing of October 30, 1946, which he had set out in full in the complaint. In the amended complaint, after having alleged that the parties made an oral agreement, it was alleged that on October 30, 1946, plaintiff mailed to defendants "a written confirmation for the purchase of said almonds." It appears that the trial judge, in construing the allegations of the amended complaint, considered (as shown by his written opinion) the words of the writing of October 30th as set forth in the original complaint. Under the circumstances here, it was proper for the trial judge in construing the allegations of the amended complaint to refer to the writing of October 30th which was set forth in full in the complaint. See *Fox Chicago Realty Corp. v. Zukor's Dresses*, 50 Cal.App.2d 129, 135, 122 P.2d 705. "Facts once alleged \* \* \* cannot be withdrawn from consideration by merely filing an amended pleading omitting them without explanation." *Neal v. Bank of America*, 93 Cal.App.2d 678, 682, 209 P.2d 825, 827. It is to be noted that the words "Purchase Order" appear at the top of said writing of October 30th. Also, the following words are thereon: "Acknowledge this *order* immediately" and "Show *order* number on invoice." (Italics added.) Also, the writing includes provisions which were not in the alleged oral agreement. In that respect, it is to be noted that the writing names the varieties of almonds which will be acceptable to the buyer, and names a kind that will not be acceptable; and states that the buyer will furnish bags and seller will allow usual bag differential. There is no reference in the writing to any oral agreement previously made or to any conversation at all. It therefore appears that said writing did not constitute a confirmation of the al-

leged oral agreement. As above shown, it is stated on the writing that it is an order. The writing was an order for, or an offer to buy, almonds as thereon specified. The order, or offer, was directed to the Slate Almond Company only, and it was not accepted by that company, or by the defendant Slate, or by the defendant California Almond Orchards, Inc., a corporation. Undoubtedly the said order of October 30th, which is set out in the original complaint, is the alleged "written confirmation" which plaintiff refers to in his amended complaint. The omission of the unaccepted order from the amended complaint does not remove it from the consideration of the court in construing the allegations of the amended complaint. The fact that the original complaint, which disclosed the existence of the unaccepted order, was not verified does not remove the order from consideration in construing the allegations of the unverified amended complaint. The written order of October 30th, submitted by plaintiff, is at variance in several respects, as above shown, with the alleged oral agreement of October 23d under which the purported sale was allegedly "then and there completed." The order refutes the allegation that on October 23d in a telephone conversation the plaintiff and the defendants "then and there" agreed that the "purchase and sale" was "then and there completed." The fact that said order was submitted by plaintiff refutes the allegation that the "accepted mode" of buying and selling almonds was under oral agreements. As above stated, sufficient facts were not alleged to show that defendants waived, or were estopped to rely on, the statute of frauds. The almonds were of the approximate value of \$28,500, and there was no memorandum of the alleged contract of sale signed by the parties to be charged.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

97 Cal.App.2d 391

**PEOPLE v. O'BRIEN.**

Cr. 2617.

District Court of Appeal, First District,  
Division 2, California.

May 8, 1950.

Walter J. O'Brien was convicted in the Superior Court of the State of California, in and for the County of Monterey, H. G. Jorgensen, J., of bigamy on his plea of guilty. The Superior Court entered an order denying defendant's motion to set aside the judgment of conviction, and the defendant appealed. The District Court of Appeal, Dooling, J., held that there was no error in the action of the Superior Court.

Order affirmed.

**1. Criminal law**  $\hookrightarrow$ 997

The non-statutory motion to set aside a judgment of conviction is the equivalent of a petition for writ of error coram nobis.

**2. Bigamy**  $\hookrightarrow$ 1

Where there was a bigamous cohabitation within the state, crime of bigamy was committed, though second marriage occurred in a foreign country.

**3. Criminal law**  $\hookrightarrow$ 1158(1)

Where assistant district attorney denied under oath on motion by defendant to set aside judgment of conviction, the making of alleged promise of probation if defendant would plead guilty, the District Court of Appeal could not on appeal from order denying the motion interfere with determination of trial court that such promise was not made.

**4. Criminal law**  $\hookrightarrow$ 1158(1)

Where medical reports which were basis of claim of insanity were inconsistent and inconclusive, District Court of Appeal on appeal by defendant from an order denying motion to set aside judgment of conviction, could not hold that trial court erred in concluding that defendant fully realized what he was doing in his bigamous cohabitation, and in entering plea of guilty.

**5. Criminal law**  $\hookrightarrow$ 998

On motion by defendant to set aside judgment of conviction, no right was violat-

ed by denying his application to be present at the hearing of his motion.

Brobeck, Phleger & Harrison, Alfred A. Hampson, Jr., San Francisco, attorneys for appellant.

Fred N. Howser, Attorney General, Clarence A. Linn, Deputy, attorneys for respondent.

DOOLING, Justice.

Appellant was charged in an information with the crime of bigamy, to which he pleaded guilty. Probation was denied him and he was sentenced. He was represented throughout by counsel appointed by the court.

The present appeal is from an order denying a motion made in pro. per. to set aside the judgment of conviction. The motion was made upon the grounds that defendant was induced to plead guilty by promises that he would receive probation made to him by a deputy district attorney; that by reason of pleading guilty, his confinement in the county jail and the use of a sedative he was not able to present a defense, and that the court lacked jurisdiction. On this appeal counsel were appointed to represent appellant at his request.

[1] The non-statutory motion to set aside the judgment is the equivalent of a petition for writ of error coram nobis. *People v. Adamson*, 34 Cal.2d 320, 210 P.2d 13; *People v. Gilbert*, 25 Cal.2d 422, 154 P.2d 657. Assuming that the grounds urged were open to appellant on such proceeding, see *People v. Adamson*, supra, 34 Cal.2d 327, 210 P.2d at page 16, we find no error in the trial court's action.

[2] Appellant does not assert that he did not contract a bigamous marriage. The second marriage occurred in England but a bigamous cohabitation in California is sufficient under our statute to constitute the crime, *People v. Ellis*, 204 Cal. 39, 266 P. 518; *People v. Jacobs*, 11 Cal.App.2d 1, 52 P.2d 945, which disposes of the jurisdictional question.

[3, 4] The assistant district attorney denied under oath making the asserted prom-



ise of probation and we cannot interfere with the fact determination of the trial court on conflicting evidence. The medical reports which were the basis of the claim of insanity are inconsistent and inconclusive and we cannot hold that the court erred in concluding that appellant fully realized what he was doing in his bigamous cohabitation and in entering his plea of guilty. No other defense is suggested.

[5] Appellant requested to be present at the hearing of his motion but the cases are clear that no right was violated by denying this application. *People v. Russell*, 139 Cal. App. 417, 34 P.2d 203; *People v. Martin*, 78 Cal.App.2d 340, 177 P.2d 813.

Order affirmed.

NOURSE, P. J., and GOODELL, J., concur.



97 Cal.App.2d 357

**ZRYD et al. v. CHAPMAN et al.**  
Civ. 4038.

District Court of Appeal, Fourth District,  
California.  
May 4, 1950.

Suit by Alston R. Zryd, and others, against George Chapman, and others for injunctive relief to reinstate plaintiffs as officers of unincorporated association, to recover money allegedly belonging to association, and to prevent use of association's name. The Superior Court of Kern County, W. L. Bradshaw, J., denied plaintiffs' plea for injunctive relief, and plaintiffs appealed. The District Court of Appeal, Shepard, J., pro tem, held that where meetings for nomination of officers and election of officers were held in accordance with constitution and by-laws of association and where plaintiffs who had opportunity to vote at annual election, did not make any attempt to follow their remedy of majority vote and were not expelled from any meetings, there was no fraudulent attempt by a minority to capture control of as-

sociation by trickery or fraud, notwithstanding removal of officer was without authority.

Judgment affirmed.

#### Associations — 17

Where meetings held by defendant members of unincorporated park improvement association, for nomination and election of officers, were held in accordance with association's constitution and by-laws, and no plaintiff was denied right to nominate or right to vote, and throughout entire existence of association many technical requirements of its constitution and by-laws were ignored, there was no fraudulent attempt by defendants to capture association by trickery or fraud, and equity would not interfere in association's affairs.

Siemon, Maas & Siemon, Bakersfield, for appellants.

George J. Coffaro, Bakersfield, for respondents.

SHEPARD, Justice Pro Tem.

This is an appeal from a judgment denying plaintiffs' plea for injunctive relief to reinstate plaintiffs as officers of Frazier Mountain Park Improvement Association, an unincorporated association, and to recover money allegedly belonging to said association and to prevent use of said association's name.

Plaintiffs contend that the evidence does not support the findings and that the findings do not support the judgment.

Frazier Mountain Park Improvement Association was organized as an unincorporated association about January, 1947. A constitution and by-laws were adopted and officers were elected.

The pertinent provisions of the organization constitution relating to the matters here under consideration are as follows:

#### "Article V.

"The elective officers of this Association shall be President, Vice-President, Secretary, Treasurer and Corresponding Secretary.

"1-a: The nominations shall be held at the regular meeting in February \* \* \*

"2-a: The officers shall be elected by secret ballot at the first regular meeting in March, and shall hold office for a period of one year unless removed for cause or until their successors are elected and installed. All members shall be notified at least one week prior to all meetings at which elections are to be held \* \* \*

"6. Should any officer absent himself for three consecutive meetings without a reasonable and lawful excuse, his office shall be declared vacant and it shall be the duty of the President to order an election to fill such vacancy \* \* \*

"Article VI.

"5 \* \* \* A: The Executive Committee shall have all the power of the Association between the meetings of same, except that being a subordinate body they shall not modify any action taken by the Association as a whole \* \* \*

"By Laws

"Article I

"1. This Association shall convene for the purpose of transacting business at least once a month on the last Friday of each month \* \* \*

"3. The Corresponding Secretary shall notify all members of a special meeting at least one week before meeting convenes."

The constitution and by-laws do not fix the meeting place nor direct any special notice of meetings except in case of special meetings and those for election of officers.

Plaintiff Alston R. Zryd presided over most of the 1947 monthly association meetings except July, October, November and December. He states, and defendants apparently concede, that there was no October meeting. Up to and including November, 1947, the association meetings were held in the fire hall.

November 28, 1947, the meeting instructed the corresponding secretary to write to the school board for use of the school house for association meetings. The December meeting was held at the school house. At the December meeting the cor-

responding secretary was instructed to give notice to the members that nomination of officers for the ensuing year would take place at the February meeting.

January 19, 1948, the corresponding secretary mailed notice to all members of a meeting to be held on the 30th of January, 1948, in the room next to the post office. None of the minutes of any previous association meeting or executive committee meeting mentioned this as a place to meet.

January 30, 1948, part of the association members met at the school house and part of them met at the room next door to the post office. Plaintiff Zryd attended the meeting near the post office but also visited briefly the school house meeting.

Those who met at the school house voted to vacate the office of president and vice president on the ground that these officers had been allegedly absent from four successive association regular meetings. Defendant George Chapman was placed in the chair for this meeting. Defendant group also at this time voted to have the annual nomination of officers on the 27th of February, 1948, at the school house and the annual election of officers on the 13th of March, 1948, at the school house.

From this schism of the 30th of January, 1948, two groups of members headed by plaintiffs and defendants developed, each contending for control of the Frazier Mountain Park Improvement Association.

February 1, 1948, a bulletin was prepared and mailed to all members by defendant George Chapman, giving notice, among other things, that a meeting would be held the 27th of February, 1948, at the school house for nomination of association officers for the ensuing year and that the election for such officers would be held on the 13th of March, 1948.

At said meeting of February 27, sixteen of plaintiffs' group attended but upon being refused permission to seat plaintiff Zryd as presiding officer fourteen of them left. Candidates were nominated on behalf of both groups. No one was denied the right to place the name of the person of his choice in nomination. At the close of this meeting the members present again voted

to hold the annual election of officers on the 13th of March, 1948.

At the meeting thus called and noticed defendants were elected officers of the association. None of plaintiffs' group were denied the right to vote at this meeting.

Throughout a great share of the proceedings during the association's entire existence, many of the technical requirements of the constitution and by-laws of the association were ignored. Neither of the said group meetings of the 30th of January, 1948, was competent to act for nomination or election of officers. The notice was defective for the school house as a meeting place and was apparently without authority for the room next to the post office. Furthermore, the date was wrong under the association's constitution, as far as the nomination of officers was concerned.

The meeting of the 27th of February appears to have been a duly located and dated meeting for nomination of officers and for the regular transaction of business. All members of the association had notice of this meeting. While there does appear to have been a usurpation of the chair, nevertheless nominations were duly made for both contending groups and appear to have been entirely in order and in accordance with the constitution and by-laws of the organization. The meeting was competent to fix the date for the election of officers and the date and hour fixed for the meeting were both in accordance with the constitution and by-laws and the notice of election which had already been given.

The findings do, in substance, find that a meeting was held on the 27th of February, 1948, for the nomination of officers and that an election was held on the 13th of March, 1948, in accordance with the constitution and by-laws of the organization and that those elected thereat are now the officers of the association. The findings state sufficient facts to warrant the denial of judgment to plaintiffs.

We agree with appellants that the attempted removal of Zryd on the 30th of January, 1948, was without authority, but

the point is moot since his term of office expired in March, 1948, and another person has been regularly elected to fill the office of president.

From the foregoing it will be observed that plaintiffs had the opportunity to vote at the annual election of the 13th of March, 1948, and did not make any attempt to follow their remedy of majority vote. They have not been expelled from any meetings. There is no showing anywhere of a fraudulent attempt by a minority to "capture" the association by trickery or fraud.

In this state of the record we cannot perceive the propriety of a court of equity interfering in the association's affairs.

Judgment affirmed.

GRIFFIN, Acting P. J., and MUSSELL, J., concur.



97 Cal.App.2d 336

**BAIRD v. CITY OF FRESNO et al.**

Civ. 4056.

District Court of Appeal, Fourth District,  
California.

May 3, 1950.

Action by Thomas B. Baird against the City of Fresno, a municipal corporation, and others, for a judgment determining that plaintiff had been duly and regularly retired on a pension by order of the Pension Board of the City of Fresno. The Superior Court of Fresno County, Ernest Klette, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that the defendant city was estopped from denying validity of city pension board's action and could not set aside board's finding.

Reversed.

#### **I. Municipal corporations** $\S$ 200(1)

Where a fireman rendered services under the pension statute, statute became a



part of contemplated compensation for such services, and part of contract of employment. Gen.Laws, Act 2592, § 8.

## 2. Municipal corporations ⇨200(1)

Where fireman was retired on pension by reason of physical disability, but was at all times subject to orders of chief of fire department, and a member thereof, and was required in cases of public emergency to perform such duties as chief of fire department might direct, retired fireman was still in the service of the city. Gen. Laws, Act 2592, § 8.

## 3. Evidence ⇨83(1), 87

It is presumed that public officers have regularly performed their duties, and such a presumption is evidence.

## 4. Pensions ⇨1

Pension statutes are to be liberally construed.

## 5. Municipal corporations ⇨120

Contemporaneous construction of the city pension ordinance by the City Pension Board, which board was charged with administering pensions, is entitled to great weight and importance in a court, especially when conduct was long acquiesced in by city.

## 6. Estoppel ⇨62(1)

Ordinarily, a governmental agency may not be estopped by conduct of its officers and employees, but there are instances in which an equitable estoppel in fact will run against government where justice and right require it.

## 7. Estoppel ⇨62(5)

Where fireman was told by head of fire department, mayor of city, and city attorney that he was entitled to his pension, and city pension board, under an ordinance vesting them with discretion to grant or deny pensions, determined that fireman had sufficient time to qualify for pension, and city approved board's determination by paying fireman's pension for 20 years, city was estopped from denying validity of board's action, and could not set aside finding of board.

Loren A. Butts, Los Angeles, and Samuel F. Hollins, Fresno, for appellant.

C. M. Ozias, City Attorney of the City of Fresno, Fresno, for respondents.

## MUSSELL, Justice.

Action for declaratory relief. Plaintiff in the instant action prays for a judgment determining that he has been duly and regularly retired on a pension by order of the pension board of the city of Fresno, and that in the event it be determined that the action of the pension board was illegal and void, it then be decreed that he is the duly appointed chief engineer of the fire department of the city and entitled to be paid the salary incident to his employment. The judgment of the trial court was for the defendants and plaintiff appeals.

Plaintiff was appointed a member of the fire department of the city of Fresno on February 8, 1900. He occupied various positions in the department until October 13, 1913, when he was placed on inactive duty by reason of injuries received in the performance of his duty. His retirement for disability was ordered pursuant to the provisions of Act 2592, Deering's General Laws, entitled: "An act to create a firemen's relief, health, and life insurance and pension fund in several counties, cities and counties, cities, and towns of the state". Plaintiff remained on inactive duty until November, 1922, at which time he was restored to active duty and appointed engineer of the fire department. He served in that capacity until July 1, 1928, and on that date was retired to inactive duty by order of the city pension board. The retirement order was made pursuant to the provisions of Ordinance No. 1415 of the city and was effective as of July 1, 1928. The amount of the pension as ordered by the board was 63⅓ per cent. of the salary attached to the position of chief engineer and the pension was paid to plaintiff regularly from July 1, 1928 to June 1, 1949. Payment by the city was then discontinued and the instant action was commenced.

It is the contention of plaintiff that the trial court erred in finding and determining that plaintiff did not serve in the Fresno

fire department a sufficient length of time to qualify for a service pension and that the period when plaintiff was on inactive duty (October 13, 1913 to November 3, 1922) could not legally be included in computing the time of his service. Defendants do not contend that plaintiff's length of time served is insufficient if the nine year period was legally included therein.

The pertinent provisions of Act 2592, Deering's General Laws, pursuant to which plaintiff was placed on inactive duty in 1913 are as follows: "§ 8. Examination of firemen retired for disability. Any person retired for disability under this act may be summoned before the board herein provided for at any time thereafter, and shall submit himself thereto for examination as to his fitness for duty, and shall abide the decision and order of such board with reference thereto; and all members of the fire department force who may be retired under the provisions of this act shall report to the chief of the fire department of the county, city and county, city, or town where so retired, on the first Mondays of April, July, October, and January of each year; and in cases of great public emergency may be assigned to and shall perform such duty as said chief of the fire department may direct; and such persons shall have no claim against the county, city and county, city, or town, for payment for such duty so performed."

[1] Where, as here, plaintiff rendered services under the pension statute, its provisions became a part of the contemplated compensation for such services and was a part of the contract of employment itself. *O'Dea v. Cook*, 176 Cal. 659, 661, 169 P. 336; *Kern v. City of Long Beach*, 29 Cal. 2d 848, 851, 852, 179 P.2d 799; *Snyder v. City of Alameda*, 58 Cal.App.2d 517, 579, 136 P.2d 857.

[2] Under the terms of the statute and contract, plaintiff was required to submit himself from time to time to the board for examination as to his fitness for duty and to abide the decision and order of the board with reference thereto. He was at all times subject to the orders of the chief of the fire department, was a member

thereof, and was required in cases of public emergency to perform such duties as the chief of the fire department might direct. He was still in the service of the city when retired on pension by reason of physical disability. *Aitken v. Roche*, 48 Cal.App. 753, 192 P. 464.

The pertinent provisions of city ordinance No. 1415, pursuant to the terms of which plaintiff was retired from service on July 1, 1928, are as follows: "After any member of the police or fire department shall have served twenty-five (25) years in the aggregate, such member shall, as a matter of right, be entitled on his application to retirement on a pension. \* \* \* Upon receipt of such application, it shall be the duty of the pension board to investigate the same and in its discretion to grant or deny such application. \* \* \* In determining the period of service necessary to render any member eligible for a pension under the provisions hereof, aggregate service only shall be considered dating from the date when the member was actually confirmed as a member of either the police or fire department. Such aggregate service need not be continuous and may be as a member of either or both departments and any rights acquired by service shall not be lost by reason of resignation or withdrawal from the department except as otherwise expressly provided."

It is admitted by counsel for the defendants that the application filed by the plaintiff with the pension board was in due form. After the receipt of said application, the matter was duly investigated by the board. A resolution ordering the pension was passed and contained a recital "That the said Thomas Baird has served as a member of the fire department for 28 years and is by reason of said service entitled to retirement on pension". It was further resolved that the plaintiff was thereby retired to inactive service on a pension in the amount of 63⅓ per cent. of the salary attached to the rank or position held by him.

It is apparent that the defendant city, by the terms of the ordinance, vested the pension board with discretion to grant or deny plaintiff's application and the only limita-

tion placed upon the exercise of that discretion in determining the period of service necessary to render plaintiff eligible for pension was that aggregate service only should be considered and that such aggregate service need not be continuous.

In *Mogan v. Board of Police Com'rs*, 100 Cal.App. 270, 273, 279 P. 1080, 1081, a general rule is stated that: "Whenever any person or persons have authority to hear and determine any question, their determination is, in effect, a judgment having all the incidents and properties attached to a similar judgment pronounced in any regularly created court of limited jurisdiction acting within the bounds of its authority." This rule is approved in *McColgan v. Board of Police Com'rs*, 130 Cal.App. 66, 68, 69, 19 P.2d 815. However, it is stated in *Peters v. Sacramento City E. R. System*, 27 Cal.App.2d 10, 17, 80 P.2d 179, 182: "There are many cases where the court has given relief where the action of the board or tribunal has been founded upon unsubstantial testimony which was insufficient upon which to base a finding even though the board or tribunal was vested with discretionary authority."

It was also stated, 27 Cal.App.2d on page 16, 80 P.2d 179, that where there was no substantial evidence to support the conclusion reached by the retirement board, it had no facts upon which to base the conclusion reached. Hence it exercised no discretion and having acted contrary to the undisputed facts, its action was treated and considered as arbitrary.

In *Brooks v. Pension Board*, 30 Cal.App. 2d 118, 121, 85 P.2d 956, where a municipal pension ordinance provided for a pension in case a police officer or fireman was retired from actual work because of a disability resulting from bodily injury or illness and where such officer was required to remain a member of the department subject to recall and restoration to active duty depending upon the condition and continuance of his disability, it was held that where the determination of the question of such officer's right to pension was left to the discretion of the pension board, its determination should not be disturbed un-

less the exercise of such discretion was abused.

In the instant case, the defendant city having vested the pension board with the authority to grant or deny plaintiff's application, and having approved the granting thereof by a payment of the pension in accordance with the determination of the board for almost twenty years, now seeks to repudiate its action and declare the findings of the board illegal.

It is not necessary to here decide whether the determination of the pension board has the force and finality of a judgment but we deem such determination to be of importance in passing upon the equities involved and the construction to be placed upon the terms of the pension contract.

In the case of *Palaske v. City of Long Beach*, 93 Cal.App.2d 120, 208 P.2d 764, the court considered as evidence the custom of the pension commissioners of the city to submit all legal questions concerning the pension provisions of the city charter and all doubtful pension claims to the city attorney for an opinion and held that a practice pursuant to opinions rendered by the city attorney to include time spent on vacation, sick leave and leave of absence on furlough in computing aggregate length of service for granting retirement pensions was, while not controlling upon the court, entitled to great weight, particularly when long acquiesced in. There, as here, formal rules or regulations with respect to granting or denying pension claims had not been adopted. It was there said, 93 Cal.App.2d at page 129, 208 P.2d at page 769: "It was necessary for the board to determine the meaning of the phrase 'aggregate service.' This it did, acting upon the advice of the City Attorney. Its contemporaneous construction of the law it was charged with administering, while not controlling upon the courts, is entitled to great weight, particularly when long acquiesced in."

[3] It is presumed that public officers have regularly performed their duties. Such a presumption is evidence. *Los Angeles Athletic Club v. City of Long Beach*,



128 Cal.App. 427, 17 P.2d 1061; *People v. Siemsen*, 153 Cal. 387, 95 P. 863.

[4] It is well settled that pension statutes are liberally construed. *Dillard v. City of Los Angeles*, 20 Cal.2d 599, 602, 127 P.2d 917, 128 P.2d 537; *Hurley v. Sykes*, 69 Cal.App. 310, 231 P. 748; *Klench v. Board of Pension Fund Com'rs*, 79 Cal.App. 171, 249 P. 46; *Whitehead v. Davie*, 189 Cal. 715, 209 P. 1008; *Jackson v. Otis*, 66 Cal.App. 357, 360, 225 P. 890; *Aitken v. Roche*, 48 Cal.App. 753, 760, 192 P. 464; *O'Dea v. Cook*, 176 Cal. 659, 169 P. 366.

As was said in the case of *Hurley v. Sykes*, supra, 69 Cal.App. at pages 316 and 317, 231 P. at page 751: " \* \* \* In ascertaining the intent and meaning of the charter provision, a liberal construction should be indulged in to carry out the beneficial purposes aimed at. *O'Dea v. Cook*, 176 Cal. 659, 169 P. 366; *Aitken v. Roche*, 48 Cal.App. 753, 192 P. 464. The spirit of these provisions is to protect all members of the fire department in the benefits which the fund insures, and they should not be narrowed by any strict or technical construction, but should be interpreted on broad principles. \* \* \*"

Also, in the case of *Snyder v. City of Alameda*, 58 Cal.App.2d 517, 520, 136 P. 2d 857, 860, which was a pension case, the court, speaking in reference to the construction of statutes, said: "(8) Moreover, it is a well established rule of statutory construction that where the language of a statute is susceptible of two constructions, one of which in its application will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted. (Citing cases.)"

[5] The construction placed upon the provisions of the pension contract by the city is of importance in considering the question before us. *People v. Southern Pac. Company*, 209 Cal. 578, 595, 290 P. 25.

As was said in *Loomis Fruit Growers Ass'n v. California Fruit Exch.*, 128 Cal. App. 265, 275, 16 P.2d 1040, 1044: "The

principle that parties should be bound by the construction placed upon a contract by a long course of conduct is eminently just and fair, and, we think, amply supported by the authorities. 6 Cal.Jur., p. 306; *Alexander v. Walling*, 105 Cal.App. 525, 288 P. 138; *Retsloff v. Smith*, 79 Cal.App. 443, 249 P. 886; *Kennedy v. Lee*, 147 Cal. 596, 82 P. 257."

The defendant city has not questioned action of the pension board for almost twenty years. Plaintiff filed his application for a pension at the request of the mayor of the city of Fresno. At the time of the hearing on the verified petition for the pension, the board had before it an opinion filed by the then city attorney to the effect that the nine year period in question should be included in a computation of plaintiff's time of service. The city attorney was also a member of the board and it is apparent that the board was fully advised of the question as to the inclusion of the nine year period in computing plaintiff's time of service. These circumstances clearly indicate that both parties to the pension contract placed a definite construction upon the provisions relating to the computation of plaintiff's time of service. To now construe the contract contrary to the intention of the parties under the facts here shown, would result in a hardship and injustice to plaintiff. Such a construction is not favored. *People v. Ventura Refining Co.*, 204 Cal. 286, 268 P. 347, 283 P. 60.

[6] Ordinarily, a governmental agency may not be estopped by the conduct of its officers and employees but there are many instances in which an equitable estoppel in fact will run against the government where justice and right require it. *Farrell v. County of Placer*, 23 Cal.2d 624, 627, 145 P.2d 570, 153 A.L.R. 323.

The evidence before us shows that plaintiff was told by the Commissioner of Public Safety and Welfare, who was head of the police and fire departments, that he was entitled to his pension and should apply for it and retire. Plaintiff was informed by the city attorney that he was entitled to the pension and testified that he

would not have filed his application had it not been for the statements of the mayor.

It also appears that plaintiff at the time of his retirement was forty-six years of age. Had there been any doubt as to the meaning of ordinance No. 1415, which is now before us for consideration, plaintiff could have served out his twenty-five years in active service.

In our opinion, to hold that the city is entitled to question the action of the pension board taken in 1928 would result in an injustice to the plaintiff.

[7] We conclude that the rule announced in the Farrell case, *supra*, is applicable here and that the defendant is now estopped to deny the action of its board in approving plaintiff's application and granting him a pension.

We conclude also that the city, having invested the pension board with the discretion to grant or deny plaintiff's application after investigation, the determination of the pension board relied upon for many years by both the city and plaintiff should not now be set aside under the circumstances herein shown.

The judgment is reversed.

GRIFFIN, Acting P. J., and SHEPARD, Justice pro tem., concur.



97 Cal.App.2d 465

**TERRY v. SCHWARTZ et al.**

Civ. 4036.

District Court of Appeal, Fourth District,  
California.

May 10, 1950.

Hearing Denied July 6, 1950.

Action by Willard Terry against Charles Schwartz and others, for balance due on sale and delivery of a circulating pump. From a judgment of the Superior Court of Kings County, Clark Clement, J., in favor of plaintiff, the named defendant appealed. The

District Court of Appeal, Shepard, J. pro tem., held that evidence sustained recovery. Affirmed.

# 1. Appeal and error ⇨989

Where defendant appealed from judgment on verdict for plaintiff and contended that evidence was insufficient to support judgment, district court of appeal was concerned only with evidence most favorable to plaintiff.

# 2. Sales ⇨359(1)

In action by seller for balance due on circulating pump, evidence that buyer told seller he would buy pump if he could get driller to drill wells on buyer's land, that buyer later told seller to proceed with special work required on pump, and that buyer agreed to pay price fixed and made part payment, sustained recovery, though buyer may have intended that title should ultimately rest in driller.

Sidney J. W. Sharp, Herbert M. Braden, Lawrence W. Clawson, Hanford, for appellant.

William M. Martin, Hanford, for respondent.

SHEPARD, Justice pro tem.

Plaintiff sues for \$312.50, balance due and unpaid on the sale and delivery by plaintiff to defendants of one Byron-Jackson circulating pump. Defendant Hamblin defaulted. Defendant Schwartz answered, denying the debt. Trial was had before a jury. The verdict was for plaintiff. Judgment was entered thereon. A motion for new trial was denied and defendant Schwartz appeals.

[1] Defendant Schwartz contends that the evidence was insufficient to support the judgment. In commenting on that contention we are here concerned only with the evidence most favorable to plaintiff. *Bellman v. San Francisco High School Dist.*, 11 Cal.2d 576, 581, 81 P.2d 894.

[2] In general substance that evidence shows: that early in January, 1948, defendant Schwartz inquired of plaintiff about the pump and told plaintiff he would buy

it if he could get codefendant Hamblin to drill some wells on his (Schwartz's) land; that he also asked plaintiff to hold the pump for him and plaintiff agreed to do so; that about the middle of January plaintiff told Schwartz that plaintiff had an opportunity to sell the pump and asked Schwartz if he still wanted the pump; that Schwartz said he would see Hamblin in a day or so to be sure; that Schwartz reconfirmed his purchase a day or two later and ordered the special work required on the pump to be finished by plaintiff; that plaintiff explained then that he would not charge the pump to Hamblin and Schwartz agreed to pay for it; that about 20 January, Schwartz asked the price of the pump, was told \$500, and again agreed to pay for same; that Schwartz told his codefendant Hamblin that he, Schwartz, had made arrangements with plaintiff to pay for the pump; that Hamblin picked up the pump from plaintiff and took it to Schwartz, on whose property it was used to drill wells for defendant Schwartz and where it remained from one to two months; that later, defendant Schwartz talked to plaintiff and asked him to take the pump back and allow Schwartz to make payment for its use to that time on a rental basis; that plaintiff mailed Schwartz a bill for the purchase price, and a few days later received a check for \$200 from Schwartz accompanied by a note saying: "This is \$200. Please apply on pump".

On these facts and the inferences which might properly be drawn therefrom, we are satisfied the jury was justified in concluding that defendant Schwartz ordered and agreed to pay for the pump and that in accordance therewith the pump was actually delivered to the possession of defendant Schwartz and that Schwartz assumed dominion over it with the understanding and intent that he, Schwartz, was to pay for it. The fact that Schwartz may have intended to ultimately rest the title in Hamblin would not change the legal relationship of Schwartz and plaintiff.

There was, in addition, ample other evidence to corroborate various vital points in the foregoing. We are satisfied that the

evidence was sufficient to support the verdict.

There are certain contentions of error regarding the admission of alleged hearsay evidence. We have read the entire record and we are satisfied that there was no prejudicial error.

From a reading of the entire record it appears that a full and fair trial was had and that the verdict was amply supported by the evidence produced.

The judgment is affirmed.

GRIFFIN, Acting P. J., and MUSSELL, J., concur.



97 Cal.App.2d 161

**FREEMAN v. MILLS et al.**

**Civ. 17160.**

District Court of Appeal, Second District,  
Division 3, California.

April 25, 1950.

Rehearing Denied May 19, 1950.

Hearing Denied June 22, 1950.

Wesley D. Freeman sued William Mills and Thoroughbred Racing Protective Bureau, Inc., and others, for libel. The Superior Court of Los Angeles County, Alfred E. Panoessa, J., rendered judgments of nonsuit, and plaintiff appealed from judgment in favor of Thoroughbred Racing Protective Bureau, Inc. The District Court of Appeal, Vallee, J., held that the communication was made without malice and was privileged.

Judgment affirmed.

# 1. Libel and slander $\S$ 30, 34

A publication must be false and unprotected in order that it shall constitute a libel. Civ.Code,  $\S$  45.

## 2. Trial $\S$ 165

On motion for judgment of nonsuit in libel action, trial court was required to treat the involved publication as false.



**3. Appeal and error** ⇨927(3)

On appeal from judgment of nonsuit rendered in libel action, District Court of Appeals was required to treat the involved publication as false.

**4. Libel and slander** ⇨123(1)

Whether a publication is libelous on its face is a question of law. Civ.Code, § 45.

**5. Libel and slander** ⇨9(1)

A report prepared by investigative bureau for director of a turf club, stating that writer had been informed that plaintiff who was an assistant starter of horse races was type of individual who might readily have been involved in furnishing batteries to jockeys, etc., was libelous on its face. Civ.Code, §§ 45, 45a.

**6. Libel and slander** ⇨50½

A defamatory publication may be privileged though false. Civ.Code, §§ 45, 47, subd. 3.

**7. Libel and slander** ⇨51(1)

Where occasion and relations between one making a defamatory charge and the one to whom charge is made, are such that publication would be privileged, the right of the publisher to write is complete and unqualified, except that he must write without malice. Civ.Code, §§ 45, 47, subd. 3.

**8. Libel and slander** ⇨123(8)

Where facts and circumstances under which a defamatory publication is made are not disputed, the question of privilege is one of law. Civ.Code, §§ 45, 47, subd. 3.

**9. Libel and slander** ⇨51(1)

Where it appears without conflict that defamatory publication, if made without malice, was a privileged communication to an interested person within statute defining a privileged communication, malice becomes gist of libel action and must exist as a fact before cause of action will lie. Civ.Code, §§ 45, 47, subd. 3.

**10. Libel and slander** ⇨51(1)

Privilege to publish an otherwise libelous communication may be lost if publisher has no reasonable grounds for believing

communication to be true, and may be lost if publication is motivated by any cause other than desire to protect interest for protection of which privilege is given. Civ. Code, §§ 45, 47, subd. 3.

**11. Libel and slander** ⇨4

"Actual malice" is that state of mind arising from hatred or ill will toward plaintiff.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Actual Malice".

**12. Libel and slander** ⇨5

Fact that defamatory publication is false does not necessarily import malice. Civ.Code, § 45.

**13. Libel and slander** ⇨112(2)

The tenor of a defamatory publication may be evidence of malice. Civ.Code, § 45.

**14. Libel and slander** ⇨44(1), 112(2)

In libel action against an investigative bureau which prepared a report for director of a turf club stating that defendant had been informed that plaintiff, who was an assistant starter of horse races, was type of individual who might readily have been involved in furnishing batteries to jockeys, etc., evidence was insufficient to justify finding that defendant was activated by a malicious or improper motive, or published charges without reasonable grounds for believing them true, and publication was privileged. Civ.Code, §§ 45, 47, subd. 3.

**15. Libel and slander** ⇨112(2)

In libel action, malice may be established by direct proof of state of mind of publisher, or by evidence from which its existence may be inferred, and evidence must bear on course of conduct of defendant toward plaintiff from which existence of malice reasonably may be inferred.

**16. Libel and slander** ⇨104(3)

In libel action against an investigative bureau which prepared a report for director of a turf club stating that defendant had been informed that plaintiff, who was an assistant starter of horse races, was type of individual who might readily have been

involved in furnishing batteries to jockeys, etc., a communication from defendant to turf club mentioning plaintiff's name only in the heading, and containing nothing libelous of plaintiff, and containing nothing to prove state of mind of defendant toward plaintiff, or having a logical tendency to prove publication on which action was based was prompted by malice, or tending to show a malicious and vindictive attitude of mind toward plaintiff, was properly excluded from evidence.

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Elwood Bowles; Brown & Gilbert, Los Angeles, for appellant.

James V. Brewer, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of nonsuit in an action to recover damages for libel.

Plaintiff, 57 years of age, had been employed nearly all his life as an assistant starter of horse races at various courses throughout the country. During the 1946-1947 racing season, conducted by Los Angeles Turf Club at its Santa Anita racecourse, plaintiff was employed as an assistant starter under the supervision of starter William Mills. At the conclusion of the season Mills told plaintiff he "expected him back next year." Plaintiff then worked as assistant starter at Thistle Down and River Downs racecourses in Ohio.

In 1947, defendant Thoroughbred Racing Protective Bureau, Inc., referred to as defendant, was a nonprofit corporation organized and maintained by about 34 major racecourses throughout the United States for the purpose of conducting investigations for such courses. It served only its members. Its purpose was to foster horse racing and its proper conduct, to investigate employees and prospective employees, to investigate matters which the courses wanted investigated, and furnish them with information with respect thereto. Los Angeles Turf Club was a member of defend-

ant Protective Bureau and paid defendant about \$24,000 a year for its services. Carleton F. Burke was director of racing and presiding steward for Los Angeles Turf Club and also a director and vice-president of defendant Protective Bureau. As presiding steward he was interested in any information he might obtain as to any proposed employee, and he wanted defendant to furnish him any information it might have—"that is what they are for." Defendant did not make recommendations; it only made reports. Assistant starters at Santa Anita were employed subject to Burke's approval and all employees were screened very carefully.

About November 20, 1947, defendant sent the following written communication to Burke as director of reading:

"Thoroughbred Racing Protective Bureau, Inc. File No. 11-8 Origin of Investigation Chicago Title Wesley Freeman—Assistant Starter Character of Case Eleven

"It was ascertained from confidential informant T-1 that an assistant starter who worked with Freeman at the Thistle Down meeting at Randall Park allegedly made the statement that he wished he had been interviewed by the TRPB regarding Wesley Freeman. It was indicated by T-1 that this assistant starter, if he could be located, would be willing to furnish information to the TRPB concerning Freeman's alleged unethical practices. This same informant advised that an assistant starter who worked with Freeman was at the Churchill Downs meeting and there was a possibility that this assistant starter was identical with the person referred to above.

"Information from Mr. Reuben White, starter at Churchill Downs, reflects that the person referred to by T-1 who was attending the Churchill Downs meeting was Edward Lee Faulkner. It should be noted that a lead is set forth in referenced report for the Baltimore Office to interview Ed Faulkner relative to the activities and conduct of Wesley Freeman at River Downs. This lead is being restated for the Miami Office since it was ascertained that Faulkner intends to go to Florida and

will probably be an assistant starter at Gulfstream. It was ascertained that Faulkner's social security number is 567-14-3127 and that he worked at the Ohio tracks and was at the Churchill Downs meeting in Kentucky. The above information was not obtained from Mr. White until the last few days of the meeting at Churchill Downs and subsequent to that time Mr. Faulkner was not available for interview. Accordingly, the lead is set forth for Faulkner to be interviewed in Florida.

"T-1 advised the writer that he had discussed instant matter with Starter Reuben White. White was very reluctant to discuss the matter and indicated that Freeman was one of the best assistant starters in the business but that he had heard a number of rumors about Freeman's conduct and activities and was of the opinion that Freeman was the type of individual who might readily have been involved in furnishing batteries to jockeys, etc. It should be noted that White did not state that he had any knowledge of Freeman having done anything unethical and in fact stated that he had not observed Freeman commit any violation of the rules of racing.

#### *"Undeveloped Leads*

##### *"The Miami Office*

"Will locate and interview Edward Lee Faulkner, Assistant Starter, concerning information in his possession relative to the activities and conduct of Wesley Freeman at River Downs and Thistle Down, it being noted that Faulkner will probably be employed at Gulfstream.

"Will attempt to ascertain from Edward Lee Faulkner the identity of all the assistant starters employed at River Downs and Thistle Down at the time Freeman was employed in a similar capacity.

##### *"The Chicago Office*

###### *"At New Orleans, Louisiana*

"Will discreetly interview Starter Reuben White regarding any knowledge he has of Freeman's activities at Thistle Down and River Downs.

#### *"Confidential Informant*

##### *"Confidential Informant T-1:*

"Jack Young, Steward representing the Kentucky State Racing Commission

|                                    |                                     |                               |
|------------------------------------|-------------------------------------|-------------------------------|
| Report made by<br>C. E. Perrin LLG | Report made at<br>Chicago, Illinois | Date of<br>Report<br>11/20/47 |
|------------------------------------|-------------------------------------|-------------------------------|

Period covered  
10/21; 11/14/47

"Los Angeles 1 cc- Carleton F. Burke, Dir. of Racing Santa Anita 12/2/47

T.R.P.B. Los Angeles Dec 1 1947 File No. 11-11-9  
Initials F"

As a result of the receipt of this communication by Burke, plaintiff was not employed the next racing season by Los Angeles Turf Club. The next race meet was too near to permit an investigation of the contents of the communication, and Burke did not want to employ plaintiff whether he was guilty or not.

Plaintiff pleaded that the publication was false. Defendant denied that it was false and pleaded that it was privileged. Motions of the defendants for judgments of nonsuit were granted. Plaintiff appeals from the judgment in favor of Thoroughbred Racing Protective Bureau, Inc.

Plaintiff asserts that: the communication is libelous *per se*; a qualified privilege is defeated by the existence of malice; an inference of malice arises from "the internal character of the communication," and the course of conduct pursued by defendant; the communication is false. Defendant says that: the communication is not libelous *per se*; it was privileged and the privilege was not defeated by the existence of malice; no inference of malice can be drawn from the evidence; and the truth or falsity of the communication is immaterial.

Civil Code section 45, in part, reads: "Libel is a false and unprivileged publication by writing, \* \* \* which has a tendency to injure him [any person] in his occupation." Section 45a, in part, reads: "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face." Section 47 reads: "A privileged



publication \* \* \* is one made— \* \* \* 3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information." Section 48 reads: "In the case provided for in subdivision 3 of the preceding section, malice is not inferred from the communication."

[1-3] A publication must be false *and* unprivileged in order that it shall constitute a libel. *Snively v. Record Publishing Co.*, 185 Cal. 565, 574, 198 P. 1. The court below, for the purpose of the motion for judgment of nonsuit, was required to, and we must, treat the publication as false. Plaintiff testified that he had never in his life furnished a battery to a jockey.

[4, 5] Whether a publication is libelous on its face is a question of law. *Howard v. Southern California Associated Newspapers*, 95 Cal.App.2d 580, 213 P.2d 399. The publication obviously is libelous on its face. It is defamatory of plaintiff without the necessity of explanatory matter. The words used tended directly to injure plaintiff in his occupation. See *Oberkotter v. Woolman*, 187 Cal. 500, 202 P. 669; *Maher v. Devlin*, 203 Cal. 270, 275, 263 P. 812; *Layne v. Kirby*, 208 Cal. 694, 284 P. 441; *Bates v. Campbell*, 213 Cal. 438, 441, 2 P.2d 383; *Locke v. Mitchell*, 7 Cal.2d 599, 61 P.2d 922; *Washer v. Bank of America*, 21 Cal.2d 822, 827, 136 P.2d 297, 155 A.L.R. 1338; *Rosenberg v. J. C. Penney Co.*, 30 Cal.App.2d 609, 613, 620, 86 P.2d 696; 16 Cal.Jur. 45, sec. 19; 6 A.L.R.2d 1008. The language is not susceptible of an innocent interpretation. See *Brewer v. Second Baptist Church*, 32 Cal.2d 791, 197 P.2d 713; *Washer v. Bank of America*, 21 Cal.2d 822, 828, 136 P.2d 297, 155 A.L.R. 1338; *Locke v. Mitchell*, 7 Cal.2d 599, 601, 602, 61 P.2d 922; *Adams v. Cameron*, 27 Cal.App. 625, 150 P. 1005, 151 P. 286.

[6-8] A publication may be privileged though false. *Snively v. Record Publishing Co.*, 185 Cal. 565, 574, 198 P. 1; *Jones v.*

*Express Publishing Co.*, 87 Cal.App. 246, 257, 262 P. 78. If the occasion and the relations between the one making the charge and the one to whom it is made are such that the publication would be privileged, the right of the publisher to write is complete and unqualified, except that he must write "without malice." *Snively v. Record Publishing Co.*, 185 Cal. 565, 576, 198 P. 1. Where the facts and circumstances under which a defamatory publication is made are not disputed, the question of privilege is one of law. *Carpenter v. Ashley*, 148 Cal. 422, 423, 83 P. 444, 7 Ann.Cas. 601; *Adams v. Cameron*, 27 Cal.App. 625, 638, 150 P. 1005, 151 P. 286; *Jones v. Express Publishing Co.*, 87 Cal.App. 246, 256, 262 P. 78. The evidence is without conflict that the publication in the present case was a communication made to a person interested therein by one who stood in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, and also by one who had been requested by the person interested to give the information. Civ.Code, sec. 47, subd. 3. It was privileged if made "without malice." *Harris v. Curtis Publishing Co.*, 49 Cal.App.2d 340, 349, 121 P.2d 761; *Heuer v. Kee*, 15 Cal. App.2d 710, 714, 59 P.2d 1063; *Longworth v. Curson*, 56 Cal.App. 489, 206 P. 779; Rest., Torts, secs. 595, 596; 33 Am.Jur. 127, sec. 128 et seq.; 3 A.L.R. 1654; 11 A.L.R. 1014.

[9] Where it appears without conflict that the publication, if made without malice, was a privileged communication to an interested person within the meaning of section 47, subdivision 3, malice becomes the gist of the action and it must exist as a fact before the cause of action will lie. *Locke v. Mitchell*, 7 Cal.2d 599, 602, 61 P.2d 922. In the cited case it was said, 7 Cal.2d at page 602, 61 P.2d at page 923: "[W]hile in the case of a false and unprivileged publication, libelous *per se*, malice is implied, and lack of it is a matter of defense, which need not be pleaded (*Gilman v. McClatchy*, supra [111 Cal. 606, 44 P. 241]); *Snively v. Record Pub. Co.*, 185 Cal. 565, 198 P. 1), this is not true of a qualified privilege, for section 48 of the

Civil Code expressly declares that 'malice is not inferred from the communication or publication' in the cases provided for in subdivisions 3, 4, and 5 of section 47 [now only subdivision 3]. Hence, where the complaint discloses a case of qualified privilege, no malice is presumed and in order to state a cause of action the pleading must contain affirmative allegations of malice in fact." See also *Jackson v. Underwriters' Report, Inc.*, 21 Cal.App.2d 591, 593, 69 P.2d 878; *Glenn v. Gibson*, 75 Cal.App.2d 649, 660, 661, 171 P.2d 118.

[10] It affirmatively appeared in the proof of plaintiff's case that the communication was qualifiedly privileged. Hence, malice is not presumed; and, in order to establish a cause of action, it was necessary that plaintiff prove the existence of malice. Malice defeats the privilege. The privilege may be lost if the defendant has no reasonable grounds for believing his statements to be true. It may also be lost if the publication is motivated "by any cause other than the desire to protect the interest for the protection of which the privilege is given." *Brewer v. Second Baptist Church*, 32 Cal.2d 791, 797, 197 P.2d 713, 717.

The question then is whether there is any evidence which would have supported a finding by the jury that defendant was motivated by a malicious or other improper motive or published its charges without reasonable grounds for believing them to be true.

[11,12] "'Actual malice' is that state of mind arising from hatred or ill will toward the plaintiff; \* \* \*." Civ.Code, sec. 48a, subd. 4(d); *Hearne v. De Young*, 132 Cal. 357, 361, 64 P. 576; *Davis v. Hearst*, 160 Cal. 143, 157-160, 116 P. 530; *Gudger v. Manton*, 21 Cal.2d 537, 543, 134 P.2d 217. The fact that the publication was false does not necessarily import malice. *Emde v. San Joaquin County Central Labor Council*, 23 Cal.2d 146, 161, 143 P.2d 20, 150 A.L.R. 916.

[13,14] Plaintiff argues that "malice arises from the internal character of the communication." Malice may not be inferred from the fact alone of the communi-

cation of a defamatory statement. Civ. Code, sec. 48; *Brewer v. Second Baptist Church*, 32 Cal.2d 791, 799, 197 P.2d 713. While the tenor of the statement may be evidence of malice, *Brewer v. Second Baptist Church*, supra, there is nothing in the communication of November 20, 1947, indicating that defendant was actuated by hatred, ill will, spite, ill feeling, a desire to do harm for the satisfaction of doing it, or lack of good faith; or that defendant did not have reason for believing its statements to be true; or that it was motivated by any cause other than the desire to protect the interest of Los Angeles Turf Club.

It is also argued that malice may be inferred from the fact that defendant did not forward any communication to Los Angeles Turf Club from November 20, 1947, to the date of trial, December 6, 1948, "either confirming, verifying, denying, modifying, explaining or exonerating" plaintiff, and that the courses at which the alleged misconduct took place were not members of defendant. It cannot reasonably be inferred from these facts that the defendant acted maliciously in sending the communication of November 20, 1947.

Plaintiff does not suggest that there was any other evidence of malice and we have found none. Although the complaint did not directly allege malice, it did allege that the publication of November 20, 1947, was made "without probable cause to believe it true." The record is barren of evidence to support this allegation.

[15,16] It is contended that the court erred in not admitting in evidence a communication dated November 4, 1947, from defendant to Los Angeles Turf Club. The contention is made without argument. The report is headed "Wesley Freeman—Assistant Starter." Plaintiff's name is not otherwise mentioned in the communication. It has to do only with an attempt to ascertain the whereabouts of a horse owner named Skully. There is nothing opprobrious in the communication or anything defamatory, derogatory or in any way libelous of plaintiff. At the time the communication was offered in evidence plaintiff's counsel stated "There is no

charge in that particular one definitely against Mr. Freeman." Malice may be established by direct proof of the state of mind of the person, or by evidence from which its existence may be inferred. The evidence must bear on the course of conduct of the defendant toward the plaintiff from which the existence of malice reasonably may be inferred. *Snively v. Record Publishing Co.*, 185 Cal. 565, 577, 198 P. 1. There is nothing in this publication which tends to prove the state of mind of defendant toward plaintiff, or having a logical tendency to prove that the publication of November 20, 1947, was prompted by malice, or "tending to show a malicious and vindictive attitude of mind" toward the plaintiff. *Scott v. Times-Mirror Co.*, 181 Cal. 345, 361, 362, 184 P. 672, 680, 12 A.L.R. 1007. The court did not err in not admitting the communication of November 4, 1947, in evidence.

In view of the fact that it appeared affirmatively without contradiction from the proof of plaintiff's case that the publication was privileged, the court properly granted the motion for judgment of nonsuit.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



97 Cal.App.2d 300

LOS ANGELES CITY HIGH SCHOOL  
DIST. v. CULVER CITY HIGH  
SCHOOL DIST. et al.

Civ. 17530.

District Court of Appeal, Second District,  
Division 1, California.

May 1, 1950.

Hearing Denied June 29, 1950.

Los Angeles City High School District petitioned for a peremptory writ of mandate directed to Culver City High School District, Roger Jessup, and others, as and constitut-

ing board of supervisors of the County of Los Angeles, and Joseph Lowery, as County Auditor of the County of Los Angeles. A judgment for petitioner and peremptory writ of mandate pursuant thereto was entered by the Superior Court of Los Angeles County, Clarence M. Hanson, J., and the Board of Supervisors and County Auditor appealed. The District Court of Appeal, Drapeau, J., held that bonded indebtedness represented by bonds delivered on January 25, 1949, was incurred by petitioner before withdrawal from it of the territory of the defendant Culver City High School District, so that territory of the defendant district was liable for its proportionate share of the indebtedness.

Judgment affirmed.

#### Schools and school districts $\Rightarrow$ 41(2)

Where elementary school district voted to withdraw territory comprising that district from high school district and to form new district at election held on January 19, 1949, which election was canvassed and declared carried by county board of supervisors on January 25, 1949, new district did not under statute become effective until July 1, 1949, so far as outstanding bond issues were concerned, and, hence, bonds of old district for which bid had been accepted on January 11, 1949, and delivery of which was made on January 31, 1949, were a charge upon old district prior to order establishing new district, and territory being withdrawn was liable for its proportionate share thereof. Education Code §§ 1591, 1593, 3603.

Harold W. Kennedy, County Counsel, A. Curtis Smith, Assistant County Counsel, and John B. Beck, Deputy County Counsel, Los Angeles, for appellants.

M. Tellefson, City Attorney, Culver City, amicus curiae.

Ray L. Chesebro, City Attorney, Los Angeles, Leon Thomas David, Assistant City Attorney, Los Angeles, for respondent.

DRAPEAU, Justice.

The electors of Culver City Elementary School District voted to withdraw the territory comprising that district from the Los Angeles High School District, and to form



Culver City High School District. This election was held January 19, 1949. The two high school districts will hereafter be referred to as Los Angeles district and Culver City district.

The election was canvassed by the Board of Supervisors of Los Angeles County. The Board made its order dated January 25, 1949, declaring the election carried.

While the proceedings for withdrawal were pending, and prior to January 25, 1949, the Board of Supervisors received bids on bonds of the Los Angeles district in the sum of fifteen million dollars. The high bidder was a syndicate managed by Bank of America. The syndicate agreed to take the bonds if delivered prior to March 15, 1949, and if its counsel approved the validity thereof.

This bid was accepted January 11, 1949. The bonds were delivered January 31, 1949, six days after the order of the Board of Supervisors establishing the Culver City district.

The question here involved is whether the bonded indebtedness was incurred before or after the withdrawal of the territory of the Culver City district.

Los Angeles district takes the position that the bonded indebtedness was incurred when the bid was accepted, January 11, 1949, and, in any event, that the territory was not withdrawn from the Los Angeles district until July 1, 1949.

Culver City district takes the position that the territory was withdrawn January 25, 1949, prior to the delivery of the bonds, and that the territory of that district is not subject to taxation for any part of the interest or principal thereof.

These contentions turn upon the application of Sections 3603 and 1591 of the Education Code to the foregoing facts. These sections are as follows:

"§ 3603. *Continued liability for proportion of bonded indebtedness.* Any elementary or union elementary school district electing to withdraw from a high school district shall continue to be liable for the same proportion of the bonded indebtedness of the high school district, incurred before the withdrawal, as it would have been liable for had it not withdrawn."

"§ 1591. *Actions to be completed prior to February first and effective July first.* Except as provided in this article, any action undertaken to form a new school district of any type or class, to annex or unite any territory or school district to or with another school district, to withdraw or exclude territory from any school district, to unionize or merge two or more school districts, to disestablish or disincorporate any school district, or to change the boundaries of any school district, shall be completed prior to the first day of February of the school year in which the action was begun and shall be effective on the first day of July next succeeding."

The Superior Court found that the indebtedness was incurred before the withdrawal, and by its mandate directed the levy of the tax upon the territory of Los Angeles district as it was prior to the withdrawal. This makes the territory of the Culver City district liable for its proportionate share of the fifteen-million-dollar bonded debt. And from now on the territory of the Culver City district must pay for all of the expenses of its own high school.

The legal mechanics were: Petition for peremptory writ of mandate; demurrer; case submitted on the allegations in the petition and the points and authorities in support of the petition and the demurrer; findings of fact and conclusions of law; judgment; and peremptory writ of mandate.

From the judgment and the writ, the defendants, Board of Supervisors of the County of Los Angeles, and the County Auditor, appeal.

Counsel have briefed the law relative to indebtedness of school districts when such districts have been divided, from common law times until now. However, we are all bound by our own statute law. Eliminating from Section 1591 of the Education Code those portions not applicable to the present situation, we find the following:

"§ 1591. *Actions to be completed prior to February first and effective July first.* \* \* any action \* \* \* to withdraw or exclude territory from any school district \* \* \* shall be completed prior to the first day of February of the school year in

which the action was begun *and shall be effective on the first day of July next succeeding.*" (Emphasis added.)

Careful consideration has been given to appellants' argument that Section 3603, Education Code, is not modified by Section 1591. Unless Section 1591 is to be read in connection with Section 3603 and does modify it, a close question is presented. It was on January 31, 1949, that the Bank of America syndicate paid the fifteen million dollars. Appellant argues that that was the date the bonded indebtedness was created. As already stated, this was six days after the Board of Supervisors canvassed the vote and declared Culver City district established.

Appellants say that Education Code, Sections 1591 and 1593 read together relate to powers of the district, rather than the effective date of creation; that the Culver City district must have been an existing entity January 25, 1949, otherwise it would have been without jurisdiction to levy taxes for the succeeding school year; in short that the district was created immediately and Section 1591 merely postponed the exercise of part of its powers.

These two sections—1591 and 1593—are part of Division 2, Chapter 3, Article 5 of the Education Code. The article is entitled "Formation and Changes in Territory and Status of Districts." Section 1591 has already been quoted and broken down. Section 1591 says, "In the case of every other action referred to in this article, the action shall be effective on the date the action is completed for the following purposes:" and enumerates eight powers, all having to do with setting up a functioning organization for the new district.

Reading the several provisions of the Education Code indicates that it was the purpose of the Legislature to permit citizens of the State to establish new school districts, and to grant to such districts necessary pow-

ers to set up budgets, to lay the foundation for tax levies, to set up governing boards and teaching staffs, for the ensuing school year; that such new districts, however, were to continue to pay outstanding bonded indebtedness; and that the controlling date for the determination of what bonded indebtedness such districts were required to pay was fixed as the first day of July succeeding the formation of the district.

This interpretation is supported by the former statutes, of which the current sections are continuations.

"2.86. Whenever under any provision of this code any school district of any type or class is formed, or any territory or school district is annexed to or united with a school district or the boundaries of any school district are changed, such formation, annexation, union or change of boundaries shall not become effective until the first day of July; except that for the purpose of assessing the property contained in the territory or school districts affected by such formation, annexation, union, or change of boundaries for the purpose of determining the rate of school district tax to be levied, such formation, annexation, union, or change of boundaries shall become effective on the first Monday in March next succeeding such formation, annexation, union, or change of boundaries." Stats. 1933, Chap. 570, page 1481.

It is held that Culver City district became effective July 1, 1949, so far as outstanding bond issues were concerned; that the bonds here under consideration were a charge upon the territory of Los Angeles district prior to that date; and that by Section 3603 of the Education Code, the territory of the Culver City district is still liable for its proportionate share thereof.

The judgment and peremptory writ of mandate are affirmed.

WHITE, P. J., and DORAN, J., concur.

**THORSBY et al. v. BABCOCK.**

Civ. No. 14237.

District Court of Appeal, First District,  
Division 2, California.

April 27, 1950.

Hearing Granted June 22, 1950.\*

Alice Jean Thorsby and Carl E. Thorsby sued Williston A. Babcock and recovered a money judgment, and fund paid into title company as purchase price of realty sold by defendants was held by the Superior Court in and for the county of Contra Costa, Harold Jacoby, J., not to be exempt from execution as being proceeds from sale of homestead, and defendants appealed. The District Court of Appeal, Goodell, J., held that time consumed in litigation between the parties and defendants' quiet title suit would not be excluded from the six months period provided by statute within which proceeds arising from sale of homestead are exempt to homestead owner.

Order affirmed.

Doolling, J., dissented.

**1. Homestead ☞76**

Where purchase price of realty was paid into title company at request of vendors, fund was virtually same as a deposit in bank when six months following sale had elapsed, and fund lost its statutory exemption from execution as being proceeds from sale of homestead, and fact that litigation was pending to settle priorities between defendants' claim that realty was defendants' homestead and that fund was exempt from execution, and plaintiffs' claim to judgment lien did not destroy plaintiffs' right to an execution against the fund to satisfy money judgment against defendants. Civ.Code, § 1265.

**2. Homestead ☞217**

In vendors' suit to quiet title to funds paid into title company as purchase price of land, issue was as to ownership of fund and validity and priority of liens standing against land which plaintiff claimed as homestead, or the fund, as of commencement of suit, and finding and decree declaring property to be homestead of vendors and claims of defendants to be subject to

prior claim of homestead, spoke only respecting status of fund as of that time. Civ.Code, § 1265.

**3. Homestead ☞5**

The homestead statute should be given a liberal construction in favor of the exemption because it is a remedial and beneficent law and has an object of humane character. Civ.Code, § 1265.

Phillips, Munck & Niemand, Oakland, for appellant.

St. Sure & Moore, Oakland, for respondents.

GOODELL, Justice.

This appeal was taken from an order denying appellant's claim of exemption from execution.

Respondents sued appellant in the Justices' Court and recovered a judgment for \$938.25 on March 27, 1947. An appeal was taken and when the case came on for hearing in the Superior Court on November 21, 1947, appellant failed to appear. Judgment for respondents for \$1,003 was then ordered.

On the same day appellant and his wife filed a declaration of homestead on the property on which they lived in Lafayette Oaks, Contra Costa County.

The judgment for \$1,003 was entered on January 8, 1948, and thereafter an abstract thereof was filed for record.

On April 17, 1948, appellant and his wife sold the Lafayette Oaks property, and the purchase price, found to be \$4,351.62, was paid in to a title company.

At that time there stood of record against the property not only the respondents' abstract of judgment but an attachment which had been levied by another creditor a few days before the sale. The title company refused to turn over the \$4,351.62 to appellant because of these liens, and appellant and his wife on May 6, 1948 filed a suit to quiet title to the fund.

On December 7, 1948, after that suit had been tried, respondents levied an ex-

\* Subsequent opinion 222 P.2d 863.



execution in enforcement of their \$1,003 judgment, on the fund held by the title company and then awaiting decision. On January 20, 1949 the findings and decree were filed and on the next day appellant filed with the Sheriff a written claim and demand, supported by his affidavit, asserting that the fund was "exempt from execution as being proceeds from the sale of affiant's homestead." Respondents promptly moved for a determination of the validity of the claim of exemption and on March 15, 1949 the court ruled that the fund was not exempt.

Appellant claims that the ruling was erroneous because the money was "exempt on the ground that the same constitutes proceeds from the sale of his homestead which, as against respondents, was determined to be such in a proceeding to quiet title."

Section 1265, Civ.Code provides that " \* \* \* should the homestead be sold by the owner, the proceeds arising from such sale to the extent of the value allowed for a homestead exemption as provided in this title shall be exempt to the owner of the homestead for a period of six months next following such sale."

In support of his contention appellant argues that "A creditor should not be permitted, by delaying payment of proceeds to a homestead claimant through litigation for more than six months, to destroy the exemption of such proceeds."

[1] The first answer to this is that respondents did nothing to delay the payment or destroy the exemption. It was the refusal of the title company to pay over the money, which led to the litigation, resulting in a nine months delay, and that delay used up the statutory exemption period. Respondents, however, were not responsible for any part of the delay. The purchase money was paid into the title company at appellant's own instance, and was held by it as his agent. Respondents were joined in the quiet title suit by appellant and did no more therein than assert their judgment lien, as the complaint invited them to do. If they had attempted

by litigation during the six months period to circumvent the provisions of § 1265 or § 1265a and thus deprive the judgment debtor of his exemption, a different problem would be presented. But no affirmative action was taken by them until after the six months period had expired.

The second answer is that respondents' execution was levied on December 7, 1948, which was almost eight months after the sale and about seven weeks after the six months expired. Their right to the writ was wholly independent of any lien they claimed against the Lafayette Oaks property or on the fund which grew out of its sale. The writ was based on the judgment for \$1,003 alone. As soon as the six months expired—on October 17, 1948—the fund in the title company lost its statutory exemption and became exposed to this or any other levy. It was virtually the same as a deposit in bank and the fact that litigation was pending to settle priorities as between appellant's *homestead claim* and respondents' claimed *judgment lien* against the land could not destroy or affect their right to an execution.

The court in the quiet title suit found that the filing for record of respondents' abstract of judgment was subsequent to the declaration of homestead and concluded that respondents' claim based thereon was "subject to the prior claim of homestead of the plaintiffs herein." See *Thatcher v. Van Bever*, 139 Cal.App. 658, 660, 34 P.2d 740. It then decreed that the funds in the title company of \$4,351.62 "are the proceeds from the sale of plaintiff's homestead and plaintiff's title to the same is hereby quieted;" that the title company should pay them to the appellant and that respondents (and the other lienor) had no claim to them.

Appellant, to quote from his brief, "claims the property exempt on the ground that the same constitutes proceeds from the sale of his homestead which, as against respondents, was determined to be such in a proceeding to quiet title." (Emphasis added.)

[2] There is no connection or dependency between whatever lien respond-

ents might have claimed against the land or its proceeds, on the one hand, and the lien created by the execution, on the other. The adjudication in the quiet title suit could not have embraced respondents' rights under the execution, because it was not levied until some seven months after issue was tendered in that suit and several days after the case was tried and submitted. The suit was filed on May 6, 1948, which was but a few days after the six months period had commenced to run following the sale on April 17. The issue tendered by the complaint was as to the ownership of the fund and the validity and priorities of the liens standing against the homestead premises, or the fund derived therefrom, *as of the commencement of the action*. Accordingly the findings and decree spoke only respecting the fund and its status at that time. *Metropolis Trust & Savings Bank v. Barnett*, 165 Cal. 449, 452-454, 132 P. 833; *Willett v. Schmeiser Mfg. Co.*, 82 Cal.App. 249, 254, 255 P. 529. The exempt status of the fund continued only from April 17 until October 17, 1948, hence the decree which dealt with that status could not have adjudicated with respect to respondents' rights under the fresh lien of the execution levied on December 7, 1948, based, as it was, on the personal judgment for \$1,003, and not at all on the judgment lien.

[3] It is settled law, as appellant contends, "that the homestead statute should be given a liberal construction in favor of the exemption, because it is a remedial, and beneficent law, and has an object of humane character." (13 Cal.Jur. pp. 426-7). The fact remains that the liberal provisions which the legislature saw fit to write into § 1265, prolonging the exemption for six months beyond the sale, say nothing respecting any further extension or respecting the tolling of the statute in any way. If appellant's contentions were adopted the result would be that the exemption which by the clear and unambiguous language of § 1265 has been fixed at six months, could be further extended by what would amount to judicial legislation to fit the circumstances of a particular case.

Appellant cites no cases supporting his contention that the time consumed in liti-

gation (*which he started*) should be excluded from the six months period, and frankly admits that there are no authorities in point. He points, however, to the reasoning of several cases as supporting his position. These cases, *Beckman v. Manlove*, 18 Cal. 388; *California Cotton Credit Corp. v. Superior Court*, 127 Cal.App. 472, 15 P.2d 1108; a Kansas case and two Texas cases, simply hold that where exempt property of one kind is converted into property of another kind, the exemption survives the conversion and protects the new property as it had protected the old. Appellant has no need to invoke such authorities since § 1265 itself clothes the proceeds of the sale with the same exemption as that which had protected the land. This it does for the six months period but not beyond it.

The order denying the exemption claim is affirmed.

NOURSE, P. J., concurs.

DOOLING, Justice.

I dissent. The hand may be quicker than the eye but it is not too difficult in this case to locate the shell under which the pea is hidden.

It is conceded that the proceeds of the sale of the homesteaded property were exempt for six months. § 1265, Civ.Code. Relying on this exemption appellant brought an action to quiet title to these proceeds against respondents' claim based on the recording of their superior court judgment. Respondents by cross-complaint asserted a lien against the exempt fund based on their judgment. They thus tied up the fund for more than six months by the assertion of an untenable claim, and after the six months had expired and while the issue which they had voluntarily tendered was still undecided they attempted to levy execution on the fund which they had thus tied up to satisfy the identical judgment put in issue by them in the quiet title suit. "No one can take advantage of his own wrong." § 3517 Civ.Code. It seems clear to me that this case presents only two alternatives. We must either hold that respondents may be permitted to trifle with the courts by

waging a sham battle therein or we must hold that by voluntarily submitting their claim against the fund to a court of justice they made an election to be bound by the outcome of that litigation and when the judgment went against them wiping out their claim based on the lien of their judgment the intervening writ of execution by which they were trying to enforce the same judgment against the same fund was wiped out also. To affirm this order is to ignore substance and exalt form.



97 Cal.App.2d 343

**ALLEN v. HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE et al.**

Civ. 14058.

District Court of Appeal, First District,  
Division 2, California.

May 4, 1950.

Aline Allen and others, individually and in a representative capacity for and on behalf of all members of Bartenders and Culinary Workers Union, Local 560, affiliated with Hotel and Restaurant Employees' International Alliance and Bartenders' International League of America, similarly situated, brought action against Hotel & Restaurant Employees' International Alliance and Bartenders' International League of America, Frances Haskins, individually and as representative of said International Union and, Robert Burke, individually and as representative of said International Union, and others, for injunction and damages on ground that plaintiffs had been expelled from the International Union without due process. The Superior Court in and for the City and County of San Francisco, George W. Schonfeld, J., entered an order granting a preliminary injunction, and the defendants Frances Haskins and Robert Burke appealed. The District Court of Appeal, Goodell, J., held that trial court could not, by preliminary injunction, mandate de-

fendants to "advise plaintiffs' last employers that plaintiffs are free to work" for them, nor could it declare a suspension of the expulsion orders which had been made almost two months before, nor restore plaintiffs "to the status of membership in good standing they enjoyed and possessed" prior to their alleged unlawful expulsion.

Order affirmed in part and in part reversed.

**1. Injunction ⇐22**

Generally injunction lies only to prevent threatened injury and has no application to wrongs which have been completed, for redress of which a party is relegated to an action at law.

**2. Injunction ⇐137(1)**

Wrongs which have been completed cannot be corrected by temporary injunction, although facts may be such as entitle complainant to permanent relief.

**3. Injunction ⇐132**

Usual purpose of a "temporary injunction" is to preserve conditions as they are until after trial and judgment.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Temporary Injunction".

**4. Injunction ⇐4**

The office of a writ of injunction is peculiarly a preventive and not a remedial one, and is to restrain wrongdoer not to punish him after the wrong is done or to compel him to undo it.

**5. Injunction ⇐132**

The granting or denial of a preliminary injunction merely determines that the court, balancing respective equities of the parties, concludes that, pending a trial on the merits, defendant should or that he should not be restrained from exercising rights claimed by him, and does not amount to adjudication of the ultimate rights in the controversy.

**6. Injunction ⇐133**

In action by members of local labor union against the union and officers thereof for injunction on ground that plaintiffs had been expelled from union without due process, whatever might be done later on



by final judgment, trial court could not, by preliminary injunction, mandate defendants to "advise plaintiffs' last employers that plaintiffs are free to work" for them, nor could trial court declare a suspension of the expulsion orders which had been made almost two months before, nor restore plaintiffs "to the status of membership in good standing they enjoyed and possessed" prior to their alleged wrongful expulsion.

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Todd & Todd, San Francisco, for appellants.

Gladstein, Andersen, Resner & Sawyer, San Francisco, for respondents.

GOODELL, Justice.

Plaintiffs sued for an injunction and \$50,000 damages, on their own behalf and in a representative capacity for all members of their local union who are similarly situated. The defendants are Hotel & Restaurant Employees' International Alliance and Bartenders' International League of America, a voluntary, unincorporated association and labor union, Hugo Ernst, its general president, and four other representatives thereof, including appellants Haskins and Burke. A preliminary injunction was ordered on February 24, 1948, and this appeal was taken from that order.

Plaintiffs sought the injunction because they contended they had been expelled from the International union without due process.

Bartenders and Culinary Workers Union, Local 560, of Vallejo, is a constituent member of the defendant International, and appellants Haskins and Burke are officers and representatives thereof and, at the same time, representatives and agents of the International, also of its general president and of defendant McDonough.

At the time the injunction issued a case was pending in which Joseph Killeen and others were appellants and the same International was a respondent, and five days after it issued that case was decided. *Killeen v. Hotel & Restaurant Employees' League of America*, 84 Cal.App.2d 87, 190 P.2d 30, 32. From the opinion therein it

appears that there was serious dissension in the Vallejo local, and the International threatened to take charge thereof by putting in a trustee, as authorized by the International's constitution. Anticipating that McDonough, who had been designated as trustee, would take charge of the local, Killeen and others filed suit in the Superior Court in Solano County to permanently enjoin him from doing so. A temporary restraining order was issued in that case. The defendants therein moved to set it aside, and on September 18, 1946, the court did so "on the chief ground that plaintiffs failed to appeal from the decision of the President of the International \* \* \* or to exhaust their remedies" provided by its constitution. On appeal the order dissolving the restraining order and refusing a preliminary injunction was affirmed.

Three of the five plaintiffs in the present case, namely, Allen, Woody and Pohlman were co-plaintiffs with Killeen in that case, and their action in so joining with him was used by the International as the basis for one of the charges it preferred, looking to the expulsion of said three members. The principal ground of such charge was that by starting the Killeen suit and getting a restraining order against the International and its trustee they had failed to exhaust their remedies within their own organization, in violation of § 156 of the International's constitution. There were other charges as well against the same three. Plaintiffs Richards and Cotter, who were not parties to the Killeen suit, were charged with other claimed offenses. Those five accusations and the International's action thereon gave rise to the present litigation.

The charges against all five members were preferred by defendant McDonough, the International's trustee of the Vallejo local, and were contained in five separate letters dated November 18, 1947 from him to the general president of the International, resident in Cincinnati, specifying the charges. On November 25 the president wrote to each of the five, transmitting a copy of McDonough's letter, and giving them fifteen days within which to answer the president. All of them did so except

Woody. On December 30, the president wrote to each of the five saying "We are adjudging you guilty and penalizing you the amount of \$25.00 and expulsion from membership in the International Union."

The complaint alleges all these facts respecting the expulsions and that the plaintiffs had no hearing; were not confronted with witnesses; that there was no production of evidence; no opportunity to defend themselves; in short that they were expelled without due process. The complaint also alleges that the plaintiffs had lost their employment and had been prevented from obtaining further work, as a result of their expulsions.

The plaintiffs' application for a preliminary injunction was heard on their verified complaint and on a counter affidavit filed by appellant Frances Haskins. A demurrer and motion to strike out parts of the complaint were also before the court.

The injunction, dated February 24, 1948, opens with self-contradictory language commanding defendants, during the pendency of the action and until the further order of the court, to desist and refrain "from *doing* or attempting to do any of the following described acts alleged *to have been done* by plaintiffs, or any of them, *prior to December 30, 1947.*" The emphasis is ours. The defendants were thereby commanded to refrain from doing *something which they had done* almost two months before—December 30 having been the date of the letters of expulsion. Then follow five separate paragraphs reading:

"(1) From interfering in any way whatsoever with the employment or jobs of plaintiffs, and each of them, and from prohibiting plaintiffs, or any of them, from working at the culinary trade in any place or places of business wherein said defendant Union and Local Union 560 thereof have jurisdiction, or any other place of business, whether in Vallejo or any other city or place; *and defendants, and each of them, are further ordered to advise plaintiffs' last employers that plaintiffs are free to work at said establishments without objections by or interference from said defendants, or any of them, or their agents,*

*servants, employees or representatives.* (Emphasis added.)

"(2) From expelling or purporting to expel plaintiffs, or any of them, from the said Hotel & Restaurant Employees' International Alliance and Bartenders' International League of America, or Local Union 560 thereof, or from in any way or by any means whatsoever interfering with the membership of plaintiffs, and each of them, in said Union and Local Union 560 thereof.

"(3) From giving effect in any way or by any means whatsoever to the purported orders of expulsion against plaintiffs, and each of them, by Hugo Ernst, General President, dated December 30, 1947, *and said orders of expulsion for the purposes of this order are hereby declared to be suspended.* (Emphasis added.)

"(4) From interfering with or preventing plaintiffs, and each of them, participating in the business and affairs of the Hotel & Restaurant Employees' International Alliance and Bartenders' International League of America and Local Union 560 thereof, on the same terms and conditions as other members in good standing of said Unions.

"(5) From refusing to accept dues, assessments, or other monies from plaintiffs, and each of them, upon the same terms and conditions as all other members in good standing of Local 560. *The purpose of this provision is to restore plaintiffs to the membership and dues status they enjoyed in said Unions prior to the purported expulsion orders of December 30, 1947, and to protect their property rights and benefits in the Union.*" (Emphasis added.)

The last part of paragraph (1), which we have emphasized, is mandatory, directing the defendants to take affirmative, substantive, action by communicating with plaintiffs' former employers.

Paragraph (2) restrains the expulsion which had been accomplished almost two months before, by the letters of December 30.

The last seventeen words of paragraph (3), which we have emphasized, reach back and expressly suspend the expulsion orders of December 30, 1947.



The last sentence of paragraph (5), which we have emphasized, is a frank avowal of an intent to reach back and nullify the actions taken on and prior to December 30, 1947.

The five paragraphs are followed by this general avowal of the purpose for which the injunction was designed:

"The purpose of this preliminary injunction is to place plaintiffs, and each of them, in the same position as they, and each of them, enjoyed prior to the purported expulsion orders of December 30, 1947, that is to say, that plaintiffs, and each of them, are restored to the status of membership in good standing they enjoyed and possessed prior to said date."

[1-3] "As a general rule", it is said in 14 Cal.Jur. p. 209, "an injunction lies only to prevent threatened injury and has no application to wrongs which have been completed, for the redress of which a party is relegated to an action at law. Clearly, such wrongs cannot be corrected by a temporary injunction, the usual purpose of which is to preserve conditions as they are until after trial and judgment, although the facts may be such as to entitle the complainant to permanent relief."

[4] In *Blackmore Investment Co. v. Johnson*, 213 Cal. 148, 150-151, 1 P.2d 978, 979, the court said "it is elementary that an injunction cannot be granted to stay an act already committed \* \* \*." In *Blake v. City of Eureka*, 201 Cal. 643, 661, 258 P. 945, 954, the court said: "'An injunction lies only to prevent threatened injury and has no application to wrongs which have been completed.' *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 602, 98 P. 1027, 1036, 21 L.R.A.,N.S., 550 [16 Ann.Cas 1165.] 'The office of a writ of injunction, as its name imports, is peculiarly a preventive and not a remedial one; it is to restrain the wrongdoer, not to punish him after the wrong has been done or to compel him to undo it.' *Stewart v. Superior Court of San Diego County*, 100 Cal. 543, 546, 563, 35 P. 156, 158; *Hatch v. Raney*, 9 Cal. App. 716, 100 P. 886; *Delger v. Johnson*, 44 Cal. 182, 185."

In *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, at page 602, 98 P. at page 1036, the court said: "But, even if it could be held that the action of the council in sending the notices was without justification and malicious, something would still be wanting to sustain the injunction. The notices had all been sent before this action was commenced, and there was no evidence of any threat to send notice to any other person. An injunction lies only to prevent threatened injury, and has no application to wrongs which have been completed, and for which the injured party may obtain redress by an action at law." Here, likewise, "The notices had all been sent before this action was commenced."

See, also, *Hannah v. Pogue*, 23 Cal.2d 849, 858, 147 P.2d 572, which cites, inter alia, *Thome v. Honcut Dredging Co.*, 43 Cal.App.2d 737, 111 P.2d 368, 371. In the *Thome* case it is said "An injunction should issue for wrongful acts which have been completely performed, when it appears they are likely to be repeated or continued. (Citations.) When the act complained of has been fully performed, the injured party is ordinarily compelled to seek redress in a suit for damages. To authorize the issuing of an injunction it should appear with reasonable certainty that the wrongful acts will be continued or repeated."

It cannot be said that because the plaintiffs sued as representatives of other members of Local 560 who might later be dealt with by the International as it had dealt with the five plaintiffs, the injunction was within the recurrence exception since the court's minute order directing the injunction to issue shows that it was granted *only in favor of the five named plaintiffs*.

[5] In *Miller & Lux v. Madera Canal & Irrigation Co.*, 155 Cal. 59, 62-63, 99 P. 502, 511, 22 L.R.A., N.S., 391, it was said: "The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not



be restrained from exercising the rights claimed by him. When the cause is finally tried, it may be found that the facts require a decision against the party prevailing on the preliminary application."

Counsel for respondents state their position very clearly when they say: "The trial court put respondents back into the position they occupied in the unions prior to the illegal expulsion."

[6] Whatever might be done later on by a final judgment, it is clear that the court could not, by *this preliminary injunction*, mandate the defendants to "advise plaintiffs' last employers that plaintiffs are free to work" for them, nor could it declare a suspension of the expulsion orders which had been made almost two months before, nor restore plaintiffs "to the status of membership in good standing they enjoyed and possessed" prior to December 30, 1947, without violating the settled rules of all these cases.

Counsel on both sides have argued this case, not on the grounds already discussed, but on grounds which might be appropriately presented on the trial. Appellants contend that the order should be reversed because the complaint does not allege that the plaintiffs exhausted their intra-union remedies before applying to the civil courts, relying, in that behalf, on the Killeen case, *supra*. Respondents contend that their allegations of a disregard by defendants of their own rules and laws, and of a complete denial of due process, excuse, and obviate the necessity for, any allegation showing that they had exhausted their intra-union remedies, relying in that behalf chiefly on *Ellis v. American Federation of Labor*, 48 Cal.App.2d 440, 120 P.2d 79. This question need not be decided at this time.

As far as the five named plaintiffs are concerned—and the minute order shows that the injunction does not go beyond *them*—we are satisfied that the following part of paragraph numbered (1) was proper and should stand, to wit: "(1) From interfering in any way whatsoever with the employ-

ment or jobs of plaintiffs, and each of them, and from prohibiting plaintiffs, or any of them, from working at the culinary trade in any place or places of business wherein said defendant Union and Local Union 560 thereof have jurisdiction, or any other place of business, whether in Vallejo or any other city or place."

We are satisfied that the mandatory part of the same paragraph (1), emphasized by us in our first quotation thereof, together with all the remaining provisions of the injunction, cannot be sustained as a proper exercise of discretion.

Accordingly the order is affirmed respecting said part of paragraph numbered (1) last quoted above, and reversed as to the said mandatory part of paragraph (1), also reversed as to all of paragraphs numbered (2), (3), (4) and (5), and as to the declarations and orders contained in the paragraph immediately following paragraph (5) commencing with the words "The purpose of this preliminary injunction."

The motion of respondents to present additional evidence is dismissed. Each side to pay its own costs of appeal.

NOURSE, P. J., concurs.

DOOLING, Justice.

I concur. It is not necessary to hold that in no event can a court issue a mandatory temporary injunction. I take the correct rule to be that stated in *Hagen v. Beth*, 118 Cal. 330, 331, 50 P. 425: "The granting of a mandatory injunction pending the trial, and before the rights of the parties in the subject-matter which the injunction is designed to affect have been definitely ascertained by the chancellor, is not permitted except in extreme cases, where the right thereto is clearly established, and it appears that irreparable injury will flow from its refusal." See 43 C.J.S., *Injunctions*, § 5, pages 412-413; 28 Am.Jur. 214. The application of this rule to the facts of this case is all that is necessary to support our order.

97 Cal.App.2d 146

**DAIRY BELLE FARMS v. BROCK.**

Civ. 14275.

District Court of Appeal, First District,  
Division 1, California.

April 25, 1950.

Dairy Belle Farms (a co-operative corporation) filed a petition against A. A. Brock, as Director of Agriculture of the State of California, for writ of mandate directing the Director to set aside order suspending petitioner's milk license. The Superior Court in and for the City and County of San Francisco, Milton D. Sapiro, J., rendered a judgment adverse to the Director and he appealed. The District Court of Appeal, Bray, J., held that under the Milk Control Law petitioner was required to file schedule of prices with Director five days before offering fluid milk and cream for sale, and that law was constitutional.

Judgment reversed.

**1. Food ☞4**

Purpose of statute requiring distributors of fluid milk and cream to file with Secretary of Agriculture schedules setting forth prices at which distributor is selling or offering or agreeing to sell fluid milk and cream, which shall not become effective until fifth day after filing, is to prevent competitive bidding and to permit other distributors to meet the prices filed. Agricultural Code, § 736.13.

**2. Food ☞4**

Under Milk Control Law distributors of fluid milk and cream must file schedules with Secretary of Agriculture setting forth prices at which distributor is selling or offering or agreeing to sell fluid milk or cream. Agricultural Code, § 736.13.

**3. Statutes ☞233**

Generally, general words in a statute do not apply to the state or its subdivisions, but the state and its subdivisions may be included either expressly or by necessary implication.

**4. Food ☞4**

In construing provisions of milk control law requiring distributors of fluid milk and cream to file schedules with Secretary

of Agriculture setting forth prices at which distributor is selling or offering or agreeing to sell fluid milk or cream, construction given law by political subdivisions of state and of officers charged with enforcement of law was entitled to great weight. Agricultural Code, § 736.13.

**5. Food ☞4**

The section of Milk Control Law requiring distributors of fluid milk and cream to file with Secretary of Agriculture schedules setting forth prices at which distributor is selling or offering or agreeing to sell fluid milk and cream, which shall not become effective until fifth day after filing, applies to offers to sell dairy products to chartered municipalities. Agricultural Code, § 736.13.

**6. Food ☞1**

The regulation of milk is a matter of statewide concern as distinguished from a municipal affair.

**7. Municipal corporations ☞56**

A city which has brought itself within the municipal affairs provision of the Constitution can enact ordinances relating to municipal affairs which prevail over acts of legislature inconsistent therewith. Const. art. 11, §§ 6, 8.

**8. Municipal corporations ☞58**

Under the Constitution charter provisions have force and effect of legislative enactments within their constitutional limitations.

**9. Municipal corporations ☞63(1)**

Whether the matter of regulating the price of milk in sales to a municipality is a municipal affair or one of statewide concern is a matter of interpretation for courts.

**10. Municipal corporations ☞79**

Generally the manner of letting purchasing contracts is a municipal affair as to which a home rule charter is superior to general law.

**11. Municipal corporations ☞56**

The section of the Milk Control Law requiring distributors of fluid milk and cream to file with Secretary of Agriculture

schedules setting forth prices at which distributor is selling or offering or agreeing to sell fluid milk and cream, which shall not become effective until fifth day after filing, as construed to require distributors desiring to contract with city and county to file their prices with Director five days before making an offer to sell, and thereby, in effect, nullifying sealed bid provisions of city charter as to milk, is not unconstitutional as violative of the home rule provisions of the state Constitution. Agriculture Code, § 736.13; Const. art. 11, §§ 6, 8.

Fred N. Howser, Attorney General, W. R. Augustine, Deputy Attorney General, for appellant.

Walter McGovern, San Francisco, for respondent.

Dion R. Holm, City Attorney, William F. Bourne, Deputy City Attorney, San Francisco, amicus curiae in support of respondent.

BRAY, Justice.

The superior court, in a mandate proceeding brought by respondent herein, Dairy Belle Farms, against appellant, the Director of Agriculture, entered judgment directing appellant to set aside his order suspending respondent's milk license for three days, and remanding certain proceedings to the appellant for further consideration. The director appealed.

Questions Presented.

1. Does section 736.13 of the Agricultural Code require a schedule of prices to be on file with the director for a period of five days before an offer may be made to sell dairy products? 2. If so, does the section apply to offers to sell dairy products to the chartered municipality of San Francisco? 3. If so, is the section unconstitutional as an unlawful interference with a purely municipal affair?

### Summary of Proceedings.

An accusation was filed with the director charging that respondent had violated the provisions of section 736.13 of the Agricultural Code. After a hearing, the director found respondent guilty of the violation charged, and ordered respondent's distribution license suspended for three days. Respondent thereupon filed a petition for a writ of mandate in the superior court and obtained an alternative writ staying the operation of the order of suspension. Return was made by demurrer and answer. The court overruled the demurrer and proceeded to decide the matter on the facts alleged in the petition and admitted in the answer. It made certain findings which will hereafter be discussed, and then entered judgment vacating the director's order of suspension, and remanding the proceedings to the director "for further consideration and determination in accordance with the Findings and the opinion of the court \* \* \*." As stated, the director appealed.

### Facts and Court's Findings.

The facts are not disputed. The City and County of San Francisco called for sealed bids for furnishing to it fluid milk, fluid cream and other dairy products for the fiscal year commencing July 1, 1948, said bids to be opened April 23rd at 2 p. m. At one minute before 2 p. m. on April 23rd, respondent, in accordance with the city charter<sup>1</sup> submitted its sealed bid and at 2:14 p. m. filed a schedule of prices (similar to those in the bid) with the director. The court in the mandate proceeding found that the allegations in the petition that respondent had filed its proposed schedule of prices at the earliest moment possible without violating the requirements of a secret and sealed bid, and that the sealed bid provisions of the San Francisco Charter (under which respondent had filed its bid) prevailed over any conflicting provisions of the Milk Control Law,<sup>2</sup> were untrue.

1. Section 89 of the charter provides: "All contracts for the purchase of materials, supplies and equipment shall be made after inviting sealed bids by publication."

2. For brevity we are referring to Chapter 13, Division 4, formerly Chapter 10, Division 4, of the Agricultural Code, as the "Milk Control Law."



It further found that respondent filed its bid approximately 15 minutes before it filed its prices with the director; that its offer made in the bid to sell fluid milk and other dairy products was not to be effective until July 1, and "that there was, therefore, no sale at a price not then effective." As conclusions of law the court found (1) that the regulation of the dairy business in the manner prescribed by section 736.13 of the Agricultural Code, is not a municipal affair and that the respondent in dealing with San Francisco is bound by the statute; (2) that section 736.13 does not require the schedule of prices to be on file with the director for a period of five days before an offer may be made to sell dairy products to the city and county; on the contrary, all that is required is that such schedule be on file at the time an offer to sell is submitted; (3) that filing the schedule of prices 14 minutes after its bid was submitted was a substantial compliance with the requirement that the schedule be on file at the time of the offer to sell; (4) that the findings upon which the director's order of suspension was based were not supported by the evidence; and (5) that the proceedings should be remanded to the director for further consideration and determination.

### 1. Meaning of Section 736.13.

Probably the first question that should be considered is whether the trial court's interpretation of the section, to the effect that the distributor of fluid milk and cream is not required to file the schedule of prices five days before offering for sale, is correct.

The section reads in part: "\* \* \* Every distributor \* \* \* shall file with the director schedules and any amendments thereto setting forth the prices at which each such distributor is selling or offering or agreeing to sell fluid milk, fluid cream and dairy products. \* \* \* Such prices shall not become effective until the fifth day after filing. *Evidence of any sale of, or offer or agreement to sell such fluid milk, \* \* \* made as part of, or in connection with the sale of, or offer or agreement to sell fluid milk \* \* \**

*at less than the prices theretofore filed with the director by such distributor pursuant to the provisions of this section, shall constitute prima facie proof of a violation of this section."*

[1] A mere reading of the above section shows that the schedule of prices must be on file five days before the products are offered for sale. Any other interpretation disregards the italicized portion of said section, and renders completely meaningless "at less than the prices *theretofore filed with the director by such distributor pursuant to the provisions of this section* \* \* \*." (Emphasis added.) The history of the section shows that "pursuant to the provisions of this section" can only refer to the requirement that the schedule be filed five days prior to the offer to sell. The first part of the section (not quoted here) provides that no distributor shall sell any fluid milk or fluid cream at less than the prices established by the director under the provisions of the section. Prior to 1941 the section did not have the five day provision, but provided merely that the director might require distributors to file with him schedules and any amendments thereto setting forth the prices at which such distributor "is selling or offering to sell \* \* \*." In 1941 the section was amended to read as above set forth. Even though now there is no requirement that prices of the excluded products, butter, cheese, etc. (respondent's bid here included cottage cheese), be on file, it is obvious that the section was amended to prevent cutthroat competition in the sale of fluid milk and cream. Apparently the purpose of the amendment was to reach the very situation present in this case.

[2] Even though, in this case, the dairy products were not to be delivered until after July 1, the offer of sale was made the moment the bid was filed. The obvious purpose of the section is to prevent competitive bidding and to permit other distributors to meet the prices filed. The last sentence of the section reads: "Any other distributor in the marketing area may meet any such prices so filed; pro-

vided, that such distributor shall file with the director a schedule of prices not exceeding the prices so met by him within 24 hours after meeting the same." If a distributor could sell or offer to sell immediately after his schedule is filed this provision would be useless. The section specifically includes offers and agreements to sell which are conditional.

As the section plainly requires that the schedule of prices be on file with the director five days prior to an offer of sale, it becomes unnecessary to discuss respondent's contention of substantial compliance, as that is based upon the assumption that the five day provision does not apply.

## 2. Section Applies to Chartered Municipality.

Respondent contends, and the brief filed by the City and County of San Francisco as amicus curiae argues, that section 736.13 was not intended by the Legislature to apply to offers to sell dairy products to chartered municipalities, as the Legislature did not intend to invalidate existing charter provisions which required sealed bids by persons offering to sell to the municipalities. This contention, as well as the claimed unconstitutionality of the section, discussed hereafter, were made both to the director and in the trial court, and both found against respondent on both points. Respondent did not appeal, and therefore, contends appellant, this court is precluded from considering respondent's contentions. However, we are more concerned with the correctness of the court's judgment than with the reasons given by the court for its final determination. We have the right to determine if the court's judgment is right and may be sustained upon any theory of law applicable to the case. As said in *Lincoln v. Superior Court*, 22 Cal.2d 304, at page 315, 139 P.2d 13, 19, quoting from 2 Cal.Jur. 810, "it is judicial action, and not judicial reasoning or argument, which is the subject of review." [Citations.] Here the court's findings and conclusions on the interpretation of the section and its applicability, were not findings of fact but conclusions on questions of law.

That the Legislature intended that so far as sales to the municipality of dairy products were concerned, charter provisions for sealed bids were not to apply, appears from the fact that destructive trade practices in selling to a municipality would be as much an evil as selling to any other consumer,—the stabilizing effect of knowledge of prices by competing distributors would be lost.

[3] The normal rule of statutory construction is that general words in a statute do not apply to the state or its subdivisions. *Balthasar v. Pacific Elec. Ry. Co.*, 187 Cal. 302, 305, 306, 202 P. 37, 19 A.L.R. 452; *Whittaker v. County of Tuolumne*, 96 Cal. 100, 30 P. 1016; 23 Cal.Jur. 625. This is the so-called rule of "implied exclusion." See *Marin Municipal Water Dist. v. Chenu*, 188 Cal. 734, 736, 207 P. 251. However, there are exceptions to this rule. The state and its subdivisions may be included either expressly or "by necessary implication." *C. J. Kubach Co. v. McGuire*, 199 Cal. 215, 217, 248 P. 676, 677. The Milk Control Law has included chartered municipalities by necessary implication. This is so even though the Milk Control Law contains penal provisions which have been applied here and are required to be interpreted strictly in favor of the accused distributor. The purpose, intent and policy of the Milk Control Law are set forth in the introductory sections. Section 735 states that the milk industry is a business affected with a public interest and the provisions of the chapter are enacted under the police powers of the state. Subdivision (b) of that section adds that unfair, unjust, destructive and demoralizing trade practices have been carried on which constitute a menace to the health and welfare of the inhabitants of this state; that sanitary regulations alone are insufficient to prevent disturbances in the milk industry which threaten to destroy and seriously impair the future supply of fluid milk; "that it is the policy of this State to promote, foster and encourage the intelligent production and orderly marketing of commodities necessary to its citizens, including milk, and to eliminate specula-

tion, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers."

Section 735.1 provides: "The purposes of this chapter are to: \* \* \* (d) Enable the dairy industry with the aid of the State to correct existing evils, develop and maintain satisfactory marketing conditions, and bring about a reasonable amount of stability and prosperity in the production and marketing of fluid milk and fluid cream and provide means for carrying on essential educational activities. It is the intent of the Legislature that the powers herein conferred shall be liberally construed. \* \* \*

Respondent points out that the dairy products which the city purchases are not resold by it but are supplied the inmates of the city hospitals, jails and other institutions, and argues therefrom that section 736.13 should apply only to sales to retailers who propose to resell either directly or in a manufactured form. But such an interpretation overlooks the portion of the section hereinafter italicized: "No distributor shall sell to any retail store, restaurant, confectionery or *other place for consumption on the premises, or to any consumer* \* \* \*."

[4, 5] There has been a contemporaneous construction of the law ever since it was adopted, which shows that it has been interpreted as binding upon the state and its agencies, and upon the City and County of San Francisco. In 1941 the attorney general rendered an opinion to the state purchasing agent to the effect that the act was binding upon the state and its agencies. Opinion N. S. 3987. Ever since the law has existed until the year 1948, the City and County of San Francisco has paid, for milk which it purchased, the prices established by the director under the law. While it has called for sealed bids, it knew in advance that all bids would be identical. The city and county never heretofore questioned the fact that the price it was paying for its milk was fixed by the director. (It does not question now that the bidder must have on file with the director the milk prices at substantially the

moment he files his bid with the city, nor that the director may fix the prices at which dairy products are to be sold to it.) Throughout the state since 1941 milk distributors have complied with the law, irrespective of whether the milk was to be sold, or offered for sale, to private persons, cities, counties, the state, or the federal government. The trial court found that in 1947 respondent complied with the law by filing its prices with the director five days before it filed its successful bid with the city. Thus the industry generally and the political subdivisions of the state, as well as the officers charged with its enforcement, have contemporaneously construed the law. As said in *Riley v. Forbes*, 193 Cal. 740, 745, 227 P. 768, 769: "A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and since it is not clear that that construction was erroneous, it ought not now to be overturned."

3. The Section as Applied is Constitutional.

[6-9] Respondent and amicus curiae claim that an interpretation which requires distributors desiring to contract with the city and county to file their prices with the director five days before making an offer to sell, and thereby, in effect, nullifying the sealed bid provisions of the city charter as to milk, is unconstitutional as violative of the home rule provisions of the state Constitution. Art. XI, §§ 6 and 8. The trial court held quite properly that the regulation of milk is a matter of statewide concern as distinguished from a municipal affair. There can be no question but that a city which has brought itself within the municipal affairs provision of the Constitution has power to enact ordinances relating to municipal affairs which prevail over acts of the Legislature inconsistent therewith. *West Coast Advertising Co. v. City and County of San Francisco*, 14 Cal. 2d 516, 95 P.2d 138. As to section 89 of the charter, "Under our Constitution, charter provisions have the force and effect of legislative enactments *within their constitutional limitations*; the same being the organic law or local Constitution of the city."



*Dalton v. Leland*, 22 Cal.App. 481, 487, 135 P. 54, 56; emphasis added. Whether the matter of regulating the price of milk in sales to a municipality is a municipal affair or one of statewide concern is a matter of interpretation for the courts. As said in *Butterworth v. Boyd*, 12 Cal.2d 140, 147, 82 P.2d 434, 438, 126 A.L.R. 838, "No exact definition of the term 'municipal affairs' can be formulated, and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case."

"What is strictly a municipal affair is not always easy of determination." *Horwith v. City of Fresno*, 74 Cal.App.2d 443, 446, 168 P.2d 767, 769. "The rule is that—'Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the [municipal] corporation, and the power is denied.'" *Ex parte Daniels*, 183 Cal. 636, 639, 192 P. 442, 444, 21 A.L.R. 1172.

Although the particular provision under consideration in this case has not been passed upon, the constitutionality of the Milk Control Law has been established. See *In re Willing*, 12 Cal.2d 591, 86 P.2d 663; *Jersey Maid Milk Products Co. v. Brock*, 13 Cal.2d 620, 91 P.2d 577; *Ray v. Parker*, 15 Cal.2d 275, 101 P.2d 665. The latter two cases deal at length with the policy behind the Milk Control Law. That the matters regulated are of statewide concern is shown, at least indirectly, by the following quotation from *In re Willing*, supra, 12 Cal.2d at page 594, 86 P.2d at page 664:

"The purpose of said chapter, as announced in section 735, is to eliminate economic disturbances and unfair trade practices in the milk industry which threaten both the quality and adequacy of the supply of fluid milk and cream. The section declares that health regulations alone are insufficient to prevent disturbances which threaten to destroy and seriously impair the quality and supply of milk. Thus provisions which protect the producer by establishing a fair price to him and affording him security for payment of the price due him for milk and cream by means

of a bond are incident to the broader purpose to protect the public milk supply. Economic security to producers will tend to encourage compliance on their part with sanitary regulations and the maintenance of dairy herds sufficient to provide an adequate milk supply at reasonable prices to consumers.

"The price-fixing provisions are not under attack. But since they are part of the plan to afford a measure of economic security to those engaged in the milk industry in the interest of protecting the public milk supply, of which plan section 737.5, providing for a bond to secure payment to the producer is another feature, it is pertinent to cite the recent decisions of the United States Supreme Court sustaining statutory provisions for the fixing of milk prices. [Citations.]"

That the "milk business bears such a relation to the welfare of those dependent upon its use as to be clothed with a public interest" was held in *Jersey Maid Milk Products Co. v. Brock*, supra, 13 Cal.2d 620, at page 637, 91 P.2d 577, 587, and "the power to regulate extended to and included the power to fix the price at which milk might be sold." 13 Cal.2d at page 637, 91 P.2d at page 587.

[10,11] Generally speaking, the manner of letting purchasing contracts is a municipal affair as to which a home rule charter is superior to general law. However, where, as here, the statute regulating the dairy industry is a matter of statewide concern and conflicts only incidentally with the charter provisions, the statute prevails. Section 736.13, in order to carry out the purpose of the act, applies to all sales whether to municipalities or private persons. It does not conflict with the charter provisions except as to the limited matter of fluid milk and cream.

In *City of Pasadena v. Charleville*, 215 Cal. 384, 10 P.2d 745, it was held that the provisions of the Alien Labor Law of 1931 applied to a construction contract awarded by the charter of the city of Pasadena, although generally such contracts were municipal affairs. The language used in the opinion with reference to the pub-

lic policy involved in the employment of aliens could well be applied to the public policy involved in the control of prices under the Milk Control Law. The court said, 215 Cal. at pages 399-400, 10 P.2d at page 751: "Reasons of public policy may well be invoked against the employment of aliens on public work, in addition to the mere preferment of citizens. Assuming that the municipality be in position to raise the constitutional question, it would be of no avail and it may not rightly object to the allocation of its funds to citizens for services rendered on public work if, as we hold, such purpose be a matter of general state policy, as distinguished from a municipal affair."

"Though it is true that the payment of funds of a municipal corporation is a municipal affair because it affects its fiscal policy and management, this does not mean that a state statute concerning a matter of general state concern is not applicable to a charter city. The controlling feature here is the *manner* in which the state statute affects the municipal affair. If the state statute affects a municipal affair only incidentally in the accomplishment of a proper objective of statewide concern, then the state law applies even as to 'autonomous' charter cities." Dept. of Water & Power of City of Los Angeles v. Inyo Chem. Co., 16 Cal.2d 744, 753, 754, 108 P.2d 410, 416. There the court held that section 710 of the Code of Civil Procedure allowing the garnishment of public moneys was applicable to a charter city. Wilson v. Walters, 19 Cal.2d 111, 119 P.2d 340, is to the same effect. The same principle was applied in Polk v. City of Los Angeles, 26 Cal.2d 519, 159 P.2d 931, in holding that the safety rules of the Railroad Commission with reference to maintenance of pole lines applied to a charter city. "If a state statute affects a municipal affair only incidentally in the accomplishment of a proper objective of state-wide concern, the state law rather than a charter provision controls in home-rule cities. The real test, it seems, is not whether the state or the municipality has an interest in the matter, since usually they both have, but instead whether the state's interest or that of the

municipality is paramount." 2 McQuillin, Municipal Corporations, 3d Ed., p. 152, § 4.87.

As pointed out in Wilton v. Renkin, 52 Cal.App.2d 368, 126 P.2d 425, while a municipality has the exclusive right to legislate over its own internal municipal affairs and the state Legislature has exclusive jurisdiction to legislate upon matters which are of state concern, "there is a field which has been designated as 'not strictly municipal.'" 52 Cal.App.2d at page 372, 126 P.2d at page 427. The court then held that traffic regulation "is both a municipal affair, as well as being of concern to the state" and that in such event the state regulation controls. Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482, 147 A.L.R. 515, is to the same effect with reference to regulation of pedestrian traffic within a city. Thus, in our case, the awarding of contracts is a municipal affair which must give way to the state regulation of a matter of such grave statewide concern as the proper regulation of the milk industry. In Wilkes v. City, etc., of San Francisco, 44 Cal.App.2d 393, 112 P.2d 759, the city claimed that the filing of claims against it for negligence in the maintenance of a street was a purely municipal affair and hence the charter provisions prescribing *where* the claims should be filed prevailed over the general law. In holding that the general law prevailed the court said, 44 Cal.App.2d page 397, 112 P.2d at page 762: "The existence of liability for defective highways is a matter of general state concern and 'cannot be chartered away, even though a municipality should attempt to do so.'" See Helbach v. City of Long Beach, 50 Cal. App.2d 242, 123 P.2d 62; Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118; Douglass v. City of Los Angeles, 5 Cal. 2d 123, 53 P.2d 353. If the place of filing a claim against a city is a matter of statewide concern, how much more so is the regulation of the bidding for milk to be supplied a city when the state has adopted a statewide policy of milk price stabilization?

In Re Means, 14 Cal.2d 254, 93 P.2d 105, 123 A.L.R. 1378, the court held that an

ordinance requiring a certificate of registration for journeymen plumbers was invalid as applied to a state civil service employee. Respondent contended that the regulation of plumbing was a municipal affair. The court said, 14 Cal.2d at page 259, 93 P.2d at page 108, 123 A.L.R. 1378: " \* \* \* the rule to be applied is not entirely a geographical one. Under certain circumstances, an act relating to property within a city may be of such general concern that local regulation concerning municipal affairs is inapplicable." Citing *Young v. Superior Court*, 216 Cal. 512, 15 P.2d 163; *Civic Center Ass'n of Los Angeles v. Railroad Comm.*, 175 Cal. 441, 166 P. 351, and *Key System Transit Co. v. City of Oakland*, 124 Cal.App. 733, 13 P. 2d 979. The Means case establishes the principle that there can be municipal affairs which by reason of a general state concern are subject to the general law, and hence are no longer purely municipal affairs.

Respondent cites many cases where it has been held that a particular function is a municipal affair. Some of these are: *Bank v. Bell*, 62 Cal.App. 320, 217 P. 538 (a municipal market is a municipal affair); *Los Angeles Gas & Electric Corp. v. City of Los Angeles*, 188 Cal. 307, 317, 205 P. 125 (sale of electrical energy); *Heilbron v. Sumner*, 186 Cal. 648, 650, 651, 200 P. 409 (erecting a dam); *Crowe v. Boyle*, 184 Cal. 117, 151, 193 P. 111 (bond issue for viaduct); *Sunset Telephone and Telegraph Co. v. Pasadena*, 161 Cal. 265, 283, 118 P. 796 (use of streets for telephone poles); *Loop Lumber Co. v. Van Loben Sels*, 173 Cal. 228, 159 P. 600 (the letting of a sewer contract by the City and County of San Francisco is a municipal affair precluding the state from requiring materialmen's bonds); *Ex parte Braun*, 141 Cal. 204, 74 P. 780, and *Redwood Theatres v. City of Modesto*, 86 Cal.App.2d 907, 196 P.2d 119 (a charter provision for a license tax for revenue is a municipal affair). In none of these cases was there a situation where, as here, a state statute affected a municipal affair only incidentally, nor where the state's interest was paramount.

The trial court correctly found that respondent in order to contract with the City and County of San Francisco was required to comply with section 736.13 of the Agricultural Code, but incorrectly found that respondent had substantially complied with it and also incorrectly found that the section did not require filing prices five days before making an offer to sell. The court also incorrectly ordered the matter remanded to the director. Respondent had not complied with the statute and therefore the director was justified in finding that he had violated it and in ordering the three day suspension.

The judgment is reversed.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.



97 Cal.App.2d 448

**STRAHAN v. RODNEY et al.**

Civ. 17466.

District Court of Appeal, Second District,  
Division 2, California,  
May 10, 1950.

Action by Ray Strahan against Meldon Rodney and others, for damages resulting from the sale of certain corporate shares to the plaintiff. The Superior Court for Los Angeles County, Henry M. Willis, J., rendered an adverse judgment, and the defendant Rodney appealed. The District Court of Appeal, Moore, P. J., held that there was sufficient proof of false representation by the defendant resulting in damage to the plaintiff.

Judgment affirmed.

#### I. Courts ⇐30

Test of jurisdiction of a court is found in nature of the case made by the complaint and in the relief sought; and merely because plaintiff does not succeed in es-



tablishing all that he claims does not deprive the court of its jurisdiction to give judgment for amount of debt established.

## 2. Courts ⇨30

Where stock sold was declared void by reason of corporation's noncompliance with terms of permit permitting issuance of stock, and buyer brought action against seller for money had and received and brought an action for damages in a larger amount against directors who were alleged to have been agents of the seller in seeking the sale, and first cause was abandoned, court retained jurisdiction of the second cause of action.

## 3. Principal and agent ⇨19

Where stock stood in one director's name, and another director took it from him for purpose of selling it, and when second director approached prospective buyer he stated that stock belonged to first director, and second director paid money supplied by buyer to first director and never returned it to the buyer, an inference of agency between the two directors could properly be drawn.

## 4. Licenses ⇨18½(32)

Where permit of corporation commissioner authorized issuance of capital stock for cash only, but attorney for corporation, who had prepared application for the permit, had voted to make the application as a director and had signed it as secretary, thereafter received the stock for services, attorney was chargeable on sale of the stock to a third party with false representation as to its validity.

## 5. Licenses ⇨18½(32), 39.10

Stock certificates given in exchange for services instead of cash as required by corporation commissioner's permit are completely without value, and offer by director of corporation to sell such certificates is a fraud.

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A. Feldman, Los Angeles, for appellant, Meldon Rodney.

T. C. McKenna and Ira C. Doane, Los Angeles, for respondent.

MOORE, Presiding Justice.

Respondent obtained judgment against appellant for the sum of \$1750 as damages resulting from the sale of certain corporate shares to respondent.

It appears that defendants had organized Vitalife Laboratories prior to October 22, 1945, for a total capitalization of 10,000 shares. To defendant Sorensen 5100 shares were issued; 2000 to one Kroeckel and 2900 to appellant. Notwithstanding that a permit of the state corporation commissioner had on the last mentioned date authorized the issuance of the capital stock for cash only at \$1 per share, the permit had been ignored and 2900 shares issued to appellant for the sum of \$1000 and some services. At the time of its issuance appellant was the secretary and director of the corporation. On April 19, 1946, the defendant Boyle called upon respondent for the purpose of inducing him to purchase the stock of one of his codirectors. Thereafter appellant delivered his stock certificate for the 2900 shares to Boyle and the latter paid the \$1750 to appellant. In the following month respondent called upon appellant to inquire as to the whereabouts of the stock. Appellant told him to take the matter up with Boyle who was handling the transaction. On October 9, 1946, at a shareholders' meeting of the corporation, the issue of the stock to appellant was by resolution declared void by reason of its noncompliance with the terms of the permit.

In his complaint for damages respondent alleged two counts. (1) For money had and received in the sum of \$1750 and (2) an action for damages in the sum of \$2320 alleging Boyle and Sorensen to have been the agents of appellant in seeking a sale. The first cause of action having been abandoned, judgment was entered in the sum of \$1750 against appellant only.

Appellant demands a reversal on three grounds, to wit, (1) want of jurisdiction in the court below; (2) want of evidence of the agency of either Boyle or Sorensen; (3) want of proof of any faults or representations by appellant resulting in damage to respondent.

[1-3] In support of his contention that the court was without jurisdiction appellant argues that the second cause of action was predicated on the same set of facts as those alleged in the first count, citing Consolidated Adjustment Company of California v. Superior Court, 189 Cal. 92, 94, 207 P. 552. But the second cause of action is based upon the selling of 2900 shares of stock, par value of 80 cents per share making the total amount involved in the second count \$2320, the amount of damage suffered by the disclosure that the stock was worthless. The test of jurisdiction of a court is found in the nature of the case made by the complaint and in the relief sought. Merely because the plaintiff does not succeed in establishing all that he claims does not deprive the court of its jurisdiction to give judgment for the amount of debt established. Silverman v. Greenberg, 12 Cal.2d 252, 254, 83 P.2d 293. Appellant argues that since all parties deny an agency and since there was no clear proof of an actual agency or of an ostensible agency respondent must fail. Such argument is of no avail. The stock stood in appellant's name. Boyle took it from him for the purpose of selling it and when he approached respondent he stated that it was Rodney's stock. Boyle paid Rodney the money supplied by respondent and never returned it to respondent. From such facts, an inference of agency was irresistible, at least an ostensible agency which is clearly established by the acts of appellant. Not only did the latter refer respondent to Mr. Boyle when the whereabouts of the stock was asked for, but the fact that appellant received the identical amount of money paid to Boyle by respondent leaves no room for cavil.

[4,5] Finally, appellant contends that there is no proof of any false representation resulting in damage to respondent. This is an amazing state in view of the fact that the stock held by Rodney in his own name was a nullity, having been issued in violation of the permit and nothing could be done to instill value into it. The very fact that appellant assigned the certificate and offered it for sale as 2900 shares in the Vitalife Corporation was a fraud accentuated by the fact that appellant as

attorney for the corporation had prepared the application for the permit, as a director had voted to make the application and as secretary had signed it. That he knew the stock to be worthless cannot be denied upon any theory. Stock certificates exchanged for services instead of cash as required by the commissioner's permit are utterly without value and the offer by a director of the corporation to sell such certificates constitutes a fraud. Randall v. California Land Buyers Syndicate, 217 Cal. 594, 599, 20 P.2d 331; Barton v. El Encanto Apartments, Inc., 216 Cal. 500, 502, 14 P.2d 501; First National Bank of Calexico v. Thompson, 212 Cal. 388, 402, 298 P. 808.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.



97 Cal.App.2d 333

**SAYRE et al. v. EL DORADO COUNTY  
HIGH SCHOOL DIST. et al.**

Civ. 7734.

District Court of Appeal, Third District,  
California.

May 3, 1950.

Action by Marie Sayre and others against El Dorado County High School District, a political subdivision, and others, to recover for death of plaintiffs' husband and father in collision with school bus of named defendant. The Superior Court, El Dorado County, George H. Thompson, J., entered a judgment sustaining a demurrer to amended complaint without leave to amend, and plaintiffs appealed. The District Court of Appeal, Adams, P. J., held that claim against District contained a sufficient specification of the place of accident in compliance with statute.

Judgment reversed.

**1. Schools and school districts**  112

The statute requiring a claim to be filed against school district for negligent

injury to person or property should be liberally construed, and where claimant has made a reasonable attempt to comply with the law in good faith and no intent to mislead or conceal appears, claim should be held sufficient in absence of anything indicating that district was misled. Education Code, §§ 3, 1007.

## 2. Schools and school districts ☞112

The statute providing that claim against school district for negligent injury to person or property shall specify the "place of accident" does not require a particular description and definite location of the place of accident, but only the place of the accident. Education Code, § 1007.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Place of Accident".

## 3. Schools and school districts ☞112

Allegation in claim against county school district for death of motorist in collision with school bus that named person, acting within scope of employment as driver of bus for district, was operating bus on specified highway within named county constituted a sufficient specification of "place of accident" in compliance with statute, in absence of contention that district was misled thereby. Education Code, § 1007.

Philip C. Wilkins, Rowland & Craven, Sacramento, for appellants.

T. L. Chamberlain, F. L. Sinclair, Auburn, Henry S. Lyon, Placerville, for respondents.

ADAMS, Presiding Justice.

This action was brought by the surviving widow and children of Edgar Allen Sayre, to recover damages for the death of the husband and father, it being alleged that Sayre was killed in a collision between an automobile driven by him and a school bus driven by defendant Roy H. Chaix, an employee of the school district, which collision was due to the negligence of the bus driver. The complaint was filed September 15, 1948, and attached to it was a copy of a claim which had been filed with the school district in April, 1948, and denied. On Octo-

ber 16, 1948, defendant demurred to the complaint on the grounds that no cause of action was stated, and that it was uncertain in that it could not be ascertained therefrom whether the claim had been served upon the secretary or clerk of the district within ninety days after the alleged accident occurred, or that said claim was verified. The demurrer was sustained with permission to amend, and on February 5, 1949, plaintiffs filed an amended complaint. On February 10, 1949, defendants demurred to that complaint again on the general ground, also alleging that it was uncertain in that it could not be ascertained therefrom whether the claim had been served upon the secretary or clerk of the district. This demurrer was sustained without leave to amend, the court, in its order, stating "that the verified claim attached to and incorporated in said First Amended Complaint has no definite allegation describing the place of accident, as required by Section 1007 of the Education Code, which makes it impossible that said claim and complaint may be amended or changed with respect to such particular description and definite location of the place of the accident." The allegation of the claim in this respect was that Roy H. Chaix, acting within the scope of his employment as driver of a school bus for the district, "was driving and operating the said school bus upon U. S. Highway No. 50 within the County of El Dorado."

The only question presented upon this appeal is whether the foregoing allegation constitutes a sufficient specification of the "place of the accident," as provided by section 1007 of the Education Code.

[1] The present tendency of the courts is to give a liberal construction to claims statutes, and to hold that where a claimant has made a reasonable attempt to comply with the law in good faith, and no intent to mislead or conceal appears, the claim will be held sufficient in the absence of anything indicating that the defendant has been misled. See *Perry v. City of San Diego*, 80 Cal.App.2d 166, 169, 181 P.2d 98; *Sandstoe v. Atchison, T. & S. F. Ry. Co.*, 28 Cal.App. 2d 215, 223, 82 P.2d 216; *Silva v. County of Fresno*, 63 Cal.App.2d 253, 257, 146 P.2d



520; *Kelso v. Board of Education*, 42 Cal. App.2d 415, 422, 109 P.2d 29; *Uttley v. City of Santa Ana*, 136 Cal.App. 23, 25, 28 P.2d 377. Also section 3 of the Education Code provides that such code and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice.

[2,3] There is no contention here that the allegations of the claim as filed misled defendants. Neither of the demurrers, though both set up grounds of uncertainty of the claim in other respects, contained any alleged uncertainty for failure of the claim to aver the place of the accident, and the second one was filed some ten months after the filing of the claim. Education Code section 1007 does not require "a particular description and definite location of the place of the accident," as was apparently the trial court's view of its requirements, but only the place of the accident. We think that plaintiffs made a reasonable attempt to comply therewith in good faith, and that the defendants were in nowise misled.

The judgment is reversed.

PEEK, J., and SPARKS, Justice pro tem., concur.



97 Cal.App.2d 245

PEOPLE v. SHERMAN et ux.

Cr. 732.

District Court of Appeal, Fourth District,  
California.

April 27, 1950.

On Rehearing May 10, 1950.

Hearing Denied May 26, 1950.

Bruce Bentley Sherman and Mae Sherman were jointly charged with the crime of arson and with attempting to burn insured property with intent to defraud insurer and after a plea of not guilty, the jury in the Superior Court, Imperial County, L. J.

Mouser, J., returned a verdict of guilty on each count as to defendant Bruce Sherman and not guilty as to his wife and from an order denying a new trial, defendant Bruce Sherman appealed. The District Court of Appeal, Griffin, J., held that there was sufficient evidence to establish the corpus delicti and to allow the introduction of extra judicial statements of the defendant at the trial and that the evidence sustained the conviction.

Judgment and order affirmed.

#### 1. Criminal law ☞517(4)

In prosecution for arson and for attempting to burn insured property with intent to defraud an insurer, evidence sufficiently established corpus delicti for purpose of admitting extra judicial statements of defendant.

#### 2. Arson ☞37(1)

Evidence sustained conviction for attempting to burn insured property with intent to defraud an insurer. Pen.Code, § 447a, 548.

#### 3. Criminal law ☞1170½(5)

Witnesses ☞372(1)

In prosecution for arson and for attempting to burn insured property with intent to defraud insurer, where counsel for defendant was afforded opportunity of showing and did show facts attempted to be elicited in offer of proof to show bias and prejudice of fire chief against defendant, by other witnesses as well as by testimony of defendant himself, although further cross-examination of fire chief should have been allowed, no abuse of discretion or prejudicial error resulted.

#### 4. Witnesses ☞267

The latitude permitted in cross-examination of a witness is in the discretion of the trial court.

#### 5. Criminal law ☞388, 650

In prosecution for arson and for attempting to burn insured property with intent to defraud an insurer, where trial court refused to permit defendant's counsel to demonstrate burning propensities of material allegedly found burning at time of fire on defendant's premises, on theory that experiment would not be conducted under

similar conditions, and refused to admit evidence of a test made out of court which did not appear to have been made under similar conditions to those prevailing at time of fire, there was no abuse of discretion.

#### 6. Criminal law Ⓒ388

In criminal prosecutions, admission of evidence of tests conducted outside of courtroom is within discretion of trial court. Pen.Code, §§ 447a, 548.

#### 7. Criminal law Ⓒ670

In criminal prosecution, trial court is not obligated to rule on so-called demand for offer of proof on part of prosecution. Pen.Code, §§ 447a, 548.

#### 8. Criminal law Ⓒ1171(1)

In prosecution for arson and for burning insured property with intent to defraud insurer where trial court denied defendant's request for an offer of proof on part of state, and thereafter sustained objections to questions asked by prosecuting attorney relating to any other fires had by defendant or his wife, and ordered such matters stricken, and prosecutor may have proceeded in good faith believing such evidence to be admissible for limited purpose of impeachment, Supreme Court would not hold, where one interpretation would result in finding of bad faith and another a finding of good faith, that prosecution was acting in bad faith and that prejudicial error resulted. Pen.Code, §§ 447a, 548.

#### 9. Criminal law Ⓒ627½

In prosecution for arson and for burning insured property with intent to defraud insurer, refusal to submit typed statement to defendant which he had allegedly previously made, and which had been taken down by shorthand reporter, but which had not been signed by defendant, or allow him to examine paper before any questions were propounded by prosecuting attorney for impeachment purposes, was not error. Pen.Code, §§ 447a, 548.

#### 10. Witnesses Ⓒ393(2)

In prosecution for arson and for burning insured property with intent to defraud insurer, after proper foundation was

laid, allowing shorthand reporter to read to jury, from her notes, statement made by defendant and his wife prior to trial, which statements were of an impeaching nature, was not error. Pen.Code, §§ 447a, 548.

#### 11. Arson Ⓒ41

In prosecution for arson and for burning insured property with intent to defraud insurer, refusal to give instructions which told jury that if defendant was not present at time crime was committed he was entitled to an acquittal was properly refused as not being a full statement of law. Pen.Code, §§ 447a, 548.

#### 12. Criminal law Ⓒ865(1)

In prosecution for arson and for burning insured property with intent to defraud insurer, where during two days of deliberation, jury returned two times informing court it could not agree on a verdict, and each time trial judge offered to or did have read certain evidence requested and explained that due to length of trial and question involved it was only natural that a considerable length of time might be required in considering all those questions involved, and nothing was said by trial judge involving any intimation as to any opinion of court as to how jurors should decide case, trial court did not force a verdict of guilty. Pen.Code, §§ 447a, 548.

#### 13. Criminal law Ⓒ957(1)

A juror may not impeach his own verdict.

#### 14. Criminal law Ⓒ866

In prosecution for arson and for burning insured property with intent to defraud insurer, where defendant presented an affidavit of a juror claiming that two other jurors indicated that they would agree with that juror and would cast their vote as he did and that when he switched his vote and voted guilty other two did likewise did not indicate that juror making affidavit resorted to lot or chance in casting his vote and even if other two agreed that they would vote as he did that was not a resort to lot or chance. Pen.Code, §§ 447a, 548, 1181, subd. 4; Code Civ. Proc. § 657, subd. 2.

Jerome Weber, Los Angeles, Melvin B. Thale, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Howard S. Goldin, Deputy Attorney General, for respondent.

GRIFFIN, Justice.

Defendant Bruce Sherman and his wife, Mae, were jointly charged in Count 1 of an information with the crime of arson in that they feloniously set fire to the Duo-Arts Upholstery Shop, in Calexico, in violation of sec. 447a of the Penal Code and in a second count with attempting to burn insured property with intent to defraud an insurer, in violation of sec. 548 of the Penal Code. After a plea of not guilty the jury returned a verdict of guilty on each count as to defendant Bruce Sherman, and not guilty as to his wife.

The appealing defendant now claims first that there was insufficient evidence to establish the corpus delicti and to allow introduction of extrajudicial statements of the defendant at the trial. This calls for a rather minute relation of the facts presented.

Defendant had been a fireman in Los Angeles County for several months. In 1947, he rented a store in a hotel building in Calexico to carry on his upholstery business. The store contained a large display and work room, together with a small wash room at the rear thereof which was about four by five feet square. The floor and two walls of the wash room were wooden. The other two walls were of brick. There was a window opening to the outside which was covered by a cardboard and screen. About 8:15 a. m. on February 23, 1949, a witness observed smoke coming from the wash room. An alarm brought the fire department. The fire chief described finding smoke coming from that window. The screen and cardboard were removed. He then observed a small glow from embers on the floor. Water fog was applied by hose through the window. He found all doors entering the store room to be locked. He broke in and found the building was "charged" with dense smoke and that the fire was in the wash room.

The door entering it was partially opened. He found incomplete combustion of a material called coco fiber lying on top of the wooden surface of the floor and near the west wall which covered a space of about ten by twenty-four inches. Two or three bales of coco fiber were up against the wooden wall of the wash room. There were burned marks on the floor and some smoke marks on the wall. There was about one quart of charred residue of coco fiber, as well as small pieces of paper, remaining on the floor after the glow was extinguished. It was found that heat still remained in the wooden floor boards and the walls. The chief then found a removable board in the floor about 24 inches in length and 4 inches in width located about 12 to 16 inches from the place where he found the fire on the floor of the wash room. He removed this board and found fire underneath the floor. The removable board was charred underneath, and more residue of incomplete combustion of coco fiber and ash was found covering a space of about 18 inches by 3 inches, which ran counterwise to the space produced by the uplifting of the board in the floor. No mechanical devices, electric wiring or ground wires were found which might possibly have started a fire in that vicinity. Three clean, fresh and partially burned wooden matches were found about 8 inches from the debris under the floor. A partially charred board was found near the debris. The floor joists and floor boards were charred underneath.

An expert witness, produced by the people, testified that he investigated the fire and that there were two separate and distinct burned and charred areas, one under the floor and the other in the wash room on the floor as described by the fire chief; that the floor had been damp for some period of time prior to the application of the water fog and that such dampness, in addition to the lack of ventilation found to exist, would have a tendency to retard ignition of the wood products by the fire. He gave as his opinion that from the condition he observed, the fire was burning not less than three hours prior to the time of its discovery; that the type of fiber



burned had a tendency to smoke when ventilation was not favorable, and that it would remain smothered to some extent before it was completely incinerated. Defendant was seen leaving the building and premises about 4:30 a. m., at which time he left for Los Angeles. About three hours later the fire was discovered.

[1] The evidence sufficiently established the corpus delicti for the purpose of admitting the extrajudicial statements of the defendant. *People v. Hubbell*, 54 Cal. App.2d 49, 57, 128 P.2d 579; *People v. Seymour*, 54 Cal.App.2d 266, 275, 128 P.2d 726; *People v. Kaye*, 43 Cal.App.2d 802, 809, 111 P.2d 679; *People v. Walden*, 75 Cal.App. 565, 567, 243 P. 25; *People v. Haggerty*, 46 Cal. 354, 355; *People v. Simpson*, 50 Cal. 304, 306; *People v. Holman*, 72 Cal.App.2d 75, 164 P.2d 297; *People v. Cape*, 79 Cal.App.2d 284, 289, 179 P.2d 426. Incendiary origin of a fire is generally established by circumstantial evidence such as the finding of separate and distinct fires on the premises. *People v. Saunders*, 13 Cal.App. 743, 747, 110 P. 825; *People v. Patello*, 125 Cal.App.2d 480, 482, 13 P.2d 1068.

As to the second count the evidence shows that defendant had a policy of fire insurance of \$6,000 on his stock and fixtures, which policy would expire on March 21, 1949; that on February 2, 1949, he had paid for and received an additional policy, in another company, for the same amount, on the same stock and fixtures located in the upholstery shop, upon the representation that his inventory showed, on January 1, 1949, about \$14,000 of stock and fixtures on hand that he was under-insured. One witness testified that the wholesale value of the stock on hand, after the fire, was about \$1,470, plus \$1,493, the value of the fixtures. Defendant conceded that at the time of the fire he was indebted to his landlord for rent of the premises in the sum of \$800, as evidenced by a judgment obtained against him.

When Mrs. Sherman was called on the phone the morning of February 23rd, she stated that her husband had departed for Los Angeles on February 22, at about 9 p. m. However, on the witness stand, she

stated she was mistaken, that her husband left home about 4 a. m. on February 23; that she lied to the investigator because she was nervous and upset when she made that statement; that there was but one set of keys to the shop and she had them in her possession that morning.

[2] Defendant was notified, in Los Angeles, of the fire. He was interviewed there by investigators of the fire department and stated he had \$10,000 to \$12,000 worth of stock on hand; that he thought that the first policy expired on March 1, 1949, and that he obtained the second policy to replace the old one; that from 9 p. m. on February 22, to 4:30 a. m. on February 23, he was with a woman in his place of business; that he locked the premises, picked up a friend, and went to San Diego and thence to Los Angeles, where he visited his son; that his son informed him of the fire; that his lease on the place had just been canceled and that he was then on a month to month basis. The investigator stated to defendant that he thought it odd that defendant would leave Calexico at that hour of the morning, and particularly the morning of the fire; that defendant said: "Well, that is my story and I am going to stick to it." On his return to Calexico defendant was again questioned and was asked when he had last been in the upholstery shop prior to the fire and he stated approximately 5:40 p. m. on February 22; that he had arisen about 4 o'clock a. m. on February 23; that he drove his truck to pick up a friend; that he had taken a roundabout route in order to pass his upholstery shop and check whether the lights were out; that slightly after 4:30 a. m. he proceeded out of town. He was then asked whether he stopped in front of his store or at his store and defendant stated that he positively had not. At this point the investigator told defendant that he was lying and said to him: "Sherman, we can put you out of your car in front of that building", whereupon defendant declared: "Well, I might as well tell you, I did go in the building." Defendant then stated that he had gone into the shop to pick up some checks. The investigator inquired

as to whether defendant had ever had any fires and defendant answered: "This is my first fire." The investigator then accused defendant of having set this fire and stated that the facts pointed to an incendiary fire and to the fact that defendant had set it. He said: "Bruce, it points right to you \* \* \*. Now what have you got to say for yourself?" Defendant replied: "Well, all I have got to say is you are going to have to prove it." Defendant, on the witness stand, admitted he first told the officers that on the evening of the fire he had just "driven past" his shop but did not stop, and that his wife had called on the phone when he was in Los Angeles and they "fixed up" a story about him leaving Calexico at 9 o'clock the night before. Defendant endeavored to account for the inconsistent statements made by him and claimed that the woman who was with him that night was his wife and they were in their own home. He produced testimony as to the condition of the shop and said that there was nothing unusual about coco fiber being strewn all over the floor in any upholstery shop; that if he had intended starting a fire he would not have started it in or under a water-soaked floor; that no actual damage was done by reason of the fire; that he did not set the fire and did not intend to defraud any insurance company. Without a further summarization, the evidence sufficiently supports the verdict and finding of the jury as to the second count.

[3,4] The next complaint is that the court erred in not permitting counsel for defendant to cross-examine the fire chief as to his bias and prejudice against defendant. On cross-examination counsel sought to elicit from the witness certain facts. The court sustained the objection and he then made an offer of proof that defendant and the chief were once members of the fire department together and were business associates in the upholstery business; that the defendant aided the chief in securing his position; that while defendant was a member of the Calexico Advancement Organization, a claimed group of individuals opposed to the administration of the city of Calexico, the chief

requested the defendant to submit a petition recommending him for the office of police chief, as well as fire chief; that defendant agreed to submit his petition to the organization but that the defendant disapproved of the application because the chief was unfit for the job and that the witness made threats against the defendant and made demands for money. Defendant was permitted to produce evidence showing most of the facts contained in the offer of proof, and the chief did testify that he and defendant had been in business together and that defendant owed him \$1,200, but the defendant denied that he owed the debt. Defendant himself testified that the chief told him that defendant had better get out of the political organization with which he was affiliated and that there was not room in town for both of them; and that the chief told him he was going to run him out of town. The chief denied making any such statements or that he had any words with the defendant or that he was biased or prejudiced toward him. There was some evidence admitted about a petition claimed to have been presented to the defendant by the fire chief, soliciting support of the organization for his appointment as chief of police, and that defendant refused to have such a petition signed or presented. Defendant's complaint is that he should have been allowed to place the form of petition in evidence and to show more in detail the political ramifications between the defendant and the witness. The trial of the action took nearly two weeks of time and the reporter's transcript contains over 900 pages. It cannot be said, from a reading of the transcript, that counsel for defendant was unduly limited in his cross-examination where he was afforded the opportunity of showing and did show the facts attempted to be elicited in the offer of proof, by other witnesses, as well as by the testimony of himself. While further cross-examination on the subject should have been allowed. *Silvey v. Hodgdon*, 48 Cal. 185, 188; *People v. Blackwell*, 27 Cal. 65, 68, no abuse of discretion appears and no prejudicial error resulted where defendant was permitted to prove by oth-

er witnesses the facts set forth in the offer of proof, *People v. Conness*, 150 Cal. 114, 88 P. 821. The latitude permitted in the cross-examination of a witness is very largely in the discretion of the trial court, *People v. Wong Toy*, 189 Cal. 587, 591, 209 P. 543; *People v. Svendsen*, 25 Cal.App. 1, 4, 142 P. 861.

[5,6] It is next contended that the court was in error in not permitting defendant's counsel to conduct certain experimental tests in the presence of the jury. It was the people's contention that the fire was set about 4:30 a. m.; that it smoldered and did not become noticeable until about 8 a. m. due to the atmospheric conditions of the room, its dampness, and the nature of the burning propensities of coco fiber. Counsel brought into court a bucket, a cover, coco fiber, a spray-gun filled with water, and a piece of metal, and wanted a witness to light the fiber in the courtroom to demonstrate its burning propensities. The court sustained the objection to such a test, apparently on the theory that the experiment would not be conducted under similar conditions to those that existed at the upholstery shop. Offer was then made to show that such a test had been previously made outside of the courtroom by the witness and that it showed the burning propensities of the coco fiber the admission of such evidence is largely a matter of discretion with the trial court, *People v. Levine*, 85 Cal. 39, 22 P. 969, 24 P. 631; *People v. Mondshine*, 132 Cal.App. 395, 22 P.2d 779. In the first instance the trial court may have had regard for the comfort of the jurors as well as the inflammability of the courthouse in determining whether such a test should be conducted in the courtroom. It does not appear that the test made out of court was under similar conditions to those prevailing at the upholstery shop. *People v. Black*, 45 Cal.App.2d 87, 103, 113 P. 2d 746; *People v. Wagner*, 29 Cal.App. 363, 368, 155 P. 649; *People v. Halbert*, 78 Cal.App. 598, 607, 248 P. 969. No abuse of discretion appears.

The next error claimed is that the district attorney was guilty of prejudicial misconduct in offering testimony to show

that defendant had had other fires. This claim appears to be more serious than others. Counsel for defendant, anticipating the testimony about to be offered by the prosecution, approached the bench and requested the people to make an offer of proof so the court could be informed of the nature of the testimony about to be produced. The trial court denied the request. Subsequently the witness was asked: "Do you know whether or not the defendant \* \* \* had any other fires?" The witness, before an objection could be made, immediately answered: "Two". A motion to strike the answer was granted. A motion for mistrial was denied. It is argued that since the district attorney knew, beforehand, that the answer sought to be induced by the question was not admissible, he was not acting in good faith and was guilty of prejudicial misconduct, citing *People v. Angelopoulos*, 30 Cal.App. 2d 548, 549, 86 P.2d 873. The prosecuting attorney also asked defendant's wife, on cross-examination, if she "had any other fires". The court in both instances sustained an objection to those and similar questions and admonished the jury to disregard them and stated that "You are to regard matters ordered stricken as though they never had been mentioned."

In *People v. Lee Chuck*, 78 Cal. 317, 329, 20 P. 719, 723 it is said: "Equally with the court the district attorney, as a representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust." See, also, *People v. Wells*, 100 Cal. 459, 462, 34 P. 1078.

[7,8] It is true that the trial court was not obligated to rule upon the so-called demand for offer of proof on the part of the prosecution. *People v. Kemp*, 139 Cal. App. 48, 51, 34 P.2d 502. The complaint goes to the question of good faith of the prosecutor. The district attorney endeavored to claim good faith in propounding the questions and soliciting the answers for the reason that, in the consultation with the court, he claimed that evi-



dence of other offenses was admissible, and cited *People v. Gentekos*, 118 Cal.App. 177, 181, 4 P.2d 964, in support of his contention. In that case the appellant insisted that the admission in evidence of the conversation with the investigator about a previous fire was prejudicial error. The court held that since its purpose was not to prove a similar offense but to rebut contradictory statements made by the defendant to other investigators, it was not prejudicially erroneous. In the instant case there is evidence that defendant did state to the investigators that he never before had had a fire. The prosecutor may have proceeded in good faith, believing such evidence was admissible for the limited purpose of impeachment. Although it may be charitable to assume that this evidence was elicited in the manner described, only for the purpose of impeachment, we are not prepared to hold, where one interpretation results in a finding of bad faith and another a finding of good faith, that the prosecution was acting in bad faith and that prejudicial error resulted.

[9] Error is claimed to have been committed by the district attorney in asking questions, for impeachment purposes which were based on a typed statement that defendant had previously made, taken down by a shorthand reporter, but which had not been signed by the defendant. His counsel insisted that he, or the defendant, be allowed to examine the paper before any questions were propounded. The refusal to submit such a statement for inspection was not error. *People v. Singh*, 136 Cal. App. 233, 243, 28 P.2d 416.

[10] After the proper foundation was laid, it was not error to allow the shorthand reporter to read to the jury, from her notes, the statement made by defendant and his wife, prior to trial, which statements were of an impeaching nature. *People v. Mar Gin Suie*, 11 Cal.App. 42, 55, 103 P. 951; *People v. Vatek*, 71 Cal. App. 453, 474, 236 P. 163.

Defendant offered a so-called alibi instruction reading in part: " \* \* \* if \* \* \* you have a reasonable doubt

whether or not the defendant was present at the time the crime was committed, he is entitled to an acquittal." The court refused the requested instruction apparently on the theory that since it was the prosecution's contention that the fire was started around 4:30 a. m., and since defendant admitted being there about that time such an instruction was unnecessary.

The whereabouts of the defendant at the time of the discovery of the fire was immaterial, if in fact he were present at the time it was started. It was established by the evidence and defendant admitted that he was present in his shop about 4:30 a. m. at which time it is claimed by the prosecution that the fire was set. While the instruction might have been properly worded so as to cover the contention made by defendant, it lacked the necessary qualifications in order that it could be applicable to the instant case.

In *People v. Wilson*, 100 Cal.App. 428, 280 P. 169, the instruction there contained the additional qualifications that if the jury believed that defendant was not present at the time it was *alleged or proven* that the crime was committed, and therefore *could not have committed the crime*, and did not *aid or abet in its commission*, you should find him not guilty.

[11] The instruction here under consideration merely told the jury that if the defendant was not present at the time the crime was committed he was entitled to an acquittal. Such is not a full statement of the law. The instruction proffered lacked the additional qualifications required. A defendant might not be actually present at the time of the commission of the offense of arson and still aid and abet in its commission, or might set a fire and not be present at the time it was discovered.

In *People v. Gourdin*, 108 Cal.App. 333, 291 P. 701, it was held that an alibi instruction must be a *proper* instruction in relation to said defense of alibi and that it was not error to refuse a proffered instruction on that subject when it was not shown that defendant was at another place than that where the crime was committed

at the time in question. No prejudicial error resulted in the failure to give the instruction as proffered.

[12] It is charged that the trial judge forced a verdict of guilty to be returned by the jury. This claim is based on the fact that during the two days of deliberation of the jury it returned two times informing the court that it could not agree upon a verdict. Each time the trial judge offered to or did have read certain evidence requested and then explained that due to the length of the trial and the questions involved it was only natural that a considerable length of time might be required in considering all of those questions involved. Counsel for defendant then moved for a mistrial on the ground that further deliberation, under the atmospheric conditions prevailing, would be forcing a compromise verdict. This motion was denied. It does not affirmatively appear that the jurors were forced to arrive at a verdict of guilty. The conditions related might just as well have forced a verdict of not guilty. There was nothing said by the trial judge involving any intimation as to any opinion of the court as to how the jurors should decide the case. The remarks made were fair and guarded and made for the commendable purpose of having the jury labor honestly and faithfully to arrive at a verdict, if possible, and thus terminate the litigation. Accordingly, the claim of defendant is untenable. *People v. D'A. Filippo*, 220 Cal. 620, 628, 32 P.2d 962; *People v. Selby*, 76 Cal.App. 715, 720, 245 P. 792; *People v. Phillips*, 120 Cal.App. 644, 658, 8 P.2d 228.

Lastly, on a motion for new trial defendant presented an affidavit of one of the jurors claiming that two other jurors "indicated" that they would agree with that juror and would cast their vote as he did; that when he switched his vote and voted "guilty" the other two did likewise. Defendant's counsel had the two other jurors

in court and stated that they would be willing to so testify. The trial court properly rejected the affidavit and the proffered testimony on the ground that it would be impeaching their verdict, after they had been polled and indicated that their individual verdict, as to this defendant, was guilty. Sec. 657, par. 2, C.C.P.; *People v. Denton*, 22 Cal.App.2d 673, 72 P.2d 191.

[13] Counsel for defendant recognizes the general rule that a juror may not impeach his own verdict but claims the facts related by defendant come within the exception specified in sec. 1181, subdivision 4 of the Penal Code, on the theory that the verdict was arrived at by lot or chance or by means other than a fair expression of opinion on the part of the jurors.

[14] There is no indication that the juror making the affidavit resorted to lot or chance in casting his vote. His excuse was that he wanted to go home to his wife. The only proffered evidence is that the other two agreed or "more or less" agreed or "indicated" that they would vote as he did. Even if true, this is not a resort to lot or chance as decided in *People v. Kromphold*, 172 Cal. 512, 157 P. 599. There eleven jurors voted for the death penalty. The single juror concluded that if on a subsequent ballot eleven still adhered to their former vote he would yield, change his vote from life imprisonment to the death penalty, which was done. The Supreme Court declared that such change of vote was not a resort to chance, and upheld the trial court's order refusing to receive an affidavit disclosing these facts in evidence.

We have read the record and conclude that no prejudicial error exists which would justify a reversal.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER, TRAYNOR, and SCHAUER, JJ., dissenting.

97 Cal.App.2d 218

## In re STUART'S ESTATE.

STUART v. STUART et al.

Civ. 14155.

District Court of Appeal, First District,  
Division 2, California.

April 27, 1950.

widow had been by mutual mistake of widow and deceased husband included in language of document which was both a contract and a joint will of the parties, in belief of the parties the language used did not cover separate property of widow, so as to entitle widow to relief on ground of mutual mistake.

Proceeding in the matter of the estate of Theodore M. Stuart, wherein Antoinette Stuart and American Trust Company (a corporation), as executors of the last will and testament of Theodore M. Stuart, deceased, filed their first account and report and petition for confirmation and wherein George C. Stuart, a nephew of the deceased, filed his exceptions to the account and report. The Superior Court in and for the County of San Mateo, A. R. Cotton, J., rendered an order in favor of the executors, and George C. Stuart appealed. The District Court of Appeals held that evidence produced by Antoinette Stuart, who was the widow of the deceased, was sufficient to support conclusion that her separate property was by mutual mistake included in language of document which was both a contract and a joint will of the parties, in belief of the parties that the language used did not cover such separate property, so as to entitle her to relief on ground of mutual mistake.

Order affirmed.

## 1. Wills ⇐62

Where document was both a contract and a joint will of husband and wife, the document, in so far as it purported to subject to testamentary disposition certain property which the husband could not otherwise dispose of by will, was a contract, and, in its dispositive provisions, it was a will.

## 2. Wills ⇐62

Contract portion of document which was both a contract and a joint will of husband and wife was subject to rules of mutual mistake applicable to contracts generally.

## 3. Wills ⇐58(2)

Evidence produced by widow was sufficient to support conclusion of probate court that certain separate property of

Lloyd S. Ackerman, Philip S. Mathews, San Francisco, for appellant.

Shapiro & Rothschild, San Francisco, Raymond T. Anixter, San Francisco, of counsel, for respondents.

NOURSE, Presiding Justice.

This is an appeal from an order settling and allowing an account in the estate of Theodore M. Stuart.

The following facts are set forth in an agreed statement filed in lieu of a clerk's transcript: Decedent died January 15, 1946, leaving a will dated September 14, 1945. At the time his will was admitted to probate the American Trust Co. and Antoinette Stuart, widow, were appointed as executors. November 12, 1947, the executors filed an inventory and appraisal; the oath of the American Trust Co. was to the effect the inventory was a true statement of all the estate of deceased, that of Antoinette Stuart contained the affirmation, "that said annexed Inventory contains real and personal property which Affiant claims as her own property individually and which Affiant asserts is not and should not be considered as a part of the estate of said deceased" which items were marked in the Inventory with an asterisk.

On March 22, 1948, the executors served and filed their First Account and Report of Executors and Petition for Confirmation Thereof. April 9, 1948, George C. Stuart, nephew of decedent and appellant herein, filed his exceptions to the account and report in which he alleged that Antoinette and Theodore Stuart made a joint will September 14, 1945 (the will admitted to probate) and that by its terms all prop-



erty owned by decedent and his wife on September 14, 1945, regardless of title by which it was held became community property, with the exception of jewelry and certain personal effects specifically excluded. Appellant claimed executrix Antoinette Stuart had failed to account for certain community property and other property and income of the estate, and named certain properties and interests in the following exceptions: (1) United States Savings Bonds, (2) certain shares of stock, (3) two insurance policies, (4) proceeds from sale of property in San Mateo (home), (5) interest in the estate of respondent's father which was in the process of being probated at the time the exceptions were filed, (6) property deeded to respondent by her mother. Appellant also objected to certain items of disbursement as not proper charges. The trial court granted exceptions (1) and (2), but found untrue the contention of appellant that all property owned by decedent and Antoinette Stuart at the time the conjoint will was made regardless of title became community property. It concluded that the assets mentioned in exceptions (3), (4), (5), and (6)—specifically insurance policies, proceeds from the sale of the home, interest in estate of respondent's father and property given to her by her mother—were not community property subject to the will agreement, and made an order in accordance with such findings, overruling exception (7) and settling and allowing the first account and report of executors.

According to the terms of the will upon the death of either one all right title and interest in all the property should go to the survivor and upon his or her death the remainder should go one-half to decedent's nephew, George Stuart, or his children, and one-half to designated kin of the wife.

Upon this appeal George Stuart claims that under the specific terms of the will all property must remain in the estate and the trial court was wrong in ruling that property to the value of approximately \$70,000 should be excluded from the operation of the will and hence from the

assets of the estate. He quotes the following from the will: "We do hereby declare that all property, both real and personal, now owned or hereafter acquired by us jointly, or by either of us severally, or held as joint tenants, and possessed by us or either of us at the time of the death of the first of us, is our community property and as such is disposed of by this Will." Appellant claims that the very essence of that arrangement was that it should be all inclusive in respect to everything owned by either party at the date of the first death, excepting only personal effects; that it is a well established principle in California that husband and wife may agree that any property, by whatever title held by them shall be community property and cites cases to the effect that property held in joint tenancy was found to be community property by agreement of husband and wife; that an insurance policy in legal contemplation is property and as such can by agreement be made part of the community property. Appellant contends that at the time of the making of the mutual will Mrs. Stuart had acquired an interest in the estate of her father which was a property right which could properly be included in the will agreement.

Appellant further argues that the court erred in admitting evidence of the decedent's oral declaration of intention to the effect that decedent did not intend to include in the scope of the will agreement the home held in joint tenancy and the life insurance policies. He contends that the court also erred in admitting in evidence Mrs. Stuart's will of December 18, 1945, over his objections. Appellant quotes the will, the opening paragraph of which reads: "\* \* \* At the suggestion of my husband, Theodore M. Stuart, I am making this will disposing of my separate property. He assures me that the items herein mentioned are not included in our conjoint and mutual will of September 14th, 1945, and should be disposed of in a separate will of my own." The will then disposes of the same items which the trial court held were respondent's separate property plus her personal effects.

Appellant argues this will constituted a self-serving declaration which is not evidence.

The real and controlling issue raised here is whether the trial court erred in admitting evidence of the circumstances and conversations of the parties relating to the execution of the contract-will. Over objection of appellant Mrs. Stuart testified: "We were going on a long motor trip and he said to me, 'You have some separate property, have you made a will?' I said, 'No.' He said, 'I think you should and you and I should make a conjoint will of our community property.' Then he said to me, 'Your insurance is payable to you and is never controlled by a will, it isn't any part of the estate. Our home is in joint tenancy with the right of survivorship that goes outright to the survivor and isn't part of the estate.' He said, 'If you go first the home is mine and no part of the estate. If I go first it is the same.' I think that is all the discussion we had about it and then he brought home the will the next night and I looked it over and read it. I signed everything he ever gave me all of his life, I knew I could trust him."

Also over objection of appellant Mrs. Collins testified that a few weeks after the September 14th will was executed she consulted the deceased regarding a will for herself, that they read carefully the Stuart will, particularly the portion declaring all their property community, and that she said: "'Ted, I don't like that; you have said that Tony's—all of the property left from her father's and mother's estate and husband's estate and gifts she has acquired during her lifetime are bound to be disposed of and you have told her to be sure and make out a will.' And then about the life insurance you said that the life insurance was part of the estate and I always understood that life insurance goes to the widow without being a part of the estate and doesn't have to be probated. You also said the property, the house and lot are held in joint tenancy, but I said to him this paragraph doesn't say that and he said if the house, for instance, in joint ten-

ancy was a part of the community property, it would have to go through legal procedure or redeed it, I have forgotten the term he used. Anyway, legally put it back in as community property other than joint tenancy. He said I would have to make papers out to that effect and also the life insurance would have to be rearranged. That is the same way that your estate is. I said the fact that my husband's home was given to us as a gift from his father, would that make any difference and he said no because it is in joint tenancy and therefore goes to you without having to go through court to be probated, that doesn't have to be probated."

On October 30, 1945, Mr. and Mrs. Simpson consulted with deceased to have him prepare their will. They testified that deceased showed them his will of September 14th, prepared a will for them of like tenor and assured both that the life insurance policy was not included in the will prepared for them and that it was not included in his own joint will.

The separate will of Mrs. Stuart executed on December 18, 1945, admitted in evidence over appellant's objection, appears unmistakably to have been prepared either by deceased or by some attorney familiar with all these circumstances. This observation is further strengthened by the fact that it followed closely the conferences between deceased and the other witnesses relative to the meaning of the joint will, and his discovery through those conferences that he had made a mistake of law regarding the proper interpretation of his joint will. If this testimony was properly received in evidence the findings and order were fully supported and the order should be affirmed.

Primarily the question arises as to what issues were before the trial court. The hearing was had under section 927 of the Probate Code, which specifies the procedure under which exceptions to the account must be heard. It provides that the filing of the exceptions puts in issue "all matters" which "may be contested." Ordinarily when exceptions relate to items of the

account alone no issue of fact is raised, at least none which requires findings of facts. *Estate of Franklin*, 133 Cal. 584, 65 P. 1081; *Estate of McPhee*, 156 Cal. 335, 104 P. 455, Ann.Cas.1913E, 899; *Estate of Tretheway*, 32 Cal.App.2d 287, 89 P.2d 679. But here there was more before the trial court than the settlement of the account. There was the issue of the proper interpretation of the contract portion of the will. Both parties joined in that issue and, in his opening brief, appellant states as one of six issues involved in this appeal: "What is the intent, purpose and effect of the will-agreement with respect to the exclusion of any other property than that which it expressly enumerates for exclusion?" When the issue was stated the court expressed the view that it was without authority to try it. Counsel for the Trust Company insisted that the court had authority. Counsel for appellant said nothing. Permission was granted to file briefs on the point. These briefs are not in the file, but we may assume that they satisfied the court. In any event it is no time now to question the power.

In seeking to determine the "intent, purpose and effect" of the contract two defenses immediately became apparent—mutual mistake and fraud. The defense first relied on by respondent was that the contract, as distinguished from the will, was the result of the mutual mistake of the parties. The greater part of the testimony recited above relates to that issue. The American Trust Company, as joint executor, petitioned for the settlement of the account. In its petition it prayed for "a determination of the ownership" of the property claimed by the widow. The appellant in his exceptions set up the same claim that these assets should be held to be a part of the estate. The parties were in accord throughout the hearing, at the opening of which counsel for the Trust Company stated: "the matter, in addition, comes before the Court as to what property is properly includable in the estate under the terms of the mutual and con-

joint will."

Thus all parties, by joint agreement, put in issue the question of ownership of the

disputed properties and the hearing before the trial court was heard on that issue. There the respondent took the position that these properties were included in the contract by mutual mistake. The appellant took the position that extrinsic evidence was not admissible for that purpose.

Apparent consent is not free when obtained through mistake or fraud. Civil Code, sec. 1567. A mistake of law may be mutual or it may be a misapprehension by one party of which the other is aware. Civil Code, sec. 1578. In either case the injured party may avoid the contract by rescission or defend it against its enforcement. 6 Cal.Jur. pp. 78 et seq. That extrinsic evidence to prove the mistake is admissible is not questioned since that is the only manner in which such proof can be made.

On this point we are agreed. But there is another ground which I believe compels an affirmance of the order and that is that in so far as the contract-will is a contract it was a fraud upon the wife under the presumption found in section 2235 of the Civil Code. The conceded facts are that all the property acquired and held by the husband was community property (except one lot in the State of Colorado). All the property standing in the name of the wife was her separate property. In the absence of a will all the community interest of the deceased husband would have gone to the surviving wife. Probate Code, sec. 201. On the death of the wife intestate one-half of her separate property would have gone to the husband, the other half would go to the deceased wife's collateral heirs. Probate Code, sec. 223. Hence when the husband, a practicing attorney, persuaded the wife to enter into the will-contract under which, if she predeceased him, he would take all her separate property and all her community share he obtained an advantage over her which is presumed to have been "without sufficient consideration, and under undue influence." Section 2235, Civil Code.

This principle was first announced in *McKay v. McKay*, 184 Cal. 742, 746, 195 P. 385, 386, where the Supreme Court held that "transactions between husband and



wife are covered and controlled by the rule applicable to transactions between trustees and beneficiaries," and that when such conditions are shown the burden is upon the husband "or his heirs" to show that the transaction was free from fraud. The McKay case is cited with some reservation since one of the members of this court was the counsel who lost the case on appeal and another member was the trial judge who was reversed. But though the rule seemed new at that time it has been uniformly followed, and with emphasis on the burden of proof cast on the husband, as will appear from *Estate of Cover*, 188 Cal. 133, 143, 204 P. 583, 588, where the court said: "Confidential relations are presumed to exist between husband and wife, and, in his dealings with his wife, the husband, if he obtains an advantage over her, must stand unimpeached of any abuse of the confidence presumptively reposed in him by the wife and resulting from the marital relation, and, failing in this, he must bear the burden of showing that the transaction was fair and just and fully understood by the party from whom the advantage was obtained. *Bacon v. Soule*, supra [19 Cal. App. 428, 126 P. 384]; *Smith on Fraud*, § 190; *Robins v. Hope*, supra [57 Cal. 493]; *Brison v. Brison*, 75 Cal. 525, 17 P. 689, 7 Am.St.Rep. 189; *Jackson v. Jackson*, 94 Cal. 446, 29 P. 957; *Dimond v. Sanderson*, 103 Cal. 97, 37 P. 189. It is the rule in this state that transactions between husband and wife shall be subjected to the general rule which controls the actions of persons occupying confidential relations with each other, as provided in section 2235 of the Civil Code (Civ.Code, § 158), which, when applied to the relation of husband and wife, has been interpreted to mean that—'In every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity and casts upon that party the burden of proving affirmatively its compliance with equitable requisites and of thereby overcoming the presumption.' *Odell v. Moss*, 130 Cal. 352, 62 P. 555; *White v. Warren*, 120 Cal. 322, 49 P. 129, 52 P. 723; *Brison v. Brison*, 75

Cal. 525, 17 P. 689, 7 Am.St.Rep. 189; 2 Pomeroy's Equity Jurisprudence, §§ 955, 956, et seq.; *Dimond v. Sanderson*, 103 Cal. 97, 37 P. 189." Later cases of the same import are: *Norris v. Norris*, 50 Cal.App.2d 726, 733, 123 P.2d 847; *Matassa v. Matassa*, 87 Cal.App.2d 206, 215, 196 P.2d 599; *Locke Paddon v. Locke Paddon*, 194 Cal. 73, 80, 227 P. 715.

The executor American Trust Co. and the objector-appellant joined in the contest of the account on the express issue that the property claimed by the widow was community property by reason of the contract, and all parties conceded that at the time of the making of the will those items were the separate property of the widow. There was no contest of the will. All parties agreed that the will was a valid disposal of all the "community" property. The only controversy was whether the contract transmuted the widow's separate property into the community. The advantage gained by the husband over the wife because of that contract was never disputed. Thereupon the code presumption immediately came into play as evidence of the fraud. That such a presumption is evidence is no longer disputed in this state. (10 Cal.Jur. 744.) In *Stafford v. Martinoni*, 192 Cal. 724, 738, 221 P. 919, 925, the Supreme Court said: "The disputable presumption raised by section 164 of the Civil Code is a form of evidence under the express terms of section 1957 of the Code of Civil Procedure. It may be controverted by other evidence, direct or indirect, but unless so controverted the court or jury is bound to find according to the presumption. Code Civ.Proc., §§ 1961-2061. It is therefore for the court or jury to determine whether or not the evidence against the presumption is sufficient to overthrow it. *People v. Milner*, 122 Cal. 171-179, 54 P. 833; *Moore v. Gould*, 151 Cal. 723-726, 91 P. 616; *Hitchcock v. Rooney*, 171 Cal. 285-289, 152 P. 913." And see *Fish v. Security-First Nat. Bank*, 31 Cal.2d 378, 384, 189 P.2d 10.

In so far as the matter of pleading is concerned it is not sufficient to argue that the widow did not affirmatively plead the

fraud in the contract. That question was fully discussed in *Estate of Cover*, supra, which was a proceeding for revocation of letters of administration previously issued to the widow. She defended on the ground that a prior contract with her husband purporting to waive her right to letters was void under section 2235 of the Civil Code. In defending her right to so attack the agreement the Supreme Court said: 188 Cal. 133, 140, 204 P. 583, 587, "In such a case neither the limitation of the statute nor the doctrine of laches will operate to bar the defense of the invalidity of the agreement upon the ground of fraud, for, so long as the plaintiff is permitted to come into court *seeking to enforce the agreement*, the defendant may allege and prove fraud as a defense. In short, it is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and when enforcement is sought against him excuse himself from performance by proof of the fraud. *Cox v. Schnerr*, 172 Cal. 371, 156 P. 509; *Hart v. Church*, 126 Cal. 471, 58 P. 910, 59 P. 296, 77 Am.St.Rep. 195; *Evans v. Duke*, 140 Cal. 22, 73 P. 732; *McColgan v. Muirland*, 2 Cal.App. 6, 82 P. 1113; *Secret Valley Land Co. v. Perry* [187 Cal. 420], 202 P. 449; *Robinson v. Glass*, 94 Ind. 211; *Butler v. Carpenter*, 163 Mo. 597, 63 S.W. 823; *State [ex rel. American Freehold-Land Mtg. Co., London] v. Tanner*, 45 Wash. 348, 356, 88 P. 321." (Emphasis ours.)

The application of these rules to the present controversy is clear. The widow-executrix filed an account omitting certain properties which she claimed were not included in the will. The appellant as legatee under the will filed exceptions to the account putting in issue the terms of the will-contract. Under section 927 of the Probate Code, which specifies the procedure under which such exceptions may be filed and heard, this is all the *pleading* that is necessary to put in issue "all matters" which "may be contested." The only matter then put in issue and contested was whether the specified items of property which were concededly the separate prop-

erty of the widow at the time of the will were included in the will by reason of the contract waiver. When the will-contract thus came before the court for interpretation the first evidence facing the court was the presumption found in section 2235 of the Civil Code and the burden of proof was then cast upon the devisee to show that the contract part of the will—the portion which purported to transmute the separate estate of the widow into community property was fair and was executed after a full disclosure by the deceased husband. This he failed to do, relying wholly upon the written terms of the document.

His failure to assume the burden did not, however, foreclose the wife in taking it up, in part only, by showing that, though a full disclosure had not been made by deceased, he assured her as her legal advisor at the time that certain specified separate properties were not included. At this time it would be well to quote again the first paragraph of the contract-will which reads: "We do hereby declare that all property, both real and personal, now owned or hereafter acquired by us jointly, or by either of us severally, or held as joint tenants, and possessed by us or either of us at the time of the death of the first of us, is our community property and as such is disposed of by this Will." It will be noted that the words "separate property" do not appear at any place in the document. This was a term with which the deceased, an able and successful lawyer, was thoroughly familiar. The widow was a trusting wife who "signed everything he gave me all of his life."

But, since the burden of proof was on appellant to show that the contract "was fair and just and fully understood by the party from whom the advantage was obtained," *Estate of Cover*, supra, the application of the presumption opened the door as well to respondent to show that such disclosure was not made and that the contract was fraudulent, sec. 1856, Code Civ. Proc.; 10 Cal.Jur. p. 937; *Zirbes v. Mounsey*, 176 Cal. 677, 169 P. 368; *Martin v. Sugarman*, 218 Cal. 17, 21 P.2d 428; *Fernald v. Lawsten*, 26 Cal.App.2d 552, 79 P.2d

742, and this section of the code expressly declares that its provisions are applicable to wills as well as to contracts between parties.

Here we find no evidence of any kind tending to show that, before the contract-will was executed, the deceased fairly disclosed to respondent that she thereby waived her right to the proceeds of the life insurance policies, to her joint tenancy in the family home, or to her right of inheritance in the estate of her father. All her testimony showing that those matters were not explained to her became admissible. And all that testimony which showed that deceased assured her that they were not included was beyond the limitations of the parol evidence rule on which appellant relies.

Finally, appellant relies upon the conclusive presumption found in subd. 3 of section 1962 of the Code of Civil Procedure prohibiting one from denying an act which he has "intentionally and deliberately led another to believe." But there is not a particle of evidence justifying the application of the presumption. The deceased was a lawyer of many years of experience. His wife relied entirely on his advice in legal matters. The will was prepared by deceased and he instructed the wife to sign. There was no representation made by her which would make this presumption applicable.

Order affirmed with costs assessed to appellant.

GOODELL and DOOLING, Justices.

We concur in the affirmance of the order but not in the sweeping conclusion, which is unnecessary to the decision in this case, that a mutual will by which a wife agrees to subject her separate property to its dispositive provisions goes into the probate court burdened with a presumption that the husband has overreached the wife. Nor is it necessary to find that there was any fraud practiced by the decedent.

There is ample evidence, as pointed out in the main opinion, from which the probate court could properly conclude that

the decedent and his wife were laboring under the mutual mistake that the property excluded by the probate court's order was not included in the terms of the contract made a part of the mutual will.

[1-3] The document is both a contract and a will. In so far as it purports to subject certain property to testamentary disposition which the husband could not otherwise dispose of by will it is a contract. In its dispositive provisions it is a will. The contract portion of the document is subject to the rules of mutual mistake applicable to contracts generally. The evidence produced by the wife is sufficient to support the probate court's conclusion that certain property of the wife was by mutual mistake of the parties included in the language of the will in the belief of both parties that the language used did not cover it. This is sufficient to entitle the wife to relief on the ground of mutual mistake. *Stafford v. California Canning Peach Growers*, 11 Cal.2d 212, 78 P.2d 1150. We need go no further to affirm the order.



97 Cal.App.2d 327

**H. Y. MINAMI & SONS v. STATE BOARD  
OF EQUALIZATION et al.**

Civ. 7711.

Sac. 6036.

District Court of Appeal, Third District,  
California.

May 3, 1950.

Action by H. Y. Minami & Sons, a copartnership composed of H. Y. Minami and others, against the State Board of Equalization of the State of California and another to recover motor vehicle transportation license taxes paid under protest. The Superior Court, Sacramento County, B. F. Van Dyke, J., entered judgment in favor of defendants, and plaintiffs appealed. The District Court of Appeal, Adams, P. J., held that the evidence sustained finding that produce trans-



ported to market by plaintiffs in their trucks was transported on consignment for sale and did not belong to plaintiffs so as to entitle them to exemption from tax

Judgment affirmed.

**1. Appeal and error ⇨931(1), 989**

To justify reversal of a judgment on ground of insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to prevailing party which may be drawn therefrom, and, excluding all evidence in conflict therewith, the law precludes such prevailing party from recovering a judgment.

**2. Appeal and error ⇨931(1), 989**

In determining the sufficiency of evidence to sustain a judgment, every favorable inference and presumption which fairly may be deduced from the evidence should be resolved in favor of the prevailing party, and such party's evidence must, ordinarily, be accepted as true and contradictory evidence must be disregarded.

**3. Automobiles ⇨97**

Evidence as to manner in which licensed commission merchants, dealers and brokers accounted to growers for proceeds of sale of fresh vegetables transported by such merchants to market in their own trucks after deducting their charges, including hauling charges, sustained finding that such produce was transported on consignment for sale and did not belong to owners of trucks so as to entitle them to exemption from motor vehicle transportation license tax as to transportation of such produce. Agricultural Code, § 1 et seq.; Revenue and Taxation Code, § 9603.

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George Finucane, Jr., Arroyo Grande, for appellants.

Fred N. Howser, Atty Gen., James E. Sabine and Irving H. Perluss, Deputies, for respondents.

ADAMS, Presiding Justice.

This is an action brought by H. Y. Minami and Sons, a copartnership composed of

H. Y. Minami, H. Y. Minami, J., and Y. Minami, to recover taxes paid under protest. Judgment was entered in favor of defendants, and this appeal by plaintiffs followed.

Plaintiffs, during the period for which the tax was imposed, were licensed as commission merchants, dealers and brokers under the requirements of the Agricultural Code, and were engaged in the business of packing and shipping fresh vegetables grown by others in the Santa Maria Valley in Santa Barbara County. Their principal place of business was Guadalupe, in Santa Barbara County. The shipping was carried on in their own trucks, their principal markets being Los Angeles, San Francisco, Sacramento and other valley towns. The ground upon which they based their action for a refund is that they transported what was exclusively their own property in motor vehicles owned and operated by them, and were therefore exempt from the taxes imposed, as the act under which they were imposed, now section 9603 of the Revenue and Taxation Code, exempts any person so doing.

The only question presented here is whether appellants brought themselves within the said exemption by establishing that the garden produce which they transported was their own property or whether such produce belonged to the growers and was transported by appellants on consignment for sale. Shipments consisted mainly of "dry pack," to wit, produce picked in the field and shipped without further processing. The trial court, on conflicting evidence, found that the agreements between the growers and appellants, which were oral, were that the grower was to receive an amount to be determined on the basis of the Los Angeles local markets, and that the transactions were consignments to appellants for sales and not sales.

[1,2] Appellants' counsel argues with great earnestness that the evidence shows that appellants were the owners of the produce shipped, and that the judgment of the trial court should be reversed upon the ground that it is not supported by the evi-

dence. But this court is bound by the rule that before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may be drawn therefrom, and, excluding all evidence in conflict therewith, the law precludes such prevailing party from recovering a judgment; that every favorable inference and presumption which fairly may be deduced from the evidence should be resolved in favor of the prevailing party, that such party's evidence must, ordinarily, be accepted as true, and that evidence which is contradictory must be disregarded. See *Macaulay v. Booth*, 53 Cal.App.2d 757, 761, 128 P.2d 386; *Singh v. Corbin*, 65 Cal.App.2d 105, 108, 149 P.2d 866; *Gray v. Hartman*, 73 Cal. App.2d 401, 405, 166 P.2d 374; *Tanner v. Sherman*, 67 Cal.App.2d 586, 588, 154 P.2d 906.

Appellants did not testify, and their books were not available. They relied upon the testimony of Ken Utsunoniya, who had been their bookkeeper. Without reciting his testimony it may be conceded that it tended to show that appellants were actually the owners of the produce shipped. However, this same witness made admissions on cross-examination that weakened the force of his testimony, and he was contradicted and impeached by testimony he had previously given before the transportation tax administrator of the Board of Equalization that the price paid the grower was not established definitely until the produce was sold.

Defendants relied upon the testimony of H. B. Parsons, a district supervisor for the Bureau of Marketing Information of the California Department of Agriculture, who stated that he had examined the books of plaintiffs when investigating verified claims which they had filed against an insolvent produce company in Los Angeles, and found that they had therein designated themselves as "consignees" and not as producers.

Francis J. McGowan, a certified public accountant who had been an auditor for the

Board of Equalization, testified that he had audited and examined appellants' records and made field investigations between 1937 and 1940; and that their books showed that after the produce transported had been sold the wholesale houses would notify appellants what it sold for, whereupon the latter would go back to their records and record such prices; and that periodically, perhaps monthly, a recapitulation of their day book would be made at which time they would list the number of crates, the type of produce sold, and the prices to be returned to the growers for the number of crates in each truck load. He also said that the records indicated that the prices to be paid were established at dates subsequent to receipt of the shipments and, in all probability, after they had been sold. There was a written record in one type of transaction which showed in complete detail the selling price in the Los Angeles market, less charges for hauling and handling lettuce; and that he made investigation as to who bore the loss of crates rejected on inspection in Los Angeles, and the records showed that such losses were charged to the grower. He detailed individual transactions as illustrative of how the proceeds of sales were accounted for to the grower, which indicated that appellants did not purchase the produce from the grower, but took it on consignment. There were instances where appellants paid cash to the growers for an acreage; but in such cases no taxes were imposed. He said: "I don't know the exact contractual relationship between the grower and the shipper; all I had to go by was the way in which the return to the grower was computed; and it appeared it had to be a consignment, because from the price from which the produce was sold they made their deductions in a schedule which had their packing charges, and a certain amount per crate for commission and hauling charges."

[3] Without further recitation of the evidence we are satisfied that it was ample to sustain the finding of the trial court that appellants did not own the produce which they trucked to the market, but that they sold same to commission houses, and, after receiving the proceeds, deducted therefrom

their charges, including hauling charges, and then, and only then, accounted to the growers for the differences.

The judgment is affirmed.

PEEK, J., concurs.



97 Cal.App.2d 306

**PEOPLE v. SMOOT.**

Cr. 4432.

District Court of Appeal, Second District,  
Division 3, California.

May 1, 1950.

John R. Smoot was convicted in the Superior Court of Los Angeles County, William M. Byrne, J., of annoying and molesting a child, a felony, and he appealed. The District Court of Appeal, Wood, J., held that information was not defective.

Judgment affirmed.

**1. Indictment and Information** ☞114

Information charging defendant with violating section 647a, subd. 1, Penal Code of California, with a prior conviction of violation of section 647a, Penal Code of California, to wit, of annoying and molesting a child, was not defective because not alleging prior violation of subdivision 1 of the section. Pen.Code, § 647a(1, 2).

**2. Criminal law** ☞1202(7)

Information charging defendant with violation of section 647a, subd. 1, Penal Code of California, with a prior conviction of violation of section 647a, Penal Code of California, to wit, annoying and molesting a child, if defective because not alleging prior violation of subdivision 1 of the section, did not prejudice a substantial right of defendant upon merits where defendant did not demur, or object at trial to sufficiency of information, and defendant did not object to transcript relative to prior

conviction when it was received in evidence, which showed that defendant had been convicted previously of violation of section 647a, subd. 1, Pen.Code, §§ 647a(1, 2), 960.

Gladys Towles Root, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Stanford D. Herlick, Deputy Attorney General, for respondent.

WOOD, Justice.

Defendant was accused of the crime of "Violation of Section 647a, subdivision 1, Penal Code of California, with a prior conviction of Violation of Section 647a, Penal Code of California, to wit, annoying and molesting a child, a felony." It was alleged that said violation was committed on or about May 3, 1949. It was also alleged in the information that the defendant had been convicted previously of the crime of "Violation of Section 647a, Penal Code of California, to wit, annoying and molesting a child, a misdemeanor." Trial by jury was waived. The court adjudged defendant guilty as charged in the information. He appeals from the judgment.

The evidence was sufficient to prove that appellant committed acts on May 3, 1949, which constituted a violation of section 647a, subdivision 1, of the Penal Code, to wit, annoying and molesting a child. A certified copy of a docket of the Municipal Court of Los Angeles, showing that on October 8, 1948, one John R. Smoot had been convicted in said court of violation of section 647a, subdivision 1, of the Penal Code, was received in evidence. It was stipulated that the John R. Smoot, named in that transcript, is the defendant herein. The defendant did not testify herein, and he did not present any evidence on his behalf.

Appellant contends that the information is "faulty and vitally so" because it only sets forth, with reference to a prior conviction, that there was "a prior conviction of Violation of Section 647a, Penal Code of California, to wit, annoying and molest-



ing a child." He argues that since said section 647a has two subdivisions it is necessary to allege specifically that there has been a prior violation of subdivision 1 of the section because a violation of subdivision 2 of said section "does not carry any penalty for a subsequent violation of it as does Subdivision 1."

[1] Although the information did not include the specific word and figure, "subdivision 1," in referring to the prior conviction, it did allege that defendant had been convicted previously of "Violation of Section 647a, Penal Code of California, to wit, annoying and molesting a child, a misdemeanor." Subdivision (1) of section 647a of the Penal Code provides: "Every person who annoys or molests any child is a vagrant and is punishable upon first conviction by a fine \* \* \* or by imprisonment in the county jail for not exceeding six months or by both such fine and imprisonment and is punishable upon the second and each subsequent conviction by imprisonment in the state prison not exceeding five years." Subdivision (2) of said section provides: "Every person who loiters about any school or public place at or near which school children attend, is a vagrant, and is punishable by a fine \* \* \* or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment." It is to be noted that subdivision (2) does not include a provision with reference to "annoying and molesting a child." The allegation that defendant had been convicted previously of violation of section 647a, Penal Code of California, "to wit, annoying and molesting a child," was a sufficient allegation that defendant had been convicted previously of violation of section 647a, subdivision 1, of the Penal Code. Section 952 of the Penal Code provides that in charging an offense a statement that the accused has committed some public offense "may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." Italics added. See, *People v. Codina*, 30 Cal.2d 356, 359, 181 P.2d 881.

[2] Furthermore, the defendant did not demur, or object at the trial, to the sufficiency of the information. The certified copy of the transcript, relative to the prior conviction, shows that the defendant had been convicted previously of violation of section 647a, subdivision 1, of the Penal Code. He made no objection to said transcript when it was received in evidence, and it was stipulated that this defendant is the defendant named therein. Section 960 of the Penal Code provides that: "No \* \* \* information \* \* \* is insufficient \* \* \* by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits." No substantial right of the defendant was prejudiced by reason of the form of the information.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



97 Cal.App.2d 257

**BASKIN v. INDUSTRIAL ACCIDENT  
COMMISSION et al.**

Civ. 13927.

District Court of Appeal, First District,  
Division 2, California.

April 28, 1950.

Rehearing Denied May 27, 1950.

Hearing Denied June 26, 1950.

R. F. Baskin, by his guardian ad litem and trustee, Catherine Dunn, brought a proceeding to review an order of the Industrial Accident Commission dismissing petitioner's application for compensation under the Workmen's Compensation Act, opposed by the Kaiser Company, Inc., Shipyard No. 3, employer, and Hartford Accident & Indemnity Company, insurance carrier. The District Court of Appeal, Goodell, J., held, on rehearing, that a United States Supreme Court decision, affirming a decision of the Massachusetts Supreme Judicial Court that a previous United States Supreme Court de-

cision created a twilight zone or area of doubt including all waterfront cases pertaining to both land and sea, so as to entitle injured workmen in such cases to recover compensation under either federal Longshoremen's and Harbor Workers' Compensation Act or state Workmen's Compensation Acts required reversal of the former holding of the District Court of Appeal, 89 Cal. App.2d 632, 201 P.2d 549, that petitioner's case was exclusively within federal jurisdiction.

Commission's order annulled with direction to proceed with hearing and determination of petitioner's application.

### 1. Admiralty $\S$ 11, 14

Contracts for building of ships or for performance of labor or furnishing of materials in construction thereof are not maritime contracts cognizable in admiralty, but contracts to repair completed vessels, put in commission, are maritime in nature.

### 2. Courts $\S$ 97(5)

A United States Supreme Court decision, affirming Massachusetts Supreme Judicial Court's decision that previous federal Supreme Court decision created twilight zone or area of doubt including all waterfront cases pertaining to both land and sea, so as to entitle injured workmen in such cases to recover compensation under either Longshoremen's Compensation Act or state Workmen's Compensation Acts, required California District Court of Appeal to reverse its former holding that compensation claim of employee injured while helping to repair vessel at employer's wharf was exclusively within federal jurisdiction. Longshoremen's and Harbor Workers' Compensation Act,  $\S$  1-50, 2(4), 3(a), 33 U.S.C.A.  $\S$  901-950, 902(4), 903(a).

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Stark & Champlin, Oakland, for petitioner.

T. Groezinger and John A. Rowe, Jr., San Francisco, for respondent Industrial Accident Commission.

R. P. Wisecarver, San Francisco, for respondents Kaiser Co., Inc., and Hartford Accident & Indemnity Co.

GOODELL, Justice.

This proceeding was brought to review an order of the Commission which dismissed petitioner's application for compensation on the ground that the case is exclusively within federal jurisdiction.

The cause was before this court some months ago, and on January 11, 1949 we affirmed the Commission's order. *Baskin v. Industrial Accident Commission et al.*, 89 Cal.App.2d 632, 201 P.2d 549. A rehearing was denied and thereafter a hearing by our Supreme Court was denied. Petitioner then sought a writ of certiorari in the Supreme Court of the United States, 338 U.S. 854, 70 S.Ct. 99. In granting the writ on October 24, 1949, that court vacated our judgment and remanded the cause to this court "for reconsideration in the light of *Bethlehem Steel Co. v. Moore*, 335 U.S. 874, [69 S.Ct. 239], and *Davis v. Department of Labor and Industries*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 [it appearing that the decision of this court in *Bethlehem Steel Co. v. Moore*, supra, affirming the decision of the Supreme Judicial Court of Massachusetts, *Moore's Case*, 323 Mass. 462, [162], 80 N.E.2d 478, was not available to the District Court of Appeal at the time of its consideration of this cause.] See *State of Minnesota v. National Tea Co.*, 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920; *State Tax Commission v. Van Cott*, 306 U.S. 511, 59 S.Ct. 605, 83 L.Ed. 950."

Accordingly the cause was reargued and again submitted.

Petitioner was a materialman employed from March, 1943 until December 10, 1945 by respondent Kaiser Company, Inc., at its Shipyard No. 3. His work during that time was entirely on shore (or on ships under construction) with the exception of two or three tours of short duration when he was sent to work aboard ships being repaired.

On December 10, 1945 the S. S. "William Moultrie" was undergoing repairs. She was one of three vessels tied up side by side at the shipyard wharf in San Francisco bay and was the farthest out. A crane on the wharf moved materials from place to place on these ships. One of the holds on

the "Moultrie" was being repaired. The crane's boom could not reach the planks already on board, to move them from one hold to another, and it became necessary to send men aboard to do so. Despite standing instructions that Baskin should not be sent aboard ships under repair, he was ordered onto the "Moultrie" to help, and while there fell down a hold and was seriously and permanently injured.

In 1927 Congress enacted the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901-950. Section 902, subd. 4, shows that the act covers persons "employed in maritime employment, in whole or in part, upon the navigable waters of the United States \* \* \*." Section 903(a) provides that "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States \* \* \* and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. \* \* \*"

Petitioner contends that this language indicates that "Congress made clear its purpose to permit state compensation protection whenever possible \* \* \*", Davis v. Department of Labor, etc., 317 U.S. 249, 252, 63 S.Ct. 225, 227, 87 L.Ed. 246, and states the question presented for decision as follows: "Only if the state could not constitutionally provide compensation for petitioner's injuries, may the order of respondent Commission be sustained."

[1] It is well settled that " \* \* \* contracts for the building of vessels or ships, or for labor performed, or materials furnished, in their construction, are *not* maritime contracts and *not* cognizable in admiralty, \* \* \*" but that "*After a vessel has been completed and put in commission, contracts \* \* \* to repair her \* \* \* are maritime in their nature \* \* \**" 1 Am.Jur. pp. 565-566; New Bedford Dry Dock Co. v. Purdy, 258 U.S. 96, 42 S.Ct. 243, 66 L.Ed. 482. (Emphasis added.)

The "Moultrie" was in commission and undergoing repairs hence the work on her was being done under a maritime contract.

In developing their contention that this case is within the state and not the federal act, counsel for petitioner argue that Baskin was not a carpenter; that he did nothing by way of attaching or affixing lumber or other materials to the structure of the vessel, but was a mere helper carrying planks from one hold to another, where a skilled joiner was to make them a part of the ship. The answer to this is that he was just as much engaged in the performance of his employer's maritime contract as was the joiner who did the carpentry, albeit of humbler station.

With respect to the difference in status, noted above, between a ship under construction and a commissioned ship under repair, petitioner points out that he was paid at two different rates, i. e., \$1.20 an hour while on "new construction" and \$1.34 while on repair work, and that on the day of his injury he was paid at the "new construction" rate. This is urged in aid of petitioner's broader point that his work was non-maritime, local and predominantly on shore; that his infrequent assignments to ships under repair were of but a quarter-hour to an hour's duration, hence that his work on shipboard when injured was a mere deviation from his regular non-maritime shore job, bringing the case within the *de minimis* rule.

When this case was before us the first time we reached the conclusion that such cases as Northern Coal & Dock Co. v. Strand, 278 U.S. 142, 144, 49 S.Ct. 88, 73 L. Ed. 232, 234; John Baizley Iron Works et al. v. Span, 281 U.S. 222, 232, 50 S.Ct. 306, 74 L.Ed. 819, 822; Employers' Liability Assurance Corp. v. Cook, 281 U.S. 233, 236, 50 S.Ct. 308, 74 L.Ed. 823, 824, and Parker v. Motor Boat Sales, Inc., 314 U.S. 244, 62 S. Ct. 221, 86 L.Ed. 184, compelled an affirmation of the Commission's order.

[2] As is pointed out in the mandate directed to this court, the case of Bethlehem Steel Co. v. Moore, 335 U.S. 874, 69 S.Ct. 239, affirming Moore's Case, 323 Mass. 162,



80 N.E.2d 478, was not available to us when we had the case under consideration. That case was decided on December 6, 1948 without opinion.

In *Moore's Case* the employee was injured while aboard a vessel in a dry dock floating in navigable water. He was a rigger whose work was variously on piers, dry docks and ships. There was conflicting testimony as to the proportion of his time spent on the piers and the proportion spent on the dry docks and vessels. The board found that the major portion of his work was on the piers but that occasionally it took him aboard vessels. The floating dry dock was fastened to the pier to which it was berthed by bolts spanning a distance of three or four feet from the pier itself.

In *Moore's Case* the Supreme Judicial Court of Massachusetts said, 80 N.E.2d 479-481:

"We start with the established proposition that the Massachusetts Workmen's Compensation Law covers all longshore maritime injuries not excluded by the constitutional grant of admiralty and maritime jurisdiction to the United States. (Citations.)

"But since the decision in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A.1918C, 451, Ann. Cas.1917E, 900, it has been necessary to observe carefully the line of demarcation between State and Federal authority as defined by a series of decisions of the Supreme Court of the United States following that case. In *O'Hara's Case*, 248 Mass. 31, 142 N.E. 844, decided in 1924, it appeared that the two injured employees were, at the times of their respective injuries, working on dry docks, one of which was floating and moored to piers and the other of which rested upon and was attached to land, and that each employee was engaged in the general work of repairing a previously completed vessel. The circumstances cannot, in our opinion, be distinguished in any material respect from those presented in the case at bar. This court reviewed at length the Federal decisions up to that time and stated as its conclusion the following, 'The principle deducible, as we think, from all these

decisions, is that the rights and liabilities of parties with respect to injuries received by a workman engaged in repair of a completed vessel lying in navigable waters are governed by maritime law, because the work has direct relation to navigation and the injury occurs on navigable waters.' 248 Mass. at page 37, 142 N.E. at page 847. It was held that the State act did not apply. This court further held that a dry dock designed to receive vessels floating in navigable waters is itself part of the navigable waters and subject to admiralty jurisdiction, citing *The Steamship Jefferson*, 215 U.S. 130, 142, 143, 30 S.Ct. 54, 54 L.Ed. 125, 17 Ann.Cas. 907; and *The Robert W. Parsons*, 191 U.S. 17, 33, 34, 24 S.Ct. 8, 48 L.Ed. 73. See to the same effect *Gonsalves v. Morse Dry Dock & Repair Co.*, 266 U.S. 171, 45 S.Ct. 39, 69 L.Ed. 228. A decision generally similar to that in *O'Hara's Case*, had also been made by this court in *Ahern's Case*, 247 Mass. 512, 142 N.E. 703. A repair job on a previously completed vessel has been held to fall within Federal jurisdiction, even though the repairs require the laying up of the vessel for a long period, and even though they entirely change the character of the vessel and the uses for which it is adapted. *New Bedford Dry Dock Co. v. Purdy*, 258 U.S. 96, 42 S.Ct. 243, 66 L.Ed. 482; *Hillcone Steamship Co. v. Steffen*, 9 Cir., 136 F.2d 965, 967. A different rule prevails where the work is being done in the construction of a new vessel, even though in part performed on navigable water, since a contract of new construction is not maritime in character and has no direct relation to navigation or commerce. Such work remains within State jurisdiction. *Thames Towboat Co. v. The Francis McDonald*, 254 U.S. 242, 41 S.Ct. 65, 65 L.Ed. 245; *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321, 25 A.L.R. 1008; *Millers' Indemnity Underwriters v. Braud*, 270 U.S. 59, 63-64, 46 S.Ct. 194, 70 L.Ed. 470.

"Decisions of the Supreme Court of the United States since *O'Hara's Case* was decided by this court were in accord with the rule there laid down until very recently. *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449, 457, 45 S.Ct. 157, 69 L.Ed.

372; *John Baizley Iron Works v. Span*, 281 U.S. 222, 50 S.Ct. 306, 74 L.Ed. 819. If the matter rested at this point we should conclude that the decisions above cited furnished the necessary guide and required us to dismiss the claim under the State compensation law, as was done in *O'Hara's Case*.

"But the situation was definitely altered by the decision of the Supreme Court of the United States in *Davis v. Department of Labor and Industries of Washington*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246, written by Mr. Justice Black in 1942. That was not a case of repairs upon a previously completed vessel. It was a case where the employee fell from a barge where he was examining steel that he had just helped to cut from a bridge which was in process of being dismantled. The significance of the case, however, lies in its obvious attempt to set up a means of escape from the difficulties involved in drawing the line between State and Federal Authority under the doctrine of the *Jensen* case. The *Davis* case recognizes a presumptive quality in the decisions of Federal authorities under the longshoremen's and harbor workers' act and a presumption of constitutionality of the State acts as applied to particular cases. The decision does not overrule the *Jensen* case. It does, however, at least as appraised by Mr. Justice Frankfurter, who concurred in it, and by Chief Justice Stone, who dissented from it, create a 'twilight zone' or an area of doubt within which the two acts overlap and the injured workman may recover under either of them. It would seem, therefore, that although apparently some heed must still be paid to the line between State and Federal authority as laid down in the cases following the *Jensen* case, the most important question has now become the fixing of the boundaries of the new 'twilight zone,' and for this the case gives us no rule or test other than the indefinable and subjective test of doubt. Mr. Justice Frankfurter says that 'Theoretic illogic is inevitable so long as the employee \* \* \* is permitted to recover' at his choice under either act. 317 U.S. at page 259, 63 S.Ct. at page 230. Probably there-

fore our proper course is not to attempt to reason the matter through and to reconcile previous authorities, or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about 'illogic,' and to regard the *Davis* case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and as designed to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other. We can see no other manner in which the *Davis* case can be given the effect that we must suppose the court intended it should have, and we must assume that the court intends to follow that case in the future."

In our first opinion we gave careful consideration to *Davis v. Department of Labor*, etc., *supra*, for it was on that case that the petitioner chiefly relied. We thought, however, that it was "not difficult to distinguish the *Davis* case from the present one" and gave the reasons, at 89 Cal.App.2d 637, 201 P.2d 552-553, based on decisions of the Supreme Court of the United States, why we thought our case was not within the "twilight zone." The affirmance in *Bethlehem Steel Co. v. Moore*, 335 U.S. 874, 69 S.Ct. 239, *supra*, of *Moore's Case*, 323 Mass. 162, 80 N.E.2d 478, *supra*, plainly indicates although no opinion was filed, that the Supreme Court considers the present case within the "twilight zone."

The Massachusetts court in *Moore's Case* took a different view of the *Davis* case than we took, giving it more latitude than we thought it had, but the affirmance, in 335 U.S. 874, 69 S.Ct. 239, based on the authority of the *Davis* case, shows their's was the correct view.

It cannot be gainsaid that the facts in *Moore's Case* and in *Baskin's* are very similar. In both instances the major part of the employee's work was on shore, and

in both instances he was injured while working on a vessel in commission, in navigable waters, and being repaired under a maritime contract.

Our clear duty is to reverse our former holding in this case, on the authority of *Bethlehem Steel Co. v. Moore*, supra, and *Davis v. Department of Labor*, etc., supra.

Accordingly the order of the respondent Commission is annulled with the direction to proceed with a hearing and determination of petitioner's application.

NOURSE, P. J., and DOOLING, J., concur.



97 Cal.App.2d 412

**BRICE et al. v. EVANS et al.**  
Civ. 17458.

District Court of Appeal, Second District,  
Division 1, California.

May 9, 1950.

**As Modified on Denial of Rehearing**  
May 31, 1950.

Action to quiet title by J. N. Brice and Bettie M. E. Brice against Bradley D. Evans and Vyola L. Evans. The Superior Court of Los Angeles County, Clarke E. Stephens, J., entered judgment for the plaintiffs and the defendants appealed. The District Court of Appeal, Doran, J., held that the evidence was sufficient to support the trial court's conclusion that the parties had substituted a new purchase agreement for the original contract and that defendants as purchasers were in default thereunder and hence had no interest in the premises.

Judgment affirmed.

#### 1. Appeal and error ⇨989

In respect to sufficiency of evidence, power of appellate court begins and ends with inquiry whether there is substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trial court.

#### 2. Quieting title ⇨44(3)

In action to quiet title in vendors after purchasers' default, evidence was sufficient to support trial court's conclusion that the parties had substituted a new purchase agreement for original lease and purchase contract and that purchasers were in default under new agreement and hence had no interest in premises.

#### 3. Appeal and error ⇨1164

The belief of appellants' counsel that there was no necessity to offer evidence and that under the pleadings the court's conclusion would be favorable to appellants' interest, and court's adoption of respondents' rather than appellants' theory did not warrant reversal.

#### 4. Landlord and tenant ⇨92(1)

Vendors' change of position in forbearing to assert right to claim default under lease and purchase agreement and their agreement to extend time for purchasers to make a loan sufficient for purchasers to complete purchase of the property afforded adequate consideration for new purchase agreement substituted for the original agreement.

#### 5. Vendor and purchaser ⇨335

The purchaser of realty after his default under contract of purchase without equitable excuse cannot maintain action to recover moneys paid on purchase price and vendor can retain moneys so paid.

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Arthur Speight and Samuel Marks, Los Angeles, for appellants.

Loren Miller, Harold J. Sinclair, Los Angeles, for respondents.

DORAN, Justice.

On June 20, 1945 the parties hereto executed a written "Lease Form with Agreement for Sale of Real Estate", under which the respondents Brice leased to appellants Evans certain premises for a period of 20 months, at a monthly rental of \$42.50 with an option to buy at a price of \$5,075.00. The sum of \$500.00 was received from defendants as a deposit "to insure the fulfill-



ing of this lease." It was "agreed that time is of the essence of this agreement".

The specified payments of \$42.50, according to appellants' brief, "were never made on the 1st day of each month as provided by Exhibit I (the lease). \* \* \* Brice accepted the first payment on July 9, 1945 although \* \* \* it was due June 1, 1945. According to Mr. Brice's testimony all payments were made about one month behind". The final payment should have been made on January 1, 1947, and although it was not made on that date, respondent J. N. Brice told appellants: "I wished at that time to deed the property to them even though they were one payment in arrear", and "They readily agreed to it".

Thereafter, on March 15, 1947, a new agreement of sale was signed by J. N. Brice and Mr. and Mrs. Evans, specifying a price of \$5,500.00, of which \$1,202.81 is acknowledged as having been paid, "balance payable as follows: Refinance original FHA mortgage with Bank of America for amount to cover balance". The balance is "to be deposited in escrow within 60 days \* \* and failing to make such payments, above amount paid is retained by and forfeited to Seller as liquidated damages. \* \* \* Agent reserves the right to refund payment if unsatisfactory to owner". Mrs. Brice did not sign this agreement; J. N. Brice signed as both agent and owner.

Concerning the discrepancy between the price specified in the original and substituted agreements, J. N. Brice testified: "At that time prices on property had advanced and to get the loan applied for I showed Mr. Evans that he—I told Mr. Evans that he would have to change the price which he was paying for the property. That is, a property selling under value is appraised at the selling price and not the regular appraisal value. \* \* \* Well, Mr. Evans said he would like for me to help him any way that I could help him. So then I showed him that by setting a price at \$5,550.00 we could get an eighty per cent loan on that evaluation which he readily agreed to, which would give us the amount needed to pay it off. Then we entered into this agreement at \$5,550.00."

About March 30, 1947, according to Brice's testimony, "I explained to him (Evans) that the bank had informed me of a commitment from the F. H. A. \* \* \* It seems to me it was \$4500.00, providing Mr. Evans would pay off some indebtedness that he owed on some title, one loan that he had secured. These covered erecting of a garage, putting in a water softener \* \* There was an amount of over \$700.00 due under that F. H. A., Title I. And I explained to him \* \* \* that they would not accept it until those bills were paid off. \* \* \* He were unable to pay them off at the time and also stated that if I would give him until June the 1st, he would be able to clear those bills off."

Shortly after June 24, 1947, Evans came to Brice's office "with his hands up in the air. He says, 'I got my hands up, but I don't want you to take advantage of me. It's impossible for me to go any farther'. He said, 'I don't want to lose everything I have in the property. How much will you give me back out of it and I just give up.'"

It appears that after the substituted agreement was entered into, appellants made no payments on the rent which was to be paid pending the refinancing, until May 26, 1947 when Mrs. Evans paid \$60.00. Mr. Brice pointed out that this was inadequate and Mrs. Evans "said her husband said he would bring some more Saturday \* \* \* and I told her that I would not credit it on the rental but I would take it as a deposit; that she would bring in the balance of the rental on Saturday". Evans did not bring in the money on Saturday and did not appear until in June. Brice testified: "I told him I would give him the time until June the 15th." No further payment was ever made although Evans remained in possession of the property until the time of trial, February 21, 1949. The proposed escrow was never opened, appellants being unable to comply with the F. H. A. demands for discharge of the \$700.00 indebtedness.

The complaint herein was in the conventional form seeking to quiet title in the seller. The answer of Mr. and Mrs. Evans set up the lease and purchase agreement of June 20, 1945, alleged an exercise of the

option to buy, and that "plaintiffs have refused and still refuse to abide by the terms of said agreement, and have refused to sign the necessary escrow instructions to complete the purchase of said property".

At the trial the only testimony offered was that of the plaintiff J. N. Brice; there was no cross-examination of such witness. Appellant's attorney then stated: "There is no question but that Mr. Brice's legal title to the property is good and we will make no issue of that. We have set up a defense and demand that he should go through with the agreement. \* \* \* I don't think this court could possibly do anything except to say that Mr. Brice's legal title is good and that would leave us right exactly where we were. There's not a suit to foreclose the interest of Mr. and Mrs. Evans here in the property. Consequently I make a motion for a non-suit or ask that the Court hold that the legal title of Mr. Evans is good and stop right there".

Plaintiffs (respondents) then sought permission to amend the complaint, which permission was denied unless defendants consented thereto. Defendants objected to the making of any amendment, and sought to have the court order plaintiffs to accept a compromise and to continue with the contract; this the trial court also refused to do. Thereafter the court took the matter under submission, made findings that the parties had substituted a new purchase agreement for the original contract; that the defendants had failed to comply with the substituted agreement and hence "have no interest whatever in or to said land and premises". Judgment was entered accordingly. Appellants thereafter moved to vacate the judgment, to reopen the case, and for a new trial, which motions were denied.

According to appellants' brief, "The case presents the following questions: First, what was the legal effect of plaintiffs' receiving payments always late? Second, what was the legal effect of the second agreement? Third, can equity declare a forfeiture? Fourth, considering the theory upon which the action was tried, did the statements of the court lead defendants into error in resting their case without putting

on a defense? Fifth, considering the manner and theory upon which the case was tried, did the court err in denying the motion of defendants to vacate the Minute Order of Judgment, to Reopen Trial of Case, and to Determine the Action on the Merits, and also in denying defendants' Motion for a New Trial?"

Respondents answer the above contentions by noting that both parties feared that, under the complaint to quiet title, "the Court might simply find that the Respondent's legal title was good and leave to future litigation the matter of the rights of the parties under the lease-agreement. Fearing that, he (respondent) sought in vain to amend or offer proof and then amend to conform with proof. \* \* \* As the colloquy between Court and both Counsel developed however Counsel for Respondent pointed out that (under Mr. Brice's testimony) the Court might find that the second agreement was a new one", which was the view ultimately taken by the trial court in rendering judgment.

"Appellants counsel", avers respondents' brief, "made a calculation as to his position and came to the conclusion that on the state of the record the Court could do nothing except find title in the Respondent and leave to some future time the question of Appellants' rights under the lease agreement. Acting on that belief he resisted any amendment". When the trial court adopted the respondents' view that the March 15th agreement was a new and substituted agreement with which appellants had not complied, "to Appellants' surprise and discomfiture", appellants' counsel "then changed positions and wanted to reopen the case to present the very issues to which he had objected so vigorously". Appellants' counsel, continues respondents' brief, "complains of the end the Court reached because he had believed that the Court would take another view".

[1,2] As has been so often said, in respect to sufficiency of evidence the power of the Appellate Court begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which will support the conclusion reached

by the trial court. The trial court's conclusion in the instant case that a new and substituted agreement had been entered into and that appellants were in default thereunder is certainly supported by the only testimony in the record,—that of J. N. Brice.

[3] The record does not indicate or suggest that the trial court or anyone else "led defendants into error in resting their case without putting on a defense". Appellants' counsel as well as respondents' attorneys, were in a position to view the record as it then stood, and to take whatever steps might be deemed expedient. Examination of the record shows that counsel for each party acted vigorously and zealously in attempting to preserve the client's rights at every point of the trial. It is evident, as respondents' brief has pointed out, that appellants' counsel believed there was no necessity to offer evidence and that under the pleadings the court's conclusion would be favorable to appellants' interest. That such strategy proved erroneous and that the court adopted respondents' rather than appellants' theory presents no point for reversal. Rather, such situation merely involves one of the perils of navigation incident to all litigation.

[4] The record fails to disclose any reversible error. The parties to the original agreement were entitled to substitute a new and different agreement if they chose to do so. As set forth in respondents' brief, "Respondent's change of position in forbearing to assert his right to claim default under the lease-agreement and his agreement to extend time for Appellants to make a loan sufficient for them to complete purchase of the property" affords adequate consideration for the new agreement.

[5] In reference to retention by the seller of the amounts paid by appellants,

the following quotation from *Landfield v. Cohen*, 89 Cal.App. 2d 177, 180, 200 P.2d 149, 150, is applicable: "The vendee of real property after his own default under his contract of purchase without equitable excuse therefor cannot maintain an action to recover moneys he has paid on the purchase price. *Cockrill v. Boas*, 213 Cal. 490, 492, 2 P.2d 774. The vendor's right to retain moneys paid on a purchase contract arises out of the very nature of the agreement of free moral agents and exists whether or not the contract provides for forfeiture or liquidated damages; and where the parties have made time of the essence, not even a court of equity can relieve a vendee of his default in the absence of fraud, mistake or undue influence". Incidentally, it will be remembered that appellants enjoyed occupancy of the premises without any payment whatsoever, from May 26, 1947 when Mrs. Evans paid the \$60.00 hereinbefore referred to, until the date of trial, February 21, 1949.

No reversible error has been shown in the trial court's denial of appellant's motions to vacate the judgment and reopen the trial, or in the refusal to grant a new trial. Appellants' assertion that "While it does not appear in the record, it was actually at the suggestion of the judge of the trial court that the Motion to Vacate the Minute Order of Judgment to Reopen the case was made", adds nothing to the weight of the present contentions. The same may be said in respect to appellants' observation that "The spirit and trend of modern decisions \* \* \* is that causes should be permitted to be heard on their merits".

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J.,  
concur.



97 Cal.App.2d 451

**BETTS v. REPUBLIC INDEMNITY CO.  
OF AMERICA.**

Civ. 17035.

District Court of Appeal, Second District,  
Division 3, California.

May 10, 1950.

Action by Forrest A. Betts against Republic Indemnity Company of America, a corporation, to recover attorney's fees. The Superior Court, Los Angeles County, Carl A. Stutsman, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Wood, J., held that evidence sustained the finding that the legal services of plaintiff were reasonably worth \$5,000.

Judgment affirmed.

**1. Attorney and client ☞166(3)**

In action to recover attorney's fees, evidence sustained finding that there was no oral agreement that fees would be a minimum of \$300 or a maximum of \$750.

**2. Appeal and error ☞989**

The remarks of the trial judge cannot be considered in determining whether the findings are supported by the evidence.

**3. Attorney and client ☞166(3)**

In action to recover attorney's fees, evidence sustained finding that legal services of plaintiff were reasonably worth \$5,000.

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John W. Preston, Los Angeles, Krieger, Harper & Klein, Beverly Hills, for appellant.

Jennings & Belcher, Los Angeles, for respondent.

WOOD, Justice.

In this action for attorney's fees, judgment was for plaintiff for \$4,700. Defendant appeals from the judgment.

Plaintiff alleged, in his complaint, that defendant became indebted to him in the sum of \$5,000 for the reasonable value of services rendered, and no part thereof had

been paid except \$300. Defendant denied the allegation, except the part thereof that it had paid \$300. As a further answer, defendant alleged that it was orally agreed between plaintiff and defendant that plaintiff's fees for legal services would be a minimum of \$300 "up to a maximum" of \$750, the exact amount of said fees to be dependent upon the amount of services to be rendered, but in no event to exceed \$750.

The court found as follows: that during July and October, 1945, the defendant retained the services of plaintiff, an attorney at law, for the purpose of securing the admission of defendant to do business in California; plaintiff individually or through attorneys employed in his office, spent approximately 200 hours in matters of negotiation, research of the law, preparation of documents, conferences with the client and representatives of the insurance commissioner, and other necessary services, some of which were beyond the scope originally anticipated by defendant; said services covered a period of time between July 15, 1945, and September 5, 1946; as a result of the services of plaintiff the defendant was admitted as an insurance carrier to do business in California, and defendant was permitted not only to write the insurance which it originally requested but also workmen's compensation insurance, and this result was particularly attributable to the efforts of plaintiff and it represents an extraordinary result beneficial to defendant; the services of plaintiff were reasonably worth \$5,000, and that \$300 of said sum had been paid to plaintiff. The court also found that there was no agreement, oral or otherwise, that plaintiff's fees for legal services would be "a or in a minimum fee of \$300.00, or otherwise, or a or any maximum fee of \$750.00, or otherwise, and in that connection, finds in fact that the agreement was to pay the reasonable value of the the services rendered."

Appellant asserts that said finding, that there was no oral agreement that plaintiff's fees would be a minimum of \$300 or a maximum of \$750, is not supported by the evidence.

Appellant's three witnesses, who were officers of appellant, testified in substance that plaintiff told them that his charge would be from a minimum of \$300 to a maximum of \$750.

Plaintiff testified in substance as follows: Mr. Horwitz, one of the witnesses for appellant, asked him in July, 1945, to fix a definite or flat fee, and he replied that he could not give a flat fee because he did not know what difficulty he might get into—that the fee would be a reasonable fee. Mr. Horwitz then said he had hoped that plaintiff would state a definite fee, and plaintiff replied that that was impossible. In the fall of 1945, Mr. Horwitz asked him, in the presence of one or both of the other witnesses for appellant, how much he was going to charge, and plaintiff replied he would give the same answer he gave in July—that it was impossible for plaintiff to say how much the charge would be until the time was computed and the matter was closed—that the matter might take weeks or months or a year. Mr. Horwitz said it would not take any such time as that, and he (Mr. Horwitz, who is an Illinois lawyer) gave his opinion as to the amount of work that would be required. Plaintiff replied that he could not give any flat fee, but if the work did not exceed the outline of work which appellant's representatives had discussed that day, namely, merely going through the formula of presenting the matter, the fee would be some place between \$500 and \$750. Mr. Horwitz asked him if he would make that a flat fee, and plaintiff replied that he could not do that and he could not afford to tie up his office on a financial problem of that kind and work indefinitely for \$750, and if they were not willing to accept his word that his fee would be reasonable they should take their business elsewhere. Plaintiff said if he did \$300 worth of work he would charge \$300, and if he did \$10,000 worth of work he would charge \$10,000.

[1,2] There was ample evidence to support said finding that there was no oral agreement that the fees would be a minimum of \$300 or a maximum of \$750. Appellant argues, however, to the effect that

the remarks of the judge at the close of the trial show that the judgment was not based upon the testimony of plaintiff, but that it was based upon two letters written by plaintiff after the services had been performed. Appellant asserts that said letters were of no probative value. The remarks of the trial judge cannot be considered in determining whether the findings are supported by the evidence. *Buckhantz v. R. G. Hamilton & Co.*, 71 Cal.App.2d 777, 781, 163 P.2d 756, 759.

[3] Appellant also asserts that the amount of \$5,000 awarded as attorney's fees is exorbitant. The appellant had been chartered as a casualty insurance company in Arizona and it had a paid in capital of \$150,000 and a surplus of \$50,000. It was seeking to do business as such a company in California. Under a rule of the insurance commissioner of California, an insurance company was required, in order to obtain such permission, to have one dollar of surplus for each dollar of capital. Plaintiff and an attorney employed by him had many conferences with representatives of the insurance commissioner, and they prepared many documents and exchanged many letters with the commissioner and appellant. Plaintiff discussed with Mr. Horwitz the matter of litigation to secure an order of court directing that such permission be granted to appellant. Plaintiff advised him that the litigation would be long and difficult, and suggested that he go over the corporate structure and set it up the way the commissioner had demanded. Mr. Horwitz did not want to do that. After some time the appellant changed its structure to a paid in capital of \$200,000 and a surplus of \$100,000. Thereafter many conferences were had with representatives of the commissioner and appellant. Plaintiff presented argument to the commissioner to the effect that if the company had only \$100,000 capital, instead of \$200,000, and had the \$100,000 surplus, it could qualify; and that the company should not be penalized because it had \$200,000 capital, since it had all the surplus required if its capital had been only \$100,000. After many more conferences the insurance commissioner grant-

ed the permission as originally requested, and in addition thereto appellant was granted permission to write workmen's compensation insurance in this state. About 200 hours were spent in negotiation, research of law, preparation of documents, conferences, and other similar matters. Plaintiff has been engaged in the practice of law about 25 years. He maintains a large office, and has three lawyers and four secretaries in his employ. He testified that the reasonable value of the services rendered by him was \$7,500, that he rendered a bill for \$5,000 and gave credit for the \$300 which had been paid. It was stipulated that two attorneys at law, who were called as witnesses by plaintiff, were qualified to give opinions as to the reasonable value of legal services. One of the attorneys, in answer to a proper hypothetical question, testified that the reasonable value of the legal services referred to therein was \$6,000; and the other attorney, in response to such question testified that the reasonable value of the services was a minimum of \$5,500 and a maximum of approximately \$6,500. The evidence supports the finding that the legal services of plaintiff were reasonably worth \$5,000.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



97 Cal.App.2d 321

In re GUARDIANSHIP OF HUBBARD.  
ROUSSEL v. HUBBARD.

Civ. 17328.

District Court of Appeal, Second District,  
Division 3, California.

May 3, 1950.

Proceeding by Helena Roussel contested by Mabel E. Hubbard for appointment of petitioner as guardian of the person and estate of Mabel E. Hubbard. The Superior Court

for Los Angeles County, Otto J. Emme, J., made an order appointing a guardian, and the contestant appealed. The District Court of Appeal, Wood, J., held that a guardian was properly appointed.

Order affirmed.

#### 1. Appeal and error ⇐1010(1)

##### Guardian and ward ⇐13(8)

Before the District Court of Appeal can disturb findings of lower court on ground that they are not supported by the evidence, appellate court must be able to conclude as a matter of law that there is no evidence at all to support conclusions arrived at by the trial court; and the rule is applicable to a guardianship proceeding. Probate Code, § 1460.

#### 2. Drunkards ⇐3

To authorize appointment of a guardian for an habitual drunkard, he need not always be drunk; but test is whether he had a fixed habit of drunkenness; and a disposition of mind and body which might lead to wasting of his estate is sufficient to justify appointment of a guardian as a precautionary measure. Probate Code, § 1460.

#### 3. Drunkards ⇐3

Under the statute providing for appointment of a guardian for an "incompetent person", a chronic alcoholic may be declared to be an incompetent person. Probate Code, § 1460.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Incompetent Person".

#### 4. Drunkards ⇐3

Where woman had long history of drunkenness, and during such periods endorsed checks payable to her and suffered personal injuries, and there was medical testimony that she was a chronic alcoholic, court could properly appoint daughter as guardian of mother's person and estate. Probate Code, § 1460.

Guerin, MacKay & Tendler, Los Angeles, for appellant.

Brennan & Cornell, Los Angeles, for respondent.



WOOD, Justice.

Helena Roussel filed a petition for appointment of herself as guardian of the person and estate of Mabel E. Hubbard, her mother. She alleged in the petition that Mrs. Hubbard was incompetent and unable to care for herself or her property by reason of the excessive use of alcohol. After a hearing upon the petition, the court found that Mrs. Hubbard was unable, unassisted, to manage and take care of herself or her property, and it made an order appointing petitioner the guardian of her person and appointing a bank the guardian of her estate. Mrs. Hubbard appeals from that order.

Appellant contends that the evidence does not support the implied finding that she is incompetent.

At the time the petition was filed, May 13, 1949, appellant was 60 years of age. Her husband died about 1939, and thereafter she married Jack Williams. She obtained a divorce from Williams in 1947. On May 27, 1949, after appellant had been served with notice of the petition for appointment of guardian, she married Horace Evans. Thereafter the petition was amended to show that appellant was also known as Mabel E. Hubbard Evans.

A physician, called as a witness by the petitioner, testified that he acted as an examiner for the superior court in psychopathic cases; on June 8, 1949 (the day before the hearing herein), he examined appellant who was then a patient in the psychopathic department of said court, and on that day he heard her testify at the hearing in that department; he recommended to the court (at that hearing) that appellant should receive care in a sanitarium for a long time; in his opinion she is a chronic alcoholic; her ability to quit drinking is very remote; and when she is drinking she is not competent or capable of managing her own affairs according to her normal standards.

The manager of a motel, called as a witness by the petitioner, testified that on February 14, 1949, Jack Williams registered at the motel; after he registered, she ob-

served Williams and Larry Crawford "help" appellant into the room; the next day when she (the manager) went to the room it was in a deplorable mess and liquor bottles were in the room; appellant was in bed, and Williams told her that "his wife" was ill; on February 17th appellant was deplorably intoxicated; on that date the manager notified a physician (at a sanitarium) regarding appellant's condition, and thereafter an ambulance arrived at the motel and appellant was removed from the room on a stretcher; during the time appellant was at the motel Williams never left her alone; on one occasion, when the manager and a maid were cleaning the room, the maid tried to call a telephone number and Williams said, "don't you dare call anybody"; Crawford asked the manager to cash two checks, which were payable to and endorsed by appellant; one of the checks was for \$74; the manager refused to cash the checks, and the lessee of the dining room cashed them.

The petitioner (the daughter) testified that she had seen appellant intoxicated many times; on one occasion petitioner's brother (appellant's son), whom appellant had not seen for six years, came from Honolulu to visit appellant; appellant knew he was coming, but when he arrived she was terribly drunk, and petitioner and her brother took appellant to a sanitarium; appellant was in another sanitarium in 1947 for three months and was released in July; that "every once and a while," after she was released from the sanitarium, "she would start drinking again"; about December 1, 1948, when appellant left California to spend the holidays in the east she was a little intoxicated; about January 15, 1949, after she had returned from the east, appellant "disappeared," and the petitioner could not find her for several weeks; the next time petitioner saw appellant was on February 27, 1949, when petitioner "picked her up" at a sanitarium and took her to appellant's home; at that time appellant's wrists were bruised and her face was swollen; appellant told her that "these men had kept her captive in a motel"—that they beat her, forced her to write

checks, poured liquids down her throat and mistreated her generally; appellant was angry at that time, and told petitioner that she was going to tell "these people" that she had turned her property over to petitioner, and then they would stop bothering her. Petitioner testified further, in substance, that in March, 1949, petitioner "realized," from telephone conversations with appellant, that appellant was still drinking—and every time she talked with her she was worse; petitioner then went to see appellant, and it was obvious that appellant had been drinking; petitioner "begged" appellant to stop drinking, and appellant promised to come to petitioner's home the next morning and stay there a few days; during the evening of that same day appellant "disappeared," again and petitioner made numerous unsuccessful efforts to locate her; the next time she talked with appellant was on May 12, 1949, when appellant "called" her and stated that she had been married recently to a man named Horace Evans, and that he was going to take care of her; at that time appellant did not sound like herself—she seemed intoxicated and hysterical, and she "did not make a bit of sense."

Another witness, called by petitioner, testified that he served a "citation" on appellant on May 21, 1949, at the "Lido bar" where she was with Mr. Evans; prior to making the service he had observed them for approximately four hours and during that time they were at the bar drinking; he would say they were very much under the influence of liquor. That testimony was corroborated by another witness, who stated that appellant "was just plain sloppy drunk."

A physician, called as a witness by appellant, testified that he had examined appellant and that she was then under his care; he was unable to detect anything that would indicate mental deterioration, but he found that she had been addicted to the excessive use of alcohol; she had been drinking for a number of years and in the last four or five years had become "more greatly" addicted to alcohol; she now knows she is an alcoholic, and she is sincere in

her desire to never drink again; in his opinion she is a competent person to transact her business when she is not under the influence of alcohol.

Appellant testified that she recognized she had certain alcoholic tendencies; she felt she was in need of some guidance, but she thought she had the proper people to guide her; her marriage to Williams was a mistake—she did not stop drinking; during the time she was married to him she invested about \$2,500 in a fictitious company in Mexico; in February, 1949, Williams and his friends held her "prisoner" in the auto court in Eagle Rock, and she endorsed checks "over to" Williams; she had known Evans at least three months before she married him. She testified further that her property at the time of the hearing herein consisted of: two trust deeds on which the unpaid balances were \$6,900 and \$2,700; two notes on which the unpaid balances were \$3,500 and \$3,675; a bank account in the sum of \$300; certain stocks (which appeared to be of a value of approximately \$3,000); insurance, with a cash surrender value, on which the annual premium was \$1,250; and a 160-acre farm in Canada.

[1-4] Section 1460 of the Probate Code provides: "Any superior court \* \* \* may appoint a guardian for the person and estate or person or estate of an insane or an incompetent person. As used in this division of this code, the phrase 'incompetent person,' 'incompetent,' or 'mentally incompetent,' shall be construed to mean or refer to any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons." Appellant argues that the evidence produced on behalf of the petitioner was not sufficient to show that appellant was incompetent within the meaning of that section. "Before we can disturb the findings of the lower court upon the ground that they are not supported by the evidence, we must be able to conclude as a matter of

law that there is no evidence at all to support the conclusions arrived at by the trial court." In *re McConnell's Estate*, 26 Cal. App.2d 102, 106, 78 P.2d 1043, 1045. This rule is applicable to a guardianship proceeding. *Matter of Coburn*, 165 Cal. 202, 212, 131 P. 352. The court herein could properly have concluded that appellant is a chronic alcoholic. "When an alcoholic shows pronounced mental and physical degeneration, he is termed 'chronic.'" (Stanford Law Rev. Vol. 2, p. 516.) In *re Guardianship of Gordon*, 56 Cal.2d 523, it was said at page 528, 132 P.2d 824, 827: "[I]n *Ludwick v. Commonwealth*, 18 Pa. 172 \* \* \* the court held that to authorize the appointment of a guardian of an habitual drunkard, it is not necessary that he should be always drunk, but the test is whether he has a fixed habit of drunkenness; that 'A disposition of mind and body which might lead to the wasting of an estate is sufficient to justify the appointment of a guardian,' which is a precautionary measure." In *Anderson v. State of Arizona*, 54 Ariz. 387, it was held, pages 393-394, 96 P.2d 281, 284, 126 A. L.R. 501, that a person may be declared "to be incompetent to handle his own property because he spends money too profusely or improvidently, or he may so habitually drink to intoxication that it is necessary, for the protection of his property, his family and his own person, that a guardian be appointed either of the person, or of the property, or of both, but \* \* \* the disability is not a lack of mental capacity in either case, in the ordinary sense of the word." It is well known that there are many men, generally perfectly normal, who at times are not capable of handling their finances in a proper manner during periodic spells of intoxication \* \* \*. A person may, therefore, be declared incompetent to handle his financial affairs for many different reasons, some of which may

indicate general mental incapacity, such as extreme old age resulting in senility, or physical disease \* \* \* or the declaration may be based on many other causes which do not imply the ward is of unsound mind \* \* \*." A chronic alcoholic may be declared to be an incompetent person within the meaning of section 1460 of the Probate Code. It cannot be concluded as a matter of law that there is no evidence to support the implied finding of the trial court that appellant is incompetent. In the present case it appears that appellant, while she was intoxicated at the motel, endorsed checks which were payable to her, and that Crawford (the man who was at the motel with appellant and her former husband, Williams) cashed two of those checks at the motel dining room. It also appears that appellant, while she was intoxicated at the motel, suffered personal injuries. As stated in the matter of *In re Cassidy's Guardianship*, 95 Cal.App. 641, at page 645, 273 P. 69, 71, "In cases of this kind it is not necessary to wait until actual loss or damage has been suffered before the beneficial provisions of these statutes may be invoked. It is sufficient when the mental weakness exists, which makes the unfortunate one an easy prey for the designing." In the matter of *Application of Jackson*, 34 Cal.2d 136, 208 P.2d 657, at page 660: it was said: "Protection of the incompetent from others is the main purpose of the statute [referring to section 1460, Probate Code]."

The order is affirmed.

VALLÉE, J., concurs.

SHINN, Presiding Justice.

I concur: It is too clear for argument that a confirmed inebriate, who is not competent to manage her affairs when under the influence, needs a guardian even though she is competent when she is sober.



97 Cal.App.2d 350

**PHELPS et al. v. LOUPIAS et al.**  
**Civ. 14181.**

**District Court of Appeal, First District,**  
**Division 2, California,**  
**May 4, 1950.**

**Rehearing Denied June 3, 1950.**  
**Hearing Denied June 29, 1950.**

Action by John E. Phelps, Jr., and Frances S. Phelps against Roger Loupias and others, and against Eli Rosen to foreclose a chattel mortgage and for damages arising from alleged conversion of personalty. The Superior Court, in and for the city and county of San Francisco, Franklin A. Griffin, J., decided that a chattel mortgage held by the plaintiffs constituted no lien prior to that of the defendant Rosen, and awarded judgment in favor of Rosen and against Loupias for \$12,000 and interest and the plaintiff appealed. The District Court of Appeals, Goodell, J., held that after making of Rosen-Loupias conditional sale contract on August 25, Loupias could not by word or deed deny, defeat or impair or lessen Rosen's right under that contract and when on October 15, 1947 Rosen paid seller balance due and got an assignment of the seller's underlying conditional sales contract he stepped into seller's shoes and became vested with legal title to machinery and equipment which as between him and Loupias or those claiming under Loupias related back to August 25, and plaintiffs' chattel mortgage of September 1, was not a prior lien.

Judgment affirmed.

**1. Sales** ⇨450

The retention of title by the seller is not a lien but is a reservation of title.

**2. Chattel mortgages** ⇨138(1)

Where partner purchased defendant's interest and gave defendant a conditional sales contract, and thereafter defendant obtained an assignment of seller's underlying conditional sales contract on machinery, defendant became vested with legal title, which as between defendant and partner, related back to date of defendant's contract and plaintiffs' chattel mortgage on same equipment subsequently acquired from partner to secure payment of money previously lent to partner to buy out defendant's interest, did not give them a superior lien.

Alfred F. Taddeucci, San Francisco,  
Eugene H. O'Donnell, Ralph Bancroft, San  
Francisco, for appellants.

Morris M. Grupp, San Francisco, for re-  
spondent Eli Rosen.

**GOODELL, Justice.**

Appellants sued Roger Loupias, Eli Rosen and several fictitious defendants for declaratory relief, to foreclose a chattel mortgage, and for damages arising from the alleged conversion of personal property. The court decided that the chattel mortgage held by appellants constituted no lien prior to that of defendant Rosen, and awarded judgment in favor of Rosen for his costs, and against Loupias for \$12,000 and interest. This appeal followed.

A laundry business in San Francisco known as The Splendid French Laundry was, on November 2, 1946, owned solely by defendant Loupias. On that day a "joint adventure agreement" was entered into between Roger Loupias, Eli Rosen, Warren Cochran and A. C. Ireland, wherein they agreed to carry on the business as joint adventurers. It provided that Ireland was to be general manager and outside man, and Loupias inside production manager. Rosen and Cochran were not required to devote any specific time or attention to the business. The interests of the parties were set forth as Loupias 33⅓%, Ireland 33⅓%, Rosen 16⅔% and Cochran 16⅔%.

Rosen and Cochran later purchased Ireland's 33⅓% interest and thereafter the business was owned and operated by Loupias, Rosen and Cochran.

On August 27, 1947 these three entered into a writing dissolving their joint venture, which was published the next day in "The Recorder". It recited that Rosen and Cochran had theretofore "sold, assigned, transferred and delivered to Roger Loupias \* \* \* their right, title, equity and interest" in the business "and all of its assets, including the good will thereof." The sequence of events in this change of ownership is fully shown by the findings as will presently appear.

It should first be noted that *title to the machinery and equipment which enabled the business to operate had never become vested in any of the persons running the laundry*. Loupias did not have title in the first place; the Loupias-Ireland-Rosen-Cochran group never acquired it; the survivors, Loupias-Rosen-Cochran, never did so; and when Loupias again took over he got no title to it. The title to the machinery and equipment had been retained under a conditional contract of sale dated August 1, 1946, between West Coast Laundry Machinery Company, the seller, and Loupias, the buyer, and on the dissolution on August 27, 1947, there was still owing thereon upwards of \$12,000. This fact is of importance since that property is the subject matter of appellants' chattel mortgage and respondent Rosen's conditional sale contract, with which this litigation is concerned.

Rosen and Cochran, as fairly appears from the record, were anxious to get out; they had already put considerable money into the business to keep it going. Loupias, at the same time, was anxious to get the business back into his own hands. Another laundry operator was standing by, apparently ready to pay more than Loupias for the business, and seemingly one of the reasons for the rather hasty transfer, if not *the* reason, was Loupias' desire to buy it for himself.

Apparently Cochran's interests were handled throughout the transfer by Rosen, and in his name, under some arrangement between themselves which does not appear from the record but which is not presently material since Cochran is not a party to the litigation. The findings speak of Rosen's interest, apparently including therein Cochran's.

The various steps in the transfer of the Rosen-Cochran interest to Loupias are set forth in the findings, which may be paraphrased as follows: on August 22, 1947, plaintiff John E. Phelps, Jr. lent Loupias \$12,000 in the form of a cashier's check payable to Rosen, whereupon Loupias, *in his individual capacity*, executed to Phelps

a promissory note payable seven days later. Theretofore Loupias had told Phelps that he was buying Rosen's interest and that he had no other indebtedness against the business; that there were no outstanding liens, mortgages or conditional sales contracts against it, and that the \$12,000 would pay Rosen in full and leave the laundry in the hands of Loupias free and clear of debts of every kind.

Loupias had also told Phelps that he did not want him to tell Rosen that he was making the loan, or to make any inquiry of Rosen respecting the business. Phelps believed these statements, made no investigation of his own, and purposely kept from Rosen all information of his loan, and in making the loan he relied solely on these representations.

The check for \$12,000 being a cashier's check, did not disclose its source. Loupias gave it to Rosen as part payment for Rosen's interest, the agreed purchase price of which was \$43,000, payable \$12,000 in cash and \$31,000 to be evidenced by a conditional sales contract covering the furniture, fixtures and equipment.

On August 25 the transfer of Rosen's interest to Loupias was completed by the delivery to Rosen of the \$12,000 check and on that day Loupias executed with Rosen a conditional sales contract covering all the furniture, fixtures and equipment, to secure to Rosen the \$31,000 balance.

Rosen, on receiving the \$12,000 check, learned from an attorney who had represented Phelps in his negotiations with Loupias, that it had in fact come from Phelps, and telephoned to Phelps that he had the check, inquiring whether he had lent this money to Loupias, and informing him that if so, there was no security to cover the loan; further that he had another customer to purchase the laundry, and if Phelps desired to protect himself, he (Rosen) would return the check to him. To this Phelps replied in substance: "That is my business and that it is none of your business what my dealings with Mr. Loupias are."

On August 29 [actually the 27<sup>th</sup>] the Loupias-Rosen-Cochran venture was duly dissolved.

On September 1 (which was after the telephone conversation, after the dissolution, and after the execution of the Rosen-Loupias conditional sales contract) Loupias took Phelps to the office of his attorneys, where he executed a new note to appellants for \$12,000, together with a chattel mortgage securing it, covering all the furniture, fixtures and equipment in the laundry, *and being the same property that had been already covered by the conditional sales contract which Loupias had made with Rosen to secure to Rosen the balance of the purchase price of his interest.* The chattel mortgage was recorded by Phelps on October 28, 1947, and on learning of this six days later through a commercial publication, Rosen caused his counsel to communicate these facts to Loupias' attorneys.

During the time prior to the execution of either of the notes to Phelps by Loupias, and prior to the execution of the Rosen-Loupias conditional sales contract, the major portion of the equipment and machinery in the laundry was under purchase from West Coast Laundry Machinery Company on the conditional sales contract already mentioned, dated August 1, 1946, on which a balance of over \$12,000 was owing. After the execution of the Rosen-Loupias conditional sales contract Rosen purchased the West Coast's contract and took an assignment thereof upon paying it in full the \$12,362.22 balance.

The day after Rosen received the new conditional sales contract signed by Loupias, to wit, on August 26, Rosen assigned it to American Trust Company.

Thereafter Loupias defaulted on that contract and Rosen was compelled to repurchase it from American Trust Company, paying it therefor \$28,618.28. Shortly thereafter Rosen took possession of the property covered by his contract.

On August 6, 1948, Rosen notified Phelps in writing that there was due him on the equipment, furniture and fixtures \$28,618.28 and that Phelps could obtain the property by paying him (Rosen) that sum.

No part of the \$12,000 has been paid by Loupias to Phelps.

The court found that it was not true that Rosen unlawfully took or carried away the personal property referred to herein, or converted or disposed of it to his own use.

From those findings the court drew the conclusions: (a) That the loan of \$12,000 from Phelps to Loupias was made to him in his individual capacity and not as a member of the partnership, and that Rosen had no liability for such loan. (b) That the Rosen-Loupias conditional sales contract of August 25, 1947, securing the \$31,000 balance of the purchase price of Rosen's interest, constituted a first lien against all the furniture, fixtures and assets, with the exception of the lien of West Coast under its conditional sales contract. (c) That upon the purchase by Rosen of the West Coast contract Rosen had an unqualified first lien on all such furniture, fixtures, equipment and machinery. (d) That Phelps was not entitled to any relief against Rosen by reason of anything alleged in the complaint and that he was not damaged in any amount by any of the actions of Rosen. (e) That Phelps was entitled to judgment against Loupias for \$12,000 and that, in so far as Rosen was concerned, the chattel mortgage executed by Loupias to Phelps constituted no lien prior to that of Rosen.

No claim is made that the findings are not supported by the evidence.

The conclusion that the \$12,000 loan from Phelps to Loupias was a personal loan and not made to the partnership is fully supported by the facts found which need not be recounted. It is sufficient to recall the conversation wherein Rosen, *a retiring partner*, (trying to protect Phelps by letting him know what was planned, before he used the \$12,000 to pay off the West Coast) was told to mind his own business. Once the personal nature of that loan is established, most of appellants' argument loses its force and their citations of code sections and authorities become academic and irrelevant.

The record is practically free from conflict. Phelps did not take the stand on his



own behalf. He testified as an adverse witness called by defendant Rosen, under § 2055 Code Civ.Proc. The only witness called by plaintiffs was Loupias, *a defendant against whom plaintiffs wound up with a \$12,000 judgment by default.*

The only question in the case is as to the priority as between the Rosen-Loupias contract of August 25 and the appellants' chattel mortgage of September 1.

As to the time element, a six days lead appears from the foregoing statement.

As to notice: the court found that the chattel mortgage was given *after* the none-of-your-business conversation in which Rosen told Phelps that if he lent Loupias the \$12,000 he would have no security for it. The sufficiency of this finding is not challenged.

[1] The contest is not between two lienors. It is between the holder of legal title and the holders of a lien created by a chattel mortgage. While the retention of title is sometimes spoken of as a lien (and is so spoken of in the findings herein) it is not a lien at all. "The security retained by the seller is not a lien, but is a reservation of title." *Bice v. Harold L. Arnold, Inc.*, 75 Cal.App. 629, 635, 243 P. 468, 470, citing 35 Cyc., p. 653. Followed in *Heffner v. Jackson*, 95 Cal.App. 476, 479, 273 P. 37; also in *Hougham v. Rowland*, 33 Cal.App. 2d 11, 14-15, 90 P.2d 860, 862, where the court says "A conditional vendee receives nothing more than a conditional right of possession \* \* \*". A conditional vendee is "in the position of a mere possessor". *Guerin v. Kirst*, 33 Cal.2d 402, 409, 202 P.2d 10, 14, 7 A.L.R.2d 922.

In *Oakland Bank of Savings v. California Pressed Brick Co.*, 183 Cal. 95, 297, 191 P. 524, the court said: "The owner of personal property has the right to make an agreement to sell the same and deliver possession thereof to the buyer, upon the condition that the title thereto shall nevertheless remain in the seller until the price agreed on has been fully paid, and the title so withheld by the owner will until full payment, be *superior to that of a subsequent mortgage[e] or purchase[r]* of such

personal property from the buyer, *even if such subsequent mortgage or purchase was made without knowledge or notice of the reservation of title* \* \* \* [citations]." (Emphasis added.)

[2] Loupias, as we have seen, had no title to the property when he attempted to mortgage it. See *Pacific Finance Corp. v. Hendley*, 119 Cal.App. 697, 7 P.2d 391, on the subject of chattel mortgages given by conditional vendees. At that time legal title was still retained by West Coast, but the transfer of August 25 had given Rosen a *potential* and *equitable* title as of that date. After making the Rosen-Loupias contract on August 25 Loupias could not by word or deed deny, defeat, impair or lessen Rosen's rights under that contract. *Pacific Finance Corp. v. Hendley*, *supra*. When, on October 15, 1947, Rosen paid West Coast the \$12,362.22 balance (apparently in fulfillment of his agreement so to do) and got an assignment of its underlying contract, he stepped into its shoes and became vested with complete legal title to the machinery and equipment, which, as between him and Loupias, or those claiming under Loupias, related back to August 25.

This is not a controversy between partners, or between a creditor and a partnership wherein the creditor seeks to hold partnership assets or to trace and recover diverted assets. It arises simply from a loan made by one individual to another, to enable the latter to buy out his co-partners and get sole control of a business.

Loupias' interest in the joint venture had been wiped out by losses. Rosen and Cochran on the other hand, had put into it about \$31,000. Loupias admitted that he had no money at the time of the August transfer. The purchase of Ireland's interest gave Rosen and Cochran each 33⅓%, or a two-thirds interest in the partnership between them. In these circumstances Rosen and Loupias arrived at their settlement. The balance of \$12,000 was still owing to West Coast and a \$12,000 loan of fresh money would get that out of the way. The transaction accomplished exactly what Loupias desired to accomplish. It amount-

ed to an informal liquidation of the partnership, and no authority has been cited by appellants holding that this cannot be done. In respondent's brief the concession is freely and repeatedly made that such a transaction between the partners cannot defeat partnership creditors suing the partners or pursuing the partnership assets thus taken over by one partner on such a liquidation.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J.,  
concur.



97 Cal.App.2d 292

**BURGE et al. v. LOS ANGELES  
TRANSIT LINES et al.**  
Civ. 17298.

District Court of Appeal, Second District,  
Division 1, California.  
May 1, 1950.

Melzo Burge and Johnnie Burge sued Los Angeles Transit Lines, a corporation, and Luther Sommers for death of Velma Virginia Burge resulting when decedent was struck by defendant's interurban car. The action was dismissed as to plaintiff Johnnie Burge. The Superior Court of Los Angeles Court, Arthur Crum, J., rendered a judgment on verdict for plaintiff and denied defendants' motion for a new trial and defendants appealed. The District Court of Appeal, Drapeau, J., held that refused instructions were merely cumulative of rules adequately covered by given instructions.

Order denying motion for a new trial and judgment affirmed.

**1. Appeal and error** ⇨930(1)

On appeal from judgment for plaintiff in death action all conflicts in evidence would be resolved in favor of plaintiff.

**2. Carriers** ⇨246, 318(1)

In death action, evidence was sufficient to establish that decedent was a passenger

on defendants' interurban car line, that decedent alighted at defendants' station, and almost immediately was struck by an interurban car traveling in opposite direction as was interurban car from which decedent had alighted, as decedent was crossing tracks within station area on way to decedent's destination.

**3. Appeal and error** ⇨1033(5)

In action for death of decedent resulting when decedent was crossing tracks within station area after alighting from defendants' interurban car at station, and decedent was struck by another interurban car traveling in opposite direction from which interurban car from which decedent had alighted was traveling, refusal of trial court to give requested instruction relative to duty of care required of defendants if decedent was no longer a passenger was not prejudicial to defendants where instruction given as to duty of defendants toward nonpassengers was more favorable to defendants than requested instruction.

**4. Carriers** ⇨325

The duty of a person to stop, look and listen before crossing railroad tracks does not apply in all of its strictness to a passenger at a railroad station.

**5. Trial** ⇨260(8)

In action for death of decedent resulting when decedent was crossing tracks within station area after alighting from defendant's interurban car at station, and decedent was struck by another interurban car traveling in opposite direction from which interurban car from which decedent had alighted was traveling, where a given instruction related to degree of care which must be exercised by nonpassengers in crossing tracks of an interurban transit company, the giving of defendants' requested instruction on such subject was unnecessary.

**6. Carriers** ⇨348(6)

In action for death of decedent resulting when decedent was crossing tracks within station area after alighting from defendant's interurban car at station, and decedent was struck by another interurban car traveling in opposite direction from

which interurban car from which decedent had alighted was traveling, instruction that one who alights from a street car and, to cross street, passes to rear of car, and before attempting to cross, neglects to look for street cars approaching from opposite direction, is guilty of negligence as a matter of law, which would have been confusing to jury in view of other instructions and was properly refused.

#### 7. Carriers ⇐348(6)

In action for death of decedent resulting when decedent was struck by interurban car traveling in opposite direction from which interurban car from which decedent had alighted was traveling, giving of instruction permitting jury to consider whether station conditions were such as to give a reasonably prudent person of decedent's age assurance of safety in entering upon track area, and to expressly or impliedly invite decedent to enter track area without making precautionary observations one usually should make in approaching and crossing railroad tracks, was not error.

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Morrow & Trippet, James O. White, Jr., Los Angeles, for appellants.

Bronson, Bronson & McKinnon, Los Angeles, for respondents.

DRAPEAU, Justice.

This is an action for wrongful death of Velma Virginia Burge, aged 16 years, brought by her parents, but later dismissed as to the mother, Johnnie Burge. Defendants transit company and its employee Sommers have appealed from a judgment entered pursuant to the verdict of the jury, and also from the order denying their motion for a new trial.

The only issue raised by this appeal is the alleged prejudicial error of the trial court in giving and refusing to give certain instructions.

The facts out of which the instant litigation arose are briefly the following: Appellant transit company maintains a private right of way with a double set of tracks running east and west parallel to Redondo

Boulevard in the City of Inglewood. On the north side of the right of way just west of the point where Centinela Avenue deadends at Redondo Boulevard is a station for the convenience of passengers. This consists of a small wooden structure with a paved section about fifty feet long running on the outside of each set of tracks. These sections are connected at the easterly end by a macadam walk in line with the prolongation of the westerly curb line of Centinela Avenue. South of the right of way is a vacant field, several feet higher than the right of way. Redondo Boulevard and improved city property adjoin the right of way to the north.

Shortly before eight o'clock in the evening of October 17, 1947, Velma Virginia Burge was a passenger on appellant's eastbound car, enroute to a church located about two blocks north of the station. When she prepared to leave from the front end of the car, she discussed with the motorman the location of the church. While riding she had been visiting with friends, who knew the location of the church, and as she was leaving, she turned toward them and pointed to the right, i. e., to the south; and "then we pointed left, and then she shook her head and pointed left"; thus indicating to her friends that she understood their directions that the church was north of the right of way. The young girl alighted from the front end of the car and walked back toward the middle thereof to wave to her friends as it started and passed her on its way to Los Angeles. As she crossed the track in a northerly direction, she was struck and killed by a westbound car being operated by appellant Sommers.

Mr. Sommers, who was the only eyewitness to the accident, testified that he did not intend to stop at the station; that he was behind schedule and was running 14 minutes late; that he had traveled on the down grade with full power on until he was within 200 feet of the station and that he coasted over this remaining distance at a speed of 20 to 25 miles per hour; that he did not see any eastbound cars as he approached or passed the station; that the last eastbound car he passed



was at the railroad crossing at Redondo and Florence Avenue, seven-tenths of a mile east of the station. However, there was evidence that the car in which the girl had been riding was being followed by another car at a distance, according to one witness, of 200 feet. Another witness stated that it was one or two stops behind at the time of the accident, and that when this following car arrived at a point where the motorman could see the station, the accident had already occurred.

Mr. Sommers further testified that when he first saw decedent, she was about 15 feet from the front end of his car, opposite a path leading from the field on the south side of the right of way, and that she was "running in a northerly direction with her head slightly stooped." Also, that he was unable to reduce his speed before striking her, although he applied every stopping measure at his command. The record discloses that he stopped the car 242 feet west of the macadam walk across the east end of the station area, and that after the accident the girl's body was 74½ feet west of the same walk.

This witness also stated that the left front corner of the street car struck the girl, who fell onto the front end of the fender or "scooper," and that she was then thrown clear between the east and west-bound tracks; that the impact was about 25 or 30 feet west of the macadam cross-walk and north of the path leading from the vacant field. There were no lights in or around the station area, and on the night in question it was extremely dark.

Before she left home on the evening of the accident, decedent had been given a dime and two nickels, and just prior to the accident she had been chewing gum. The police officers, who investigated the accident, testified that they found a nickel, a wad of gum and a bobby pin on or near the macadam walk. They also examined the girl's shoes and found the seams clean and free of dust or dirt.

[1,2] Since the jury returned a verdict for the plaintiff, all conflicts in the evidence must be resolved in his favor. Mac-

Gregor v. Pacific Electric Ry. Co., 6 Cal. 2d 596, 598, 59 P.2d 123. With that rule in mind, the evidence hereinabove briefly recited was amply sufficient to establish that decedent was a passenger on appellants' interurban carline; that she alighted from an eastbound car at appellants' station, and almost immediately she was struck by a westbound car as she was crossing the tracks within the station area on her way to the church located to the north thereof.

With respect to a similar situation, it was stated in MacGregor v. Pacific Electric Ry. Co., supra, 6 Cal.2d 596, 600, 59 P.2d 123, 125: "The relation of passenger and carrier commences when the intending passenger enters upon the station premises, and continues after he leaves the train until he has had a reasonable opportunity to leave the railroad premises. \* \* \* A carrier owes to its passengers the duty to 'use the utmost care and diligence for their safe carriage.' Section 2100, Civ. Code. Incident to its obligation to provide a safe place for passengers to board and leave trains, a railroad must operate its trains with special care at stations, to the end that passengers may come and go in safety."

It is apparently conceded by appellants that the jury here was instructed in accordance with such rules, but, they say, the jury was nowhere instructed as to the duty of care required of them if decedent was no longer a passenger, and that there was evidence from which the jury could have inferred that decedent had a reasonable opportunity to leave. Hence, it was prejudicial error for the trial court to refuse to give the following instruction:

"You are instructed that as to the passengers of a railroad company who are not actually in transit but on the railroad premises or property, the railroad is relieved of the extraordinary degree of care required of it toward passengers in transit \* \* \* and the measure of duty, in such case, of the railroad company toward the passenger \* \* \* is only the exercise of ordinary care."

In this connection, appellants assert that the employees of the transit company and

one passenger testified that the car in which decedent was riding passed the car which struck her approximately 7/10ths of a mile from the scene of the accident, raising the inference that decedent did not go directly across the tracks but loitered on the way. There was also testimony of Shirley Erickson, a fellow passenger of decedent on the eastbound car, that she saw the headlight of another car following the car she was on at a distance of 200 feet; and the operator of that following car testified that when he saw the westbound car it was stopped, the accident having already occurred. This latter testimony, if believed by the jury, as it apparently was, established the fact that the accident occurred shortly after the decedent alighted from the eastbound car at the station.

At appellants' request, the jury was instructed that the transit company owed no duty to nonpassengers and was also instructed as to when the passenger relationship terminated, to-wit: "The relationship of passenger and carrier, during the existence of which the carrier is obligated to exercise the highest degree of care, continues while the passenger is in the act of alighting and until she has had reasonable opportunity after leaving the streetcar to get beyond danger from its operation and until she has had reasonable opportunity to leave the railroad premises. When, however, she has alighted from the streetcar and has had the reasonable opportunity I have mentioned, from that time on she is no longer a passenger, and *the carrier is not responsible for her safe passage thereafter to any intended point of arrival.*" (Emphasis added.)

The jury was also instructed that the relationship of carrier and passenger which had existed between the transit company and decedent was terminated if decedent had a reasonable opportunity to depart from the premises and failed to do so before the accident occurred.

[3] As can be seen, the instructions which were given as to their duties toward nonpassengers were much more favorable to the appellants than the requested

instruction. Consequently, no prejudicial error resulted from the trial court's refusal to give it.

Appellants urge that the court erred in refusing to instruct regarding the standard of care required of decedent in the event she was not a passenger at the time of the accident, i. e.: "I have heretofore advised you when, if at all, the relationship of passenger and carrier between Velma Virginia Burge and the Los Angeles Transit Lines terminated. If you find that the passenger relationship did terminate prior to the accident in any of the ways heretofore mentioned, then I instruct you that from the moment that the passenger relationship terminated the said Velma Virginia Burge was no more than an ordinary traveler and must be regarded as such, and the degree of care which she must exercise in crossing the tracks of the streetcar company is the same as that imposed upon any traveler and consequently the 'Stop, look and listen' rule as I have explained it to you applies in full force."

Again appellants concede that the jury was instructed that "a duty always exists for one to use ordinary care for his own safety" as well as respecting the standard of care required of a passenger at a station, but they insist that they were entitled to have the jury instructed as to the degree of care required of decedent if she had ceased to be a passenger, which included the duty to stop, look and listen.

The language of the refused instruction readily admits that the jury was instructed as to the conditions which would effect a termination of the relationship of carrier and passenger. In addition, another instruction was given (at the request of appellants) which clearly outlines the degree of care which must be exercised by an ordinary traveler in crossing tracks of an interurban transit company:

"The tracks of a railroad, such as that involved in this case, are in themselves a warning of danger. Before one enters upon the space which would be occupied by a train if it were to pass over such tracks, it is his or her duty to use every reasonable opportunity to look and listen

for the approach of train, engine or car on the tracks, and to yield the right of way to any approaching train, engine or car so near as to constitute an immediate hazard.

"No failure of duty or of the customary practice on the part of those in charge of a train or of anyone handling or supervising any phrase of its operation, such as a failure to sound the bell, siren or whistle as required by law, absolves a person going upon a track area, such as that involved in this case, from the duty to use ordinary care for his or her own protection."

[4,5] Since the law is clear that the duty of a person to stop, look and listen does not apply in all its strictness to a passenger at a station, *Wilkinson v. United Railroads*, 195 Cal. 185, 232 P. 137; *MacGregor v. Pacific Electric Ry. Co.*, 6 Cal.2d 596, 59 P.2d 123; the above-quoted instruction could have reference only to nonpassengers, i. e., ordinary travelers, hence it became unnecessary to give the refused instruction here under review.

Appellants next urge that failure to give the following requested instruction resulted in prejudicial error:

"One who alights from a streetcar, and for the purpose of crossing the street on the side thereof opposite his alighting, passes to the rear of the car, and before attempting to cross, neglects to look for streetcars approaching from the opposite direction, is guilty of negligence as a matter of law.

"In giving you this instruction, the Court does not mean to intimate that in its opinion, the plaintiff did conduct himself in the manner set forth as the premise for the instruction. Whether he did or did not is a question of facts for you alone to decide."

[6] In view of the many instructions given to the jury on the questions of negligence and contributory negligence of the actors in the cause under consideration, the giving of the requested instruction could only have resulted in confusing the minds of the jurors.

Appellants argue that since some of the exhibits introduced at the trial herein show that a row of poles separates the two sets of tracks, it was error for the court to refuse to give the instruction reading as follows: "If the view of the tracks is obstructed, then greater caution is required in approaching them."

There is nothing in the record that even intimates that the row of poles obstructed the view of the tracks at the place of the accident, hence no factual basis exists for the requested instruction. However, the record does disclose that no lights were maintained at or around the station area, and on the night of the accident it was extremely dark. It would therefore appear that if the view of approaching cars was obstructed by the row of poles between the two sets of tracks, it was the duty of the transit company to warn persons crossing the track that cars were approaching the station, especially when, as here, such trains stopped only upon signal of persons desiring to alight or board the same.

[7] Finally, appellants cite as error, the giving of the following instruction: "I instruct you that in considering whether the deceased, Velma Virginia Burge, in her conduct at the time of and immediately preceding the accident in question herein was exercising ordinary care, you may consider also whether the station conditions maintained by and the conduct of the defendants, Los Angeles Transit Lines, a corporation, and Luther Sommers, were such as to give a reasonably prudent person of the deceased's age assurance of safety in entering upon the track area, and to expressly or impliedly invite the deceased to enter that area without making the precautionary observations that one usually should make in approaching and crossing railroad tracks."

There was no error in giving the instruction complained of. The station of itself indicated that the ordinary precautions usually taken in crossing tracks were not necessary. Also, the record discloses that there was only one direction in which passengers could normally travel after alight-



ing from the cars. To the south was an unimproved, barren field, consequently passengers alighting from eastbound cars necessarily had to cross the tracks to reach the street north of the right of way.

The record in this case discloses that a full and fair trial was accorded the parties with respect to all of the issues involved and that the jury's verdict was based upon proper instructions, the refused instructions which form the basis of this appeal being merely cumulative of rules adequately covered by the instructions which were given.

For the reasons stated, the appeal from the order denying appellants' motion for a new trial is dismissed; the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



97 Cal.App.2d 209

**PEOPLE v. KATCHER.**

Cr. 2168.

District Court of Appeal, Third District,  
California.

April 26, 1950.

A. Katcher, also known as Abbie Katcher, was convicted in the Superior Court, Siskiyou County, James M. Allen, J., of obtaining property under false pretenses and he appealed from judgment based on verdict of guilty and from order denying motion for new trial. The District Court of Appeal, Van Dyke, J., held that failure of trial court to give instruction informing jury of subject matter of statute precluding conviction for obtaining property by false pretenses unless the statement of a pretense is accompanied by use of a false token or writing, except by production of specified evidence, was prejudicial error.

Reversed and remanded for a new trial.

**1. Criminal law** ⇨829(3)

In prosecution for obtaining property under false pretenses, trial court properly refused instruction requested by defendant upon subject of intent to defraud and reliance on representations by partnership from which property was obtained, where such subjects were covered by other given instructions. Pen.Code, § 532.

**2. False pretenses** ⇨6

A draft given by defendant to auctioneer in payment of cattle bid upon by defendant, which contained nothing false within itself, was not an accompanying "false token or writing" within statute precluding conviction for obtaining property under false pretenses unless statement of a pretense is accompanied by use of a false token or writing, except by production of specified evidence. Pen.Code, §§ 532, 1110.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "False Token or Writing".

**3. Criminal law** ⇨1186(4)

**False pretenses** ⇨52

In prosecution for obtaining property under false pretenses, failure of trial judge to give instruction informing jury of subject matter of statute precluding conviction for obtaining property under false pretenses unless statement of a pretense is accompanied by use of a false token or writing, except by production of specified evidence, was prejudicial error. Pen.Code, §§ 532, 1110; Const. art. 6, § 4½.

Barr & Hammond, Yreka, for appellant.

Fred W. Burton, District Attorney Siskiyou County, Yreka, Fred N. Howser, Attorney General, by Doris H. Maier, Sacramento, for respondent.

VAN DYKE, Justice.

Appellant was informed against in the Superior Court of Siskiyou County for the alleged commission of two felonies; (1) that of issuing a worthless check in violation of sections 476 and 476a of the Penal Code, and (2) that of obtaining property

under false pretenses in violation of section 532 of that code. Upon pleas of not guilty to both counts he was tried before a jury. A verdict of not guilty was returned as to the first count and a verdict of guilty as to the second. He appeals from the judgment based upon the verdict of guilty and from the order of the court denying his motion for a new trial.

Both alleged offenses arose out of the same transaction, the purchase of cattle at an auction sale. The auction was conducted by a partnership known as "Brahs Bros." The record contains testimony as to the following happenings:

The auctioneer, before any bid was made by appellant, had told him that the sales would be for cash. When all the sales for the day had been completed the appellant, in payment for the cattle he had bid in, gave the auctioneer a sight draft for \$10,050.93. The draft was made out on a form entitled "Customer's Draft", and the body thereof read as follows:

"Dixon California  
Oct. 30, 1948.

Pay to the order of Brahs Bros. \$10,050.93.

Katcher Meat Co. Inc.  
By A Katcher

Payable through Bank of America National  
Trust & Savings Association, Eighth and  
Broadway, Oakland, California.  
Collection Item Only."

It was further shown that appellant was president of the Katcher Meat Company Inc., that his son was vice-president thereof and that the corporation had no other active officers; that the business of the corporation was the selling of meat. It was further testified to by three witnesses, including the Brahs Bros. that some trouble had been had before this auction in collecting upon like drafts given by appellant for cattle he had bid in at prior auctions, and for that reason, and before he was permitted to bid at the auction here he was asked concerning the financial situation of his company. In response he represented that his company had been refinanced, that his draft was good, that anticipating cattle purchases he had ordered the bank through which the drafts were to be paid that it was to pay any draft

issued as soon as received by it and before anything else was paid; that funds were then on deposit with the bank sufficient for that purpose and to meet the draft he might give for purchases made that day; that the money situation was all right. Upon these representations being made the auction company permitted appellant to bid for cattle, and after the sales were over accepted in payment therefor the draft above referred to.

The record further contains evidence that the above representations were false when made, were then known to be false by appellant, were made to deceive the auction firm and that the auctioneers were deceived thereby to the end that appellant procured the cattle for his corporation. The evidence was thus sufficient in law to prove the charge made in the information. But it also should be said that the evidence was in conflict upon these matters. Thus appellant testified that the understanding between himself and the auction firm was in the nature of a credit arrangement and that all parties to the transaction so understood it; that he informed the auction company that some time would necessarily elapse during which he would have to butcher and sell the cattle before funds would be available to meet the draft. Further than this the draft itself was declared on its face to be a collection item only and there was testimony that in banking practice such an instrument was not a direction to the bank to apply any existing funds of the drawer on deposit to meet the draft but that it was required that notice to the drawer be given when the draft reached the bank, whereupon the drawer would draw a check upon his funds in the bank and the bank would then pay the draft.

As might be expected in view of the testimony above summarized, appellant does not here question the sufficiency of the evidence to sustain the verdict.

Appellant urges reversal of the verdict and judgment for the following reasons: He contends that the prosecuting attorney was guilty of prejudicial misconduct. He contends further that the court erred in failing to give requested instructions on the

elements of intent and reliance, and finally he contends the court erred in refusing a requested instruction designed to inform the jury of the requirements of section 1110 of the Penal Code and in failing to give any instruction upon the subject matter of that section.

We think it unnecessary to relate in detail appellant's reasons for charging the prosecuting attorney with misconduct. It will be sufficient to say that we have scrutinized the entire record and have concluded that no finding of prejudice could be predicated upon the matters urged by appellant. At appellant's request and when these things happened, the court fully admonished the jury in respect thereto, and assuming, which we do not, that the conduct complained of was wrong, still we are completely satisfied that any possible detriment was removed by the specific admonition of the court.

[1] Appellant requested certain instructions upon the subject of intent to defraud and reliance by Brahs Bros. upon the representations made. While the instructions were refused the record shows that other instructions covering the same subjects were given. Thus the court told the jury an intent to defraud was an intent to deceive any person for the purpose of gaining some material advantage over him or to induce him to part with property or to alter his position to his injury or risk and to accomplish that purpose by some false statement or other act fitted to deceive. That there must be a union or joint operation of act and intent in every criminal offense, and that to constitute the crime of which appellant was found guilty there must have existed in his mind a specific intent to defraud, without which he could not be convicted. That to convict appellant there must be proof of fraudulent representation of an existing fact by one knowing it to be untrue and such as was fitted to induce the person to whom it was made to part with something of value. That before there could be conviction the jury must find the defendant had intended to defraud the one against whom the crime was perpetrated; that he must have actually defrauded that person; that he must have used a repre-

sentation or false pretense for that purpose; that the pretense must have been a material element in inducing that person to part with his property, and that the false pretense must have so induced the property owner. Without dealing with the instructions further it is sufficient to say that the foregoing, together with other general instructions, were sufficient to inform the jury of the matters covered by the requested instructions, and that appellant's contentions in this regard cannot be upheld.

A much more serious contention is that wherein appellant claims that the failure of the trial court to inform the jury of the subject matter of section 1110 of the Penal Code constituted reversible error. That section provides: "Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any labor, money, or property, whether real or personal, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances \* \* \*."

Stripping this code section down to that part which applies to this case it may be stated as follows:

[2, 3] Unless the statement of a pretense is accompanied by the use of a false token or writing then the defendant cannot be convicted except by the production of a writing subscribed by him and constituting the pretense or some note or memorandum thereof or by the testimony of two witnesses or of one witness and corroborating circumstances. The false pretense here involved constituted the statements hereinbefore related and made by the appellant to induce the sale to him. The draft did not constitute an accompanying false token or writing. The draft was exactly what it purported to be, was in the same form as



had been used before in like purchases from the same parties and contained nothing false within itself. *People v. Carter*, 131 Cal.App. 177, 21 P.2d 129; *People v. Gibbs*, 98 Cal. 661, 33 P. 630; *People v. Beilfuss*, 59 Cal.App.2d 83, 138 P.2d 332, 335. In the last case, concerning the meaning of the words "false token or writing" found in the code section, the court stated: "The cases contain no clear definitions of these terms, but to bring an object within either, there must, of necessity, be something false about it. A writing which is genuine and contains no false statements of fact cannot be a 'false token or writing.'"

The draft here contains no false statement of fact and indeed constitutes a binding obligation upon the drawer upon which recovery could be had in an appropriate action. See, also, *People v. Wasservogle*, 77 Cal. 173, 19 P. 270. "The word 'writing,' as used in such a statute, means some instrument, or at least a letter, or something in writing, purporting to be the act of another, \* \* \*. The term 'false writing' will not be construed to mean an unwarranted or false use of a genuine writing." 35 C.J.S., False Pretenses, § 5, page 643.

To the proper instruction of the jury, therefore, it was necessary that they be instructed concerning the requirements of the code section which must be met before they could bring in a verdict of guilty. The code section here involved is found among those wherein the legislature designates proof required in respect of certain crimes. After declaring that the rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in the Penal Code, the code proceeds to state certain exceptions. Thus by section 1103 conviction for treason is forbidden unless upon the testimony of two witnesses to the same overt act or upon confession in open court. Next it is declared that perjury must be proved by the testimony of two witnesses or of one witness and corroborating circumstances. Similar provisions are made concerning the proof of conspiracy, of abortion and seduction of a minor, and generally as to the testimony of accom-

plices. With respect to the latter provision as to the question of whether or not the trial court was required to give such an instruction on its own motion where the same had not been requested, the Supreme Court, in the case of *People v. Warren*, 16 Cal.2d 103, 104 P.2d 1024, 1031, stated:

"The general rules prescribing the duty of the trial court in the giving of instructions in criminal cases have been stated as follows: 'It is the duty of a court in criminal cases to give, of its own motion, instructions on the general principles of law pertinent to such cases, where they are not proposed or presented in writing by the parties themselves. But it is not its duty to give instructions upon specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them. When the court fully and fairly charges the jury upon the law appertaining to the facts of the case, its failure to instruct on any particular matter deemed essential is not error in the absence of a request for such an instruction.' 8 Cal.Jur. 309, and cases cited. All of these general principles should be considered in determining whether the trial court has performed its duty in any particular case.

"It may be conceded that the necessity for accomplice instructions is 'developed through the evidence introduced at the trial', but can it be said that the court 'fully and fairly charges the jury upon the law appertaining to the facts of the case', when the evidence strongly suggests that the witness, giving the only testimony tending to implicate the accused, is an accomplice and the trial court fails to instruct the jury on the law relating to the insufficiency of the uncorroborated testimony of an accomplice? We think not. Such instructions deal with the vital question of the sufficiency of the evidence to sustain the conviction under the salutary rule laid down in section 1111 of the Penal Code. We therefore believe that it was prejudicial error for the trial court to fail to give such instructions in the present case even though such instructions were not specifically requested by appellant Warren."

The court further stated: " \* \* \* we deem it appropriate to state that we are of the opinion that whenever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice, it is the duty of the trial court to instruct the jury upon the law as set forth in section 1111 of the Penal Code; that the failure of the trial court to so instruct the jury under such circumstances, with or without a specific request for such instructions, constitutes error; but that in the event of such failure in any case, the entire record must be considered in determining whether such error constituted prejudicial error requiring a reversal of the judgment of conviction."

In *People v. Curran*, 24 Cal.App.2d 673, 676, 75 P.2d 1090, 1092, wherein the trial court had failed to instruct the jury that the defendant could not be convicted of the offense of obtaining property by false pretenses unless the pretenses be proven by the testimony of two witnesses or by corroborating circumstances, the court said: "The failure to so instruct the jury constitutes reversible error. Although it is not the duty of the court to give instructions to the jury upon specific points developed by the evidence unless such instructions are requested, it is nevertheless the duty of the court in criminal actions to give to the jury instructions on the general principles of law pertaining to the case on trial. *People v. Scofield*, 203 Cal. 703, 265 P. 914. In *People v. Heddens*, 12 Cal.App.2d 245, 55 P.2d 230, the trial court failed to instruct the jury that the testimony of an accomplice must be corroborated in order to sustain a conviction, as required by section 1111 of the Penal Code. The defendant did not ask for instructions on the subject, but the judgment of conviction was reversed on account of the failure of the court to give the proper instruction on its own motion. The present case presents a parallel situation. In *People v. Carter*, 131 Cal.App. 177, 21 P.2d 129, 132, a judgment of conviction was reversed for failure of the trial court to instruct the jury concerning the requirements of section 1110 of the Penal Code. The court referred to the legal principle involved as a 'thoroughly

seasoned rule' which 'should not lightly be cast aside' and held that the provisions of section 4½ of article 6 of the Constitution did not justify an affirmance of the judgment."

It must be concluded from the foregoing that in this case it was the duty of the trial court to give an instruction embodying the principle of law pertinent to this case, as stated in Penal Code section 1110. It was its duty to do this without request therefor, and its failure to do so constituted error.

Counsel for appellant at least attempted to request such an instruction. It presented to the court a written request that the following instruction be given:

"Because of the fact that it is an easy thing and a human thing for a person who has suffered a loss in a business transaction to claim that the loss was occasioned by a false pretense, the law has been very concerned with the protection of a person accused of obtaining money or property under false pretenses. And, before you can find the defendant guilty of obtaining property by false pretenses, you must find beyond a reasonable doubt and to a moral certainty one of two things: (a) that there was a written memorandum of the false pretense. (b) That the pretense is proved by the testimony of two witnesses, or one witness in cooperating circumstances."

While the first sentence of this proposed instruction might well have been stricken as being argumentative, the concluding portion was apt and applicable and clearly sufficient to inform the trial court that an instruction in line with the code section was desired. Respondent points out that the requested instruction is "garbled", referring to the last clause thereof, "or one witness in cooperating circumstances," but from the whole context it must have been known what was meant, and the unfortunate typographical error was no justification for a refusal to give the instruction with the necessary correction, and certainly no justification for failure to give any instruction at all upon the subject.

We turn now to the question of whether or not the failure to give an instruction

along the lines we have discussed was prejudicial error necessitating reversal and beyond the saving grace of Article VI, section 4½, of the Constitution. In *People v. Carter*, supra, which was a case similar to this one, the court said: "Finally, respondent suggests that an application of the provisions of section 4½ of article 6 of the Constitution indicates that the judgment herein should be affirmed. By one of the terms of section 1110 of the Penal Code it is provided that a defendant cannot be convicted, 'unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances. \* \* \*' From a consideration of such provision, together with the evidence adduced on the trial, it will become apparent that to give effect to the constitutional provision invoked by the respondent would require either that this court ignore at least that part of the statute to which attention has been directed, or that it invade the province of the jury in its legally exclusive right to pass upon the weight of the evidence and the credibility of the sev-

eral witnesses." [131 Cal.App. 177, 21 P.2d 131]

We think the above statement aptly describes the situation in the case at bar; that in view of the record here an appellate court would not be justified in holding that reversible error was not committed in the trial of this case. In this connection it should be remembered that the jury found appellant not guilty of the crime of issuing a fictitious check or draft in this same transaction, indicating that upon the whole record this case could not be considered one where the guilt of the defendant was so clearly shown that to reverse the judgment would be in itself a miscarriage of justice. On the contrary, for this court to say that had the jury been properly instructed it would in all probability have convicted the appellant in any case, would be to indulge in sheer speculation.

For the reasons given the judgment and order denying a new trial are reversed and the cause remanded for a new trial.

ADAMS, P. J., and PEEK, J., concur.



35 Cal.2d 355

**ROUCHLEAU v. SILVA.****L. A. 21215.**

Supreme Court of California, in Bank.

May 9, 1950.

Edith G. Rouchleau, as administratrix of the estate of James Louis Rouchleau, also known as Jim L. Rouchleau, deceased, brought action under the Jones Act, 46 U.S.C.A. § 688, against Guy H. Silva to recover for fatal injuries sustained by plaintiff's deceased when he was injured on defendant's fishing vessel. A judgment for plaintiff was entered by the Superior Court, San Diego County, Robert B. Burch, J., and defendant appealed. The Supreme Court, Shenk, J., held that evidence was sufficient to support finding that defendant negligently failed to provide reasonable safeguards for use of plank as a catwalk between raised deck and a bait tank on the vessel, so as to be liable for death of plaintiff's deceased who fell while using the catwalk.

Judgment affirmed.

Prior opinion 208 P.2d 697.

**1. Seamen ⇨29(5.9)**

Where complaint in action under Jones Act for death of seaman alleged probative facts bearing on conclusions of defendant's failure, neglect and breach of duty to supply a reasonably safe appliance, allegations were sufficient to present question whether defendant negligently failed to supply a reasonably safe appliance. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

**2. Pleading ⇨407, 433(4)**

If there was lack of form in drafting of complaint seeking to recover for death of seaman under Jones Act, the defects were cured by trial on real issue without objection on ground that complaint insufficiently tendered issue of negligence under Jones Act, and by specific finding of negligence based on evidence relevant to that issue. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

**3. Appeal and error ⇨1010(1)**

In action under Jones Act for death of seaman, trial court's findings supported

by competent evidence should not be upset on appeal except for manifest error or unless they were clearly wrong. Jones Act, 46 U.S.C.A. § 688.

**4. Seamen ⇨29(1)**

The term "negligence," as used in Jones Act, is given a liberal interpretation, and includes any conscious or careless breach of employer's obligation to provide for safety of the crew. Jones Act, 46 U.S.C.A. § 688.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Negligence".

**5. Seamen ⇨29(2)**

An established duty falling on employers of seamen under Jones Act is that they shall use due diligence to provide their employees with a safe place in which to work, and in such respect a higher standard is required of them than of employers of workers on shore. Jones Act, 46 U.S.C.A. § 688.

**6. Seamen ⇨29(5.14)**

Evidence supported finding that owner of fishing vessel negligently failed to provide reasonable safeguards for use of plank as a catwalk between raised deck and a bait tank in the vessel at all times when it might be expected to be in use, so that owner could be held liable under Jones Act for death of member of crew who fell while using catwalk on ground that owner negligently failed to supply a reasonably safe appliance. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

**7. Seamen ⇨29(4)**

Where shown that use of plank as a catwalk between raised deck and bait tank on vessel was ordinary way for purpose of going across four foot space between the bait tank and the raised deck, owner of fishing vessel could not avoid liability under Jones Act for death of seaman who fell while using catwalk on ground that seaman's failure to use ladder rather than catwalk was sole proximate cause of his injuries. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

**8. Seamen** *§*29(4)

In action under Jones Act for death of seaman, facts allegedly supporting defense of assumption of risk as well as those material to defense of contributory negligence would bear only on apportionment or mitigation of damages under applicable doctrine of comparative negligence. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

**9. Seamen** *§*29(4)

Fact that seaman who was fatally injured as result of fall while using plank as catwalk between raised deck and bait tank on fishing vessel was acting master of the vessel at time of the accident did not preclude recovery for his death under Jones Act from owner of vessel for negligence in failing to furnish reasonably safe appliance, where record failed to show that seaman undertook to act as temporary master with equipment in condition other than as supplied by owner, or that any special duty was enjoined upon seaman in respect to keeping essential appliances in safe condition. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

**10. Judgment** *§*253(1)

In action under the Jones Act for death of seaman, where complaint prayed for \$25,000, and judgment of \$17,000 was entered, fact that trial court made finding of damages in sum \$30,000 before apportionment based on finding that seaman's own negligence contributed to his death did not require reversal. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

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Lasher B. Gallagher, Los Angeles, for appellant.

Harold P. Lasher and Don L. Yale, San Diego, for respondent.

SHENK, Presiding Justice.

This is an appeal by the defendant from a judgment for the plaintiff in an action

for recovery under the Jones Act, Title 46 U.S.C.A. § 688.

The plaintiff is the widow of James Louis Rouchleau who, in his lifetime, was employed as a seaman on the commercial fishing vessel the "Emma R. S." owned by the defendant. While engaged in cleaning up activities after unloading fish in San Diego Harbor, Rouchleau fell from a plank which was an appliance of the vessel into an empty fish hold and died two days later. The plaintiff sought \$25,000 general damages plus funeral expenses. Trial without a jury resulted in a judgment for \$17,000.

[1, 2] The defendant first contends that the complaint does not state a cause of action under the Jones Act. In personal injury and death cases that act makes applicable to seamen the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. Section 51 of that act extends a right of action to the plaintiff widow as the personal representative of the deceased seaman if his death has resulted from injuries in whole or in part due to defendant's negligence, or by reason of any defect or insufficiency, due to the defendant's negligence, in the boat's appliances. It appears to be the defendant's contention that there is no allegation in the complaint other than by way of legal conclusion that an alleged failure of the defendant or an alleged defect or insufficiency of the appliance was due to his negligence. The complaint, however, does allege probative facts bearing on the conclusions of the defendant's failure, neglect and breach of duty. The allegations are sufficient to present the question whether the defendant negligently failed to supply a reasonably safe appliance. See *Brown v. Western R. Co.*, 338 U.S. 294, 70 S.Ct. 105. The trial proceeded in conformity with the allegations and on the theory of negligence under the Jones Act. No demurrer was interposed. The findings of the trial court were based on the determination that the injuries resulting in death were in part caused by the negligence of the defendant in providing an unsafe ap-

pliance. The defendant was not misled, and if there was lack of form in the drafting of the complaint the defects were cured by the trial on the real issue without objection on the ground that the complaint insufficiently tendered the issue of negligence under the Jones Act, and by the specific finding of negligence based on the evidence relevant to that issue. *Colbert v. Colbert*, 28 Cal.2d 276, 281, 169 P.2d 633.

[3] The next question is whether there is sufficient evidence of the negligence which is a material element of the plaintiff's case. *Showalter v. Western Pac. R. Co.*, 16 Cal.2d 460, 471, 106 P.2d 895; *Vojkovich v. Ursich*, 49 Cal.App.2d 268, 273, 121 P.2d 803. In presenting this question the defendant contends that, following the admiralty practice, he is entitled to a trial *de novo* in the reviewing court. It may be assumed that parties to an action in a state court are entitled to the rights afforded them under federal law in admiralty matters. See *Garrett v. Moore-McCormack*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239; *Intagliata v. Shipowners and Merchants Towboat Co., Ltd.*, 26 Cal.2d 365, 159 P.2d 1. But it does not follow that if there is substantial credible evidence which supports the trial court's findings unaffected by error, this court will not affirm the judgment. The decisions, including those relied on by the defendant, indicate that the findings supported by competent evidence should not be upset except for manifest error or unless they are clearly wrong. *Davidson Steamship Co. v. United States*, 205 U.S. 187, 191, 27 S.Ct. 480, 51 L.Ed. 764; *Crist v. United States War Shipping Administration*, 3 Cir., 163 F.2d 145, 146; *Smrekar v. Bay & River Nav. Co.*, 69 Cal.App.2d 654, 657, 160 P.2d 85, certiorari denied 326 U.S. 782, 66 S.Ct. 338, 90 L.Ed. 473; *Macomber v. DeBardeleben Coal Co., Inc.*, 200 La. 633, 634, 649, 8 So.2d 624, certiorari denied, 317 U.S. 661, 63 S.Ct. 61, 87 L.Ed. 532.

The following appears by witnesses who testified at the trial and from the defendant's deposition:

The defendant had owned and captained the vessel since 1928 when the deceased

entered his employ. The vessel was taken by the Navy during the late war and was thereafter returned to the defendant. The plank in question was not a part of the equipment until the Navy took the boat and made some alterations including the addition of a raised deck. The defendant retained the alterations, and the plank as an appliance of the vessel. The trip at the close of which the injury occurred was the second for the deceased after the return of the boat to the defendant.

The plank, four feet long, twelve inches wide and two to three inches in thickness was maintained as a catwalk between the raised deck forward and a bait tank aft. The level of the raised deck was about one foot above the top of the bait tank. Between the raised deck and the bait tank was a covered opening to a fish hold below. The plank was used as a bridge over the hold opening between the raised deck and the bait tank. It was not fixed, but movable, and was held in place by cleats on the underside. There were neither cleats nor covering on the upper surface. Ordinarily a skiff adjoined the plank in place and afforded some support in its use. There was no other handhold or railing. During fishing operations the plank was used in getting to the bait tank from the pilot house which was forward of the raised deck. During unloading operations it was necessary to remove the plank and the skiff in order to bring up the fish from the hold below through the opening under the plank. It was also in evidence that the plank was customarily used by all members of the crew at their own convenience at any time at sea or in port. Another means of access to the bait tank was afforded by a companionway between the upper and lower decks and by a six foot ladder to the top of the bait tank. The men had no specific instructions about the use of either way and whenever they had occasion to go to the bait tank they usually crossed on the plank instead of using the companionway and ladder.

On October 4, 1945, when the trip started, the deceased signed on as a seaman. While at sea the defendant sustained an injury to his hand which required that he



be taken by airplane to the mainland. Before he left an agreement was signed by the crew that the deceased would act as master until such time as the defendant was physically able to return to the boat. The defendant met the boat on November 13th after it returned to port and proceeded with it from the inner harbor to where it was docked. After stopping at the Custom house for an hour the vessel tied up at Van Camp's dock, where it was unloaded the following day. The defendant came on board again during or after the unloading. He looked into the well between the bait tank and raised deck and saw that it was empty. He made no inspection of the plank at any time. The decedent Rouchleau and another seaman were engaged in washing down the equipment, bait tank, wells and decks. The plank was put in place during or at the close of the cleaning operations and was in a wet condition. The skiff was still in the water. The deceased was in the act of stepping from the bait tank to the plank. He had one foot on the plank and was about to take a step forward when he lost his footing and fell into the open well below, sustaining the injuries from which he died.

The court found negligence on the part of the defendant in failing to maintain the appliance in a reasonably safe condition. Responsive to the issues raised by the answer the court found that the decedent's injuries were in part the result of his own negligence. From the evidence of deceased's earnings the conclusion was drawn that the plaintiff was damaged in the sum of \$30,000, but that, because of the factor of contributory negligence, the defendant was entitled to have the judgment reduced to \$17,000.

In support of his claim that the evidence does not support a finding of negligence the defendant relies on his own testimony that the plank was restricted to use as a cat-walk when the skiff was in place. The evidence is clear, however, from the defendant's admissions and from independent evidence that the plank was in use as here described at all times and under all cir-

cumstances whenever the men had occasion to go between the bait tank and the raised deck. The defendant's endeavor, on interrogation by his own counsel, to cure the effect of his admitted general use of the plank is unavailing. The conclusion that the plank was not reasonably safe for such use has support in the evidence.

[4-6] The term "negligence" as used in the Jones Act is given a liberal interpretation, and includes any conscious or careless breach of the employer's obligation to provide for the safety of the crew. *Koehler v. Presque-Isle Transp. Co.*, 2 Cir., 141 F.2d 490, 491. An established duty falling on employers of seamen is that they shall use due diligence to provide their employees with a safe place in which to work, and in this respect a higher standard is required of them than of employers of workers on shore. *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 428, 59 S.Ct. 262, 83 L.Ed. 265; *Armit v. Loveland*, 3 Cir., 115 F.2d 308, 311. The issues here were addressed to a breach of that duty. Measured by the accepted standard the record discloses ample evidence that the defendant negligently failed to provide reasonable safeguards in the use of the plank at all times when it might be expected to be in use.

[7] It is contended that it was the decedent's duty to go the safer way by using the ladder and that his failure to do so was the sole proximate cause of his injuries. The defendant relies on cases to the effect that if two ways are available, one safe and the other obviously unsafe, the employee's choice of the dangerous way is at his peril if the difference is known to him. *Hardie v. New York Harbor Drydock Corp.*, 2 Cir., 9 F.2d 545, 546; *Tampa InterOcean S. S. Co. v. Jorgensen*, 5 Cir., 93 F.2d 927, 929; *Meintsma v. United States*, 9 Cir., 164 F.2d 976. As indicated in these and other cases, *Carlson v. United States*, 5 Cir., 71 F.2d 116, 117, and *Vileski v. Pacific-Atlantic S. S. Co.*, 9 Cir., 163 F.2d 553, the rule is applicable when it is shown to be the duty of the employee to use the ordinary and safe way rather

than one intended for an entirely different purpose. Here it was shown that the plank was the ordinary way; that it was expected that the men would use it at any time for the purpose of going across the four foot space between the bait tank and the raised deck; and that during cleaning up activities after unloading it was the regular practice for the plank to be in place and in use while the skiff was still in the water.

[8] The defendant refers to facts which he claims support his defense of assumption of risk, and complains that the court omitted to make findings thereon. It has been said that this defense is peculiarly inapplicable to suits by seamen to recover for negligent failure to provide a seaworthy ship and safe appliances. The facts referred to as well as those material to the defense of contributory negligence, bear only on apportionment or mitigation of the damages under the applicable doctrine of comparative negligence. *The Arizona v. Anelich*, 298 U.S. 110, 56 S.Ct. 707, 80 L.Ed. 1075; *Beadle v. Spencer*, 298 U.S. 124, 56 S.Ct. 712, 80 L.Ed. 1082; *Socony-Vacuum Oil Co. v. Smith*, supra, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265. The record shows that the trial court dealt with these matters in ordering the damages mitigated to the extent of nearly one-half. On the facts of this case and the authorities cited the defendant received the consideration to which he was entitled under the Jones Act.

[9] The defendant asserts that he was not the person responsible. He urges that the sole responsible person was the decedent himself who was the acting master and that the duty devolved upon him to use due care in furnishing reasonably safe appliances. In this connection an application was filed in this court to introduce documentary evidence consisting of a photostatic copy of the United States Coast Guard Inspector's certificate of the crew list of the *Emma R. S.* dated November 11, 1945, reporting James Rouchleau as master

and Guy H. Silva as absent from the crew. It is not disputed that the decedent was acting master at that time. Relying on that fact the defendant cites *United States Steel Products Co. v. Noble*, 2 Cir., 10 F.2d 89, to the effect that the employee charged with the duty of keeping essential appliances in a safe condition cannot make his neglect of that duty the basis of a claim against the employer. The doctrine is inapplicable here. The record fails to show that the decedent undertook to act as temporary master with the equipment in a condition other than as supplied by the defendant. There was no special duty enjoined upon him within the meaning of the doctrine relied on by the defendant. At all times the decedent was in the defendant's employ as a member of the crew and under the facts of this case he was entitled to the benefits of the statute whether acting in the capacity of seamen or master. *Warner v. Goltra*, 293 U.S. 155, 162, 55 S.Ct. 46, 79 L.Ed. 254. Furthermore the agreement appointing the decedent to act as master was to expire when the defendant was physically able to return to the boat. The defendant apparently was physically able for he returned while the vessel was in the harbor on the day prior to unloading. The court is not bound by his declarations that he did not come on board to take command nor is it material that he actually did not resume command.

[10] It is contended that the finding of damages in the sum of \$30,000 before apportionment is against law because in the complaint the plaintiff prayed for 25,000. But there was no award of damages in excess of the sum asked, and it may not be said that the amount was excessive or not justified by the evidence.

The application to introduce documentary evidence is denied and the judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

35 Cal.2d 396

**Ex parte SCHNEIDER.****Cr. 5052.**

Supreme Court of California, in Bank.

May 9, 1950.

Original proceeding in the matter of the application of Leroy M. Schneider for a writ of habeas corpus directed to Robert A. Heinze, Warden of the California State Prison at Folsom, California. The Supreme Court, Shenk, J., held that petitioner failed to establish illegality of his conviction on any of the grounds alleged.

Petition denied and order to show cause discharged.

### 1. Habeas corpus ☞85(1)

In proceeding for writ of habeas corpus to secure release from prison of petitioner who was serving sentence following his conviction of forgery, evidence failed to show that petitioner had been forced to enter a plea of guilty to forgery charge.

### 2. Habeas corpus ☞85(1)

In proceeding for writ of habeas corpus to secure release from prison of petitioner who was serving sentence following his conviction of forgery, evidence failed to show that petitioner had not been fully and adequately represented by public defender of county in forgery prosecution, who was ordered by court to defend petitioner after petitioner had stated that he had no money to employ an attorney.

### 3. Habeas corpus ☞85(1)

In proceeding for writ of habeas corpus to secure release from prison of petitioner who was serving a sentence following his conviction of forgery, evidence failed to establish illegality of petitioner's conviction on ground that he had been held incommunicado in county jail and that he had not been permitted to subpoena his witnesses.

### 4. Habeas corpus ☞85(1)

In proceeding for writ of habeas corpus to secure release from prison of petitioner who was serving sentence following his conviction of forgery, where record showed

that no money was found in petitioner's possession when he was arrested but that money was found on person of petitioner's co-defendant and that it was used for purpose of restitution to victims pursuant to statute, record failed to show illegality of petitioner's conviction on ground that after his arrest money rightfully belonging to him had been taken from him and that he was therefore unable to employ counsel of his own choice. Pen.Code, § 1407 et seq.

### 5. Habeas corpus ☞85(1)

In proceeding for writ of habeas corpus to secure release from prison of petitioner who was serving sentence following his conviction of forgery, where record showed that petitioner's preliminary examination had not been waived but that such examination was held at which some ten witnesses were sworn and examined on behalf of prosecution, petitioner's contention that his conviction was illegal because he had been wrongfully permitted to waive his preliminary examination was not sustained.

### 6. Habeas corpus ☞50

Supreme Court would not permit one to make a belated collateral attack on judgment of conviction by application of writ of habeas corpus, in absence of showing of excuse for delay in raising the question.

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Leroy M. Schneider, in pro. per., and Van H. Pinney, San Francisco, under appointment by the Supreme Court, for petitioner.

Fred N. Howser, Attorney General, and Clarence A. Linn, Deputy Attorney General, for respondent.

SHENK, Presiding Justice.

The petitioner, Leroy M. Schneider, seeks his release from Folsom prison on a Writ of Habeas Corpus. He is imprisoned for forgery and has been serving sentence since June 1947.

Upon the filing of the petition, prepared in propria persona, an order was issued requiring the respondent warden to show cause why the writ should not issue. At the request of the petitioner this court ap-



pointed counsel to represent him in this proceeding.

The principal allegations of his petition are, (1) that after his arrest money rightfully belonging to him was taken from him and that he was therefore unable to employ counsel of his own choice; (2) that he was forced to enter a plea of guilty; (3) that the services furnished to him by counsel for the state were inadequate; (4) that he was held "incommunicado" in the county jail and was not permitted to subpoena witnesses; (5) that he was wrongfully permitted to waive his preliminary examination; and (6) that he was denied due process of law.

Prior to the hearing on the order to show cause the attorney general filed a return consisting of an answer and five exhibits which include the transcript of the testimony at the preliminary examination; the transcript of the proceedings on arraignment in the superior court; the transcript of the proceedings when judgment was pronounced; and a copy of the judgment and commitment under which the petitioner is presently held. An examination of the record thus presented including the petition and two affidavits filed February 6, 1950, shows that there is no merit in the application.

At the time of his arrest the petitioner had no money on his person but his co-defendant Castro who was arrested at the same time had \$802, the proceeds of the forgeries, in his possession. The forgeries described in the five counts of the complaint and information were alleged to have occurred on the 14th day of April, 1947. The two men were arrested at the place where the last forged check was cashed. The money was used for the purpose of making restitution.

[1] Shortly after his arrest the petitioner admitted his participation in the crime. These admissions were free from any legal duress or compulsion. Thereafter a complaint was filed in the municipal court, the petitioner was duly arraigned, and a preliminary examination was held at which he was represented by a deputy city public de-

fender. At the hearing all of the elements of the offenses were established. When the petitioner appeared in the superior court for arraignment he stated to the court that he had no money to employ an attorney and the court then properly ordered that he be represented by the public defender of the county. The arraignment took place on May 8th and the time to plead was continued to May 15th. Confronted with the evidence taken before the committing magistrate the petitioner entered a plea of guilty and admitted a prior conviction—burglary in Alameda county in 1938—for which he had served a term in state's prison. There is no showing whatsoever that he was forced to plead guilty.

[2] Notwithstanding his prior conviction the petitioner was permitted to file an application for probation. Upon consideration of the report of the probation officer the petitioner's counsel stressed the fact that restitution had been made. Probation was denied but before judgment and sentence the court struck from the record all reference to the prior conviction, dismissed the information as to counts 2, 3, 4, and 5, and sentenced the petitioner on count 1 for the term prescribed by law. Leniency was thus accorded him and there is no showing that he was not fully and adequately represented by counsel.

[3] There are no facts alleged to support the conclusion that the petitioner was held incommunicado in the county jail and he does not state what witnesses he desired to subpoena or what testimony he sought to obtain from them.

At the hearing on the present application the petitioner filed two affidavits. In the one dated December 14, 1949, he avers that on the night of April 22, which was the night following his preliminary examination, he was taken from his bed in the jail to a place called the "green room" and there suffered blows from a rubber hose wielded at the hands of three police officers "in an attempt to get a confession." It is not shown that the claimed attempt was successful or resulted in a confession of any sort.

The plea of guilty in the Superior Court was entered more than three weeks later.

In his affidavit dated January 4, 1950, the petitioner avers that on April 16, 1947, he requested the use of a telephone at the county jail for the purpose of communicating with an attorney and that he was told by the officer in charge that he could not use the telephone unless he had the money to pay for the call. Assuming that he was wrongfully refused the use of the telephone without charge at the time, it does not appear that he could not have communicated with an attorney by other means. In view of the fact that he was represented by counsel at all stages of his trial proceedings the incident alleged is now unimportant.

[4, 5] Petitioner also avers that at all times he was confined in the county jail the sum of \$850 belonging to him was withheld and was "confiscated" from him at the time of his arrest on April 15, 1947. As above noted the record shows without question that he had no money in his possession when he was arrested; that the money was found on the person of his co-defendant, and that it was used for the purpose of restitution to the victims. There is no showing that it was not used in accordance with the requirements of the statute, Penal Code secs. 1407 et seq., as to his contention that he was wrongfully permitted to waive his preliminary examination the record conclusively shows that it was not waived and that such an examination was held at which some ten witnesses were sworn and examined on behalf of the prosecution. No lack of due process appears.

[6] Furthermore there is no showing to excuse this belated collateral attack on the judgment. In re Swain, 34 Cal.2d 300, 209 P.2d 793.

Other claims are made by the petitioner. They are without merit and need not be discussed.

The petition for the writ is denied and the order to show cause is discharged.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

**SIMMS et al. v. LOS ANGELES  
COUNTY et al.**

**GRIBBLE v. LOS ANGELES COUNTY et al.**

**MERCHANTS NAT. REALTY CORPORATION  
v. LOS ANGELES  
COUNTY et al.**

**SECURITY-FIRST NAT. BANK v. LOS  
ANGELES COUNTY et al.**

L. A. 20964-20986.

Supreme Court of California, in Bank.  
May 2, 1950.

Rehearing Denied June 1, 1950.

W. J. Simms and others and Carrie D. Gribble and Merchants National Realty Corporation, a corporation, and the Security First National Bank, a national banking association, sued the County of Los Angeles and others, to recover general city and county taxes and special assessment district charges paid under protest. The Superior Court, Los Angeles County, Joseph W. Vickers, J., rendered judgments for plaintiffs and defendants appealed. The Supreme Court, Gibson, C. J., held, inter alia, that misclassification of fixtures other than plaintiffs' bank vault doors and counterlines as personalty, did not result in imposition of discriminatory tax burdens upon plaintiffs in regard to general city and county taxes, and that as to special assessment district charges plaintiffs were subjected to discriminatory tax burdens by reason of misclassification of fixtures generally by county tax assessor.

Judgment reversed with directions.

See also 217 P.2d 946, 217 P.2d 948.

**1. Taxation ⇐542**

Plaintiffs' complaint of an arbitrary difference in treatment of like property similarly situated, which was basis of actions to recover general city and county taxes and special district assessment charges paid under protest, was adequately set forth in protests, as against contention that recovery was barred by statute requiring actions to recover taxes paid under protest to be brought only on grounds specified in protests. Revenue and Taxation Code, § 5139.

**2. Fixtures ⇐1**

The manner of its annexation, its adaptability to use and purpose for which

realty is used, and intention of party making annexation, are the tests which must be applied in determining whether an article is a fixture.

### 3. Taxation ⇨65

Under rule making intention of party annexing an article to realty a test in determining whether article is a fixture, for tax purposes, intention must be determined by physical facts or reasonably manifested outward appearances without regard to annexor's status as landlord or tenant.

### 4. Taxation ⇨65

Under statute, all fixtures or trade fixtures must be taxed as improvements to realty, and trade fixtures cannot be divided into classifications, some of which are assessed as personalty, and others of which are assessed as improvements to realty, and the distinction cannot be made between articles which are integral parts of a building or a unit for use therewith and trade fixtures generally.

### 5. Taxation ⇨347

Assessments will be invalidated by courts if taxing authorities resort to arbitrary methods varying from methods employed in assessing other property of like character and situation, and resulting in the imposition designedly of an unequal burden on the property of complainant.

### 6. Taxation ⇨386(1)

Fact that if plaintiffs' bank vault doors and counterlines had been improperly classified as personalty by county assessor, as assessor improperly assessed fixtures generally, plaintiffs would have been exempt from general city and county taxation under statutes and constitution, did not show that plaintiffs, by assessment of bank vault doors and counterlines as improvements to realty, were subjected to taxes not imposed upon others of the same class, or were otherwise prejudiced by the misclassification, so as to entitle plaintiffs to have assessment on bank vault doors and counterlines invalidated. 12 U.S.C.A. § 548; Revenue and Taxation Code, § 5139.

### 7. Taxation ⇨386(1)

General city and county taxes paid under protest would not be invalidated on

theory that assessment of plaintiffs' bank vault doors and counterlines by county assessor as improvements to realty, and improper assessments of fixtures generally as personalty, discriminated against plaintiffs because buildings owned by others containing similar fixtures which were improperly assessed as personalty, were systematically undervalued, whereas assessment of bank vault doors and counterlines as improvements to realty enhanced value of buildings in which they were situated to extent exceeding value of fixtures, where argument rested entirely upon conjecture and surmise.

### 8. Counties ⇨193

#### Municipal corporations ⇨971(1)

County or city tax levies cannot be shown to be discriminatory by proof of injury resulting from the act of a different and independent taxing authority.

### 9. Municipal corporations ⇨977

Recovery of local taxes on theory of discrimination in assessing taxes could only be had on proof of the comparative tax burdens imposed by defendants on plaintiffs' property and like property of others similarly situated.

### 10. Counties ⇨194

#### Municipal corporations ⇨978(6)

General city and county taxes levied upon improvements to realty were levied upon the realty and imposed no personal liability upon property owners.

### 11. Landlord and tenant ⇨148(1)

A building owner may by contract protect himself against increases in taxes that result from improvements to the building by tenants.

### 12. Constitutional law ⇨229(3)

#### Taxation ⇨40(8), 386(1)

Assessment of plaintiffs' bank vault doors and counterlines by county assessor as improvements to realty, and improper assessment of similar articles owned by others as personalty, did not violate equal protection clause of Federal Constitution and provision of state constitution requiring all laws of a general nature to have uniform operations, where no attendant in-



equality of tax burdens resulted. Const. art. 1, § 11; U.S.C.A.Const.Amend. 14.

### 13. Taxation Ⓒ40(1)

In tax matters the requirement of section of constitution requiring all laws of a general nature to have a uniform operation are substantially the same as the requirements of the equal protection clause of Federal Constitution. Const. art. 1, § 11; U.S.C.A.Const.Amend. 14.

### 14. Taxation Ⓒ10

Unjustified differences in classification of property by county assessor, without accompanying disparity in tax consequences, does not result in exceeding the statutory authority of state to tax realty of national banks to the same extent, according to its value, as other realty is taxed. 12 U.S.C.A. § 548.

### 15. Taxation Ⓒ386(1)

Where plaintiffs' bank vault doors and counterlines were classified as improvements to realty by county assessor, and fixtures generally were improperly classified as personalty, and special district taxes were levied only upon realty, special district taxes were invalid as being discriminatory to extent they represented a levy upon bank vault doors and counterlines installed in plaintiffs' buildings.

### 16. Taxation Ⓒ543(1)

Actions to recover taxes paid under protest are equitable in nature.

### 17. Equity Ⓒ66

He who seeks equity must do equity.

### 18. Taxation Ⓒ500

A property owner seeking to challenge the validity of a tax must pay or offer to pay the portion of the tax to which the taxing authority is entitled in equity and good conscience.

### 19. Taxation Ⓒ500

The rule that a property owner seeking to challenge validity of a tax must pay or offer to pay the portion of tax to which taxing authority is entitled in equity and good conscience, is applicable in actions to recover taxes erroneously collected or

paid under protest, and in proceedings to enjoin collection or otherwise restrain enforcement of taxes.

### 20. Taxation Ⓒ543(8)

Where property is fraudulently overvalued for tax purposes, recovery of taxes by property owner is limited to the inequitable portion of the taxes.

### 21. Administrative law and procedure Ⓒ817 Taxation Ⓒ543(8)

When trial court concluded that, with respect to special assessment district charges, county taxing authorities discriminated against plaintiffs by singling out plaintiffs' banking fixtures for assessment as improvements to realty and thereby subjected plaintiffs to special district taxes which were not levied upon like property of others similarly situated, trial court should have ordered actions to recover taxes paid under protest resubmitted to board of equalization for determination of value of plaintiffs' buildings without the included fixtures, retaining jurisdiction of parties and subject matter until appropriate judgment could finally be rendered in conformity with rulings of board.

### 22. Taxation Ⓒ543(8)

In action to recover general city and county taxes and special assessment district charges paid under protest, charges for transcript of hearings before board of equalization were properly allowed to plaintiffs as costs, but expense of various photographs which were introduced as exhibits at trial and were obtained at sole instance of plaintiffs to show alleged discriminatory assessment practices was not a proper item of costs.

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Harold W. Kennedy, County Counsel, Gordon Boller, Deputy County Counsel, A. Curtis Smith, Asst. County Counsel, Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Leon Thomas David, Asst. City Atty., Louis A. Babior and H. H. MacDonald, Deputy City Attys., Los Angeles, amici curiae on behalf of appellants.

Holbrook & Tarr, W. Sumner Holbrook, Jr., Freda B. Walbrecht and Francis H. O'Neill, Los Angeles, for respondent.

GIBSON, Chief Justice.

These are appeals from judgments for plaintiffs in twenty-three actions brought to recover taxes paid under protest on certain buildings. In five cases, the building involved was owned and occupied by a national bank which sought recovery for each of the tax years 1942 through 1946. In the remaining cases, the buildings were leased to and occupied by national banks but were owned by different landlords who sued separately for return of sums paid during the period 1941-1946, inclusive.

After receiving notice of assessments, plaintiffs applied to the county board of equalization for reductions in the assessed valuations of their improvements in amounts equal to the value of bank vault doors and counterlines<sup>1</sup> installed in their buildings and included in the assessments. The applications were made upon the theory that substantially all property similar to bank vault doors and counterlines had been assessed as personal property, and that the assessment of bank vault doors and counterlines as improvements to realty was therefore discriminatory. The requested relief being denied by the board, plaintiffs paid the taxes under protest and instituted actions for recovery.

The record on these appeals consists of thirty-eight volumes of the reporter's transcript, totaling over 8,500 pages, fourteen books of exhibits comprising approximately 3,000 pages, and the clerk's transcripts of about 5,000 pages. Careful examination of this voluminous record, however, reveals that the essential facts are not in dispute, and they may be summarized briefly as follows:

For several years prior to 1940 the Los Angeles County Assessor, in preparing the assessment roll of the county, followed the general practice of classifying bank vault doors and counterlines as personal property. No ad valorem taxes

were paid thereon since the personal property of national banks is exempt from local taxation. Following the decision of this court in *San Diego Trust & Savings Bank v. County of San Diego*, 16 Cal.2d 142, 105 P.2d 94, 133 A.L.R. 416, in 1940, however, the assessor reclassified and assessed vault doors and counterlines installed in buildings used for banking purposes as part of the building improvements or real estate, a practice which was again approved in 1946 by *Trabue Pittman Corp. v. County of Los Angeles*, 29 Cal.2d 385, 175 P.2d 512.

In each of the tax years involved in the present appeals, bank vault doors and counterlines installed in plaintiffs' buildings were classified as real property and, without being separately valued, were included with the buildings in assessments of improvements. During that period, however, as to property other than that occupied by banks, it was the assessor's general practice to classify and assess as *personal* property certain articles, machinery and equipment installed in buildings for purposes of trade, commercial or industrial uses. Typical of this practice was the treatment accorded to more than sixty items of property, including, among others, vault doors and counterlines of jewelers and furriers, refrigerators and counters in public markets, restaurant counters and booths, office partitions, printing presses of metropolitan newspapers, and a variety of heavy industrial machinery such as boilers, ovens and generators. The record contains photographs of all of these items showing their nature and the manner in which they were affixed to the realty. The vault doors and counterlines of jewelers and furriers were installed in the same manner and in a few instances in the same buildings as bank vault doors and counterlines. Other sizable articles were installed in buildings specially designed therefor, and still others were attached in a manner which either made their removal impossible without great damage to the building or otherwise suggested

1. The word counterlines is used to denote combinations of counters, wickets, grilles, partitions, etc.

permanence. The specific items of property were classified as personalty, however, without regard to the manner of their attachment. Their classification as personalty was representative of the assessor's practice in connection with property of that kind and nature although in some years vault doors in jewelry and fur stores were apparently classified as improvements.

The trial court found and concluded that in classifying and assessing banking fixtures as improvements, the assessor had intentionally, deliberately and without justification deviated from his general practice with regard to the classification and assessment of fixtures and that such differences in treatment of similar property constituted discrimination against plaintiffs prohibited by various provisions of the federal and state constitutions and by section 5219 of the Revised Statutes of the United States, 12 U.S.C.A. § 548. It also determined that since bank vault doors and counterlines were included with each building in a single assessment of improvements, the invalid and otherwise valid portions of each assessment were indivisible and consequently all taxes levied thereon were void. Judgments were accordingly entered for plaintiffs, and these appeals followed.

### *Sufficiency of Protests*

[1] At the outset, defendants contend that recovery in these cases is barred by Revenue & Taxation Code, section 5139, which provides that actions to recover taxes paid under protest may be brought only on the grounds specified in the protests. We are satisfied, however, that plaintiffs' complaint of an arbitrary difference in treatment of like property similarly situated, which is the basis of the present actions, is adequately set forth in the protests.

### *Misclassification of fixtures*

[2, 3] It is settled that three tests must be applied "in determining whether or not an article is a fixture—namely: (1) the manner of its annexation; (2) its adaptability to the use and purpose for which the realty is used; and (3) the intention

of the party making the annexation." *San Diego Trust & Savings Bank v. County of San Diego*, 16 Cal.2d 142, 149, 105 P.2d 94, 97, 133 A.L.R. 416. It is also settled that for tax purposes the "intention" must be determined by the physical facts or reasonably manifested outward appearances without regard to the annexor's status as landlord or tenant. *Trabue Pittman Corp. v. County of Los Angeles*, 29 Cal.2d 385, 175 P.2d 512; cf. *San Diego Trust & Savings Bank v. San Diego*, 16 Cal.2d 142, 105 P.2d 94, 133 A.L.R. 416; *Southern Cal. Tel. Co. v. State Board of Equalization*, 12 Cal.2d 127, 82 P.2d 422. Under these tests, articles which were comparable to bank vault doors and counterlines and which were installed in buildings for purposes of trade or industry constituted fixtures and were misclassified as personal property pursuant to the assessor's general practice.

Defendants argue, however, that a distinction may be made between articles which are "integral parts" of a building or a "unit for use" therewith on the one hand and trade fixtures generally on the other, and that only property in the former category need be classified as improvements for tax purposes. The nature or basis of the asserted distinction is not clearly indicated, but we infer from the briefs that the argument has reference to articles installed in buildings of special design and construction or attached in a manner rendering their severance impossible without injury as contrasted with articles attached in a manner from which the conclusion of permanence is ordinarily not so compelling. Cf. Civ.Code, § 1019. It is also urged that a reasonable classification of fixtures may be made as a matter of law on the basis of the nature of the business involved, the argument in this regard being that stability and permanence of location is present to a greater extent in the banking business than in manufacturing and industry generally.

[4] In *Trabue Pittman Corp. v. County of Los Angeles*, 29 Cal.2d 385, 175 P.2d 512, 518, the fact that the bank vault doors and counterlines were found to be fixtures or trade fixtures obviated the necessity for this court to discuss at length the criteria



to be considered in determining whether an article is a fixture. The problem there presented concerned the classification to be accorded "trade fixtures" for taxation purposes, and we held that such property was to be classified and assessed as realty. The opinion points out that the Revenue and Taxation Code declares real estate shall include "improvements" and defines improvements as including "fixtures," and that "No exception is made in the case of trade fixtures." It follows that the applicable statutes do not permit of the division of trade fixtures into classes or of the distinctions contended for by defendants, and on the contrary require all fixtures or trade fixtures to be taxed as improvements. Moreover, even if we were to assume that fixtures could be differentiated in the suggested manner, it is apparent that the considerations urged as the basis therefor do not account for the differences in the treatment of banking fixtures and other trade fixtures during the period here involved.

[5] It is not necessary for plaintiffs to show actual fraud in actions of this nature. Assessments will be invalidated by the courts if the taxing authorities "resort to arbitrary methods varying from those employed in assessing other property of like character and situation, and resulting in the imposition designedly of an unequal burden on the property of the complainant." *Hammond Lumber Co. v. County of Los Angeles*, 104 Cal.App. 235, 240, 285 P. 896, 898; *Southern Pac. Land Co. v. San Diego County*, 183 Cal. 543, 191 P. 931. In the present cases the trial court found that both the assessor's general practice of classifying trade fixtures as personalty and his deviation therefrom in classifying banking fixtures as improvements were intentional and deliberate, that the deviation was not justified, and that the facts had been presented to the board of equalization which, with full knowledge thereof, denied applications for relief.

Defendants next contend that regardless of the misclassification of substantially all other fixtures as personalty, the trial court erred in concluding that the assessment of bank vault doors and counterlines as improvements constituted unlawful discrimin-

ation. They argue that taxes on banking fixtures were not increased and that other fixtures neither escaped taxation nor received more favorable tax treatment as a result of the misclassification. This contention necessitates separate consideration of the validity of the general county and city taxes on one hand and of the special assessment district charges on the other, since the general taxes were levied upon personal as well as real property while the special district taxes were levied only upon real property.

#### *Validity of general county and city taxes*

Defendants assert, and plaintiffs do not dispute, that during the years in question general taxes were levied at the same rate upon both real and personal property by the county and by various cities for which the county acted as agent in the collection of taxes. Where, as here, there is no claim or showing that real and personal property was assessed at a different proportion of value or that there was any difference in tax rate as between the two, no inequality of tax burdens would appear to result from the classification of bank vault doors and counterlines as realty and the concurrent classification of all similar property as personalty. Cf. *California Domestic Water Co. v. Los Angeles County*, 10 Cal.App. 185, 101 P. 547; *Ledoux v. La Bee*, C.C., 83 F. 761. Nevertheless, plaintiffs assign several grounds of inequality or injury allegedly resulting from the misclassification of fixtures other than bank vault doors and counterlines.

[6] It is argued first that if bank vault doors and counterlines had received the same classification accorded fixtures generally, they would have been exempt from taxation under section 5219 of the Revised Statutes of the United States and Article XIII, section 16, subd. 1(a) of the California Constitution. The argument is fallacious. It does not show that plaintiffs were subjected to taxes not imposed on others of the same class or were otherwise prejudiced by the misclassification, but only that plaintiffs would have been benefited by a similar misclassification of their property. Discrimination cannot be thus postulated.

Cf. *Ambassador Hotel Corp. v. Los Angeles County*, 94 Cal.App. 143, 270 P. 726. Classification of bank vault doors and counterlines as personalty would not have placed such property on a parity taxwise with similar property, but would have given the former an unwarranted exemption from taxation.

[7] Plaintiffs' second argument is, in effect, that buildings owned by others were systematically undervalued as a result of the misclassification. They assert that inclusion of bank vault doors and counterlines in the assessments of their improvements enhanced the value of the buildings in which they were installed to an extent exceeding the actual value of those fixtures, and that such enhancement value was not considered in connection with other buildings because of the separate assessment of those buildings and the fixtures therein. The defect in this argument is that it rests entirely upon conjecture and surmise. There was no showing that the amount included in the assessed valuations of plaintiffs' improvements on account of vault doors and counterlines exceeded the value of those fixtures when viewed as separate items of property. In fact, there was no evidence of the value that would have been placed on bank vault doors and counterlines if treated as personalty, or of the value that would have been placed on fixtures classified as personalty if they had been treated as improvements. It is conceivable that if the similar or compared property had been assessed as part of building improvements, the resultant single assessment might have been less than the total of the separate valuations placed on those fixtures and the buildings in which they were installed in view of the possible limited use of the buildings or the restricted marketability of the fixtures. See *Trabue Pittman Corp. v. County of Los Angeles*, 29 Cal.2d 385, 401, 175 P.2d 512; *Southern Cal. Tel. Co. v. State Board of Equalization*, 12 Cal.2d 127, 137, 82 P.2d 422. Taxes, however, will not be invalidated on the basis of such a speculative charge of discrimination. Cf. *Southern Cal. Tel. Co. v. Los Angeles*, 45 Cal. App.2d 111, 113 P.2d 773.

[8,9] Plaintiff bank points out that the tax rate on banks under section 4a of the Bank and Corporation Franchise Tax Act, 3 Deering's Gen.Laws, Act 8488, is computed in part by reference to the amount of local personal property taxes paid by nonbanking corporations, and claims that misclassification of the fixtures of such corporations increased the bank tax rate. The trial court, however, expressly refused to find that the misclassification increased the bank's tax under section 4a "because of the lack of sufficient evidence to determine the effect of such practice or the amount of such increase, if any." Moreover, the taxes claimed to have been improperly increased were state taxes, and county or city levies cannot be shown to be discriminatory by proof of injury resulting from the act of a different and independent taxing authority. Recovery of local taxes on the theory of discrimination by defendants could be had in these actions only on proof of the comparative tax burdens imposed by defendants on plaintiffs' property and like property of others similarly situated. *Southern Cal. Tel. Co. v. Los Angeles*, 45 Cal.App.2d 111, 113 P.2d 773.

[10,11] Plaintiff lessors also complain that their taxes were increased by amounts attributable to the value of their tenants' fixtures where as other landlords were not similarly burdened because of the misclassification of fixtures generally. The argument overlooks the fact that the taxes were levied upon the property itself and imposed no personal liability on plaintiffs. *Trabue Pittman Corp. v. County of Los Angeles*, 29 Cal.2d 385, 402, 175 P.2d 512; *Klumpke v. Baker*, 131 Cal. 80, 82, 63 P. 137, 676. The complaint is not concerned with the comparative tax on the various properties, but solely with the question of whether the taxes will be paid by the landlord or his tenant. As pointed out in the *Trabue Pittman* case, a building owner may by contract protect himself against increases in taxes that result from improvements to the building by tenants, and plaintiffs in the present cases may have been so protected.



[12] In addition to the foregoing arguments plaintiffs complain of the differences in classification without regard to the tax consequences thereof and contend that discrimination can be shown by mere differences in classification as between similar property. No authority is cited in support of this contention, and we are of the view that mere differences in the classification of like property without attendant inequality of tax burdens do not violate the equal protection clause of the Fourteenth Amendment. See *Hillsborough Township v. Cromwell*, 326 U.S. 620, 66 S.Ct. 445, 90 L.Ed. 358; *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 54 S.Ct. 830, 78 L.Ed. 1411; *Snowden v. Hughes*, 321 U.S. 1, 9, 64 S.Ct. 397, 88 L.Ed. 497, 503; *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 353, 38 S.Ct. 495, 62 L.Ed. 1154, 1156.

[13] What has already been said largely disposes of the further contention that assessment of bank vault doors and counterlines as improvements under the circumstances in the present cases violated the provision in Article I, section 11, of the California Constitution which requires that all laws of the general nature shall have a uniform operation. Plaintiffs concede that in tax matters the requirements of this section are substantially the same as those of the equal protection clause of the Fourteenth Amendment. The statement in *Trabue Pittman Corp. v. County of Los Angeles*, 29 Cal.2d 385, 392, 175 P.2d 512, 517, that "There can be uniformity of taxation only to the extent that there is a uniform classification of real and personal property," is not authority for the proposition that unjustified differences in classification are interdicted by the California Constitution when there is no resulting inequality of tax burdens. The quoted statement was made in response to the argument that a distinction should be made for tax purposes between fixtures installed by tenants and those installed by the owner of real property, and it does not mean that lack of uniformity in classification of itself constitutes or necessarily results in prohibited discrimination. The opinion clearly recognizes that "It is the purpose of uniformity of taxation that all property in the state carry its fair bur-

den \* \* \*'" and that "to hold the doctrine of trade fixtures operative in a tax matter merely because property is claimed under two ownerships instead of one would be to discriminate in favor of one owner and against another owner of similar property, not only because of a possibility of a differential between the real and personal property tax rates for a given year but because many special assessment districts impose burdens on real property but not personal property." 29 Cal.2d at page 398, 175 P.2d at page 521.

[14] There is nothing in the language of section 5219 of the Revised Statutes of the United States, 12 U.S.C.A. § 548, which supports plaintiffs' contention that unjustified differences in the classification of property without accompanying disparity in tax consequences result in exceeding the authority to tax the real property of national banks "to the same extent, according to its value, as other real property is taxed." No cases so holding have been called to our attention, and the rule is apparently to the contrary. *Trademens Nat. Bank v. Oklahoma Tax Comm.*, 309 U.S. 560, 60 S.Ct. 688, 84 L.Ed. 947; *Amoskeag Sav. Bank v. Purdy*, 231 U.S. 373, 34 S.Ct. 114, 58 L.Ed. 274.

Finally, plaintiffs contend in support of the judgments that the taxation of bank vault doors and counterlines constituted prohibited double taxation. They argue that the "discriminatory" classification of banking fixtures as improvements resulted in imposition of local taxes upon property which is "presumed" to have been taxed by the state under Article XIII, section 16, subd. 1(a), of the Constitution and section 4a of the Bank and Corporation Franchise Tax Act, 3 Deering's Gen.Laws, Act 8488. Section 16, subd. 1(a) provides for a state tax on banks measured by their net income "in lieu" of all other taxes on such banks, "except taxes upon their real property." As previously noted, under section 4a, the state tax rate is computed according to a formula which takes into account the personal property taxes paid by nonbanking corporations. The only conceivable basis for presuming that a substituted state tax was paid on bank vault doors and counter-



lines is the assertion that the misclassification of other fixtures increased the rate under section 4a, an assertion which, we have observed, did not find support in the evidence.

We conclude that with regard to the general county and city taxes the misclassification of fixtures other than bank vault doors and counterlines did not result in the imposition of discriminatory tax burdens upon plaintiffs, and that under such circumstances the misclassification was a mere informality or irregularity which did not affect the validity of the general taxes levied upon the correctly classified fixtures installed in plaintiffs' buildings.

*Invalidity of special assessment  
district charges*

[15] The situation is different as to the special assessment district charge, and it is clear that plaintiffs were subjected to discriminatory tax burdens by reason of the misclassification of fixtures generally. The special district taxes were levied only upon realty, and, while payments were made on bank vault doors and counterlines properly classified as improvements, other similar property was completely relieved of the burden of those charges by being classified as personalty. It follows that the special district taxes were invalid to the extent that they represented a levy upon fixtures installed in plaintiffs' buildings.

There remains for consideration the nature and extent of the relief to which plaintiffs are entitled by reason of the invalidity of the special district taxes paid upon the vault doors and counterlines. Plaintiffs contend that since a substantial but uncertain amount on account of vault doors and counterlines was included with each building in a single assessment of improvements, the valid and invalid portions of the special district taxes levied thereon are incapable of separation, and that they are consequently entitled to recover the full amount of the tax. Defendants, on the other hand, contend that the alleged indivisibility of the assessments resulted from plaintiffs' failure to prove the value of the component parts of the property assessed, and that plaintiffs therefore are precluded from re-

covering any amount. In our opinion, neither contention states the proper rule to be followed in cases of this nature. Plaintiffs' contention would require defendants to refund the valid portion of the special district taxes attributable to the value of plaintiffs' buildings, and to pay interest thereon, which would be contrary to the policy that the public should not be deprived of revenue necessary for the performance of governmental functions. Defendants' contention is based upon the assumption that the courts will perform valuation or equalization functions which are vested exclusively in the local board of equalization.

[16-19] Actions to recover taxes paid under protest are equitable in nature. *Steele v. County of San Luis Obispo*, 152 Cal. 785, 93 P. 1020; *H. & W. Pierce, Inc., v. Santa Barbara County*, 40 Cal.App. 302, 180 P. 641. It is the established rule, based on the maxim that he who seeks equity must do equity, that a property owner seeking to challenge the validity of a tax must pay or offer to pay the portion of the tax to which the taxing authority is entitled in equity and good conscience. This rule is applicable in actions to recover taxes erroneously collected or paid under protest. *Otis v. Los Angeles County*, 9 Cal.2d 366, 70 P.2d 633; *Third & Broadway Bldg. Co. v. Los Angeles County*, 220 Cal. 660, 32 P.2d 377; *First Trust & Savings Bank v. Los Angeles County*, 206 Cal. 240, 273 P. 1066; *Steele v. County of San Luis Obispo*, supra; *MacKay v. San Francisco*, 113 Cal. 392, 45 P. 696; *De Fremery v. Austin*, 53 Cal. 380; *Bank of Mendocino v. Chalfant*, 51 Cal. 369; *Bandini Estate Co. v. Los Angeles County*, 28 Cal.App.2d 224, 82 P.2d 185; *DeMille v. County of Los Angeles*, 25 Cal. App.2d 506, 77 P.2d 905; *Associated Oil Co. v. County of Orange*, 4 Cal.App.2d 5, 40 P.2d 887; *H. & W. Pierce, Inc., v. Santa Barbara County*, supra. It also applies in proceedings to enjoin the collection or otherwise restrain enforcement of taxes. *Universal Consol. Oil Co. v. Byram*, 25 Cal.2d 353, 153 P.2d 746; *County of Los Angeles v. Ballerino*, 99 Cal. 593, 32 P. 581, 34 P. 329; *Esterbrook v. O'Brien*, 98 Cal. 671, 33 P. 765; *County of Los Angeles v. Ran-*

sohoff, 24 Cal.App.2d 238, 74 P.2d 828; Merchants' Trust Co. v. Hopkins, 103 Cal. App. 473, 284 P. 1072. In the first mentioned class of cases, the rule operates to limit recovery to the difference between the tax actually paid and that which properly should have been exacted, and to prevent recovery if the taxpayer paid only his fair and just proportion of taxes. The rule has been applied where the invalidity of the tax resulted, or was alleged to have resulted, from fraudulent overvaluation of a single item of property, *Universal Consol. Oil Co. v. Byram*, 25 Cal.2d 353, 153 P.2d 746; *Mackay v. San Francisco*, 113 Cal. 392, 45 P. 696; *County of Los Angeles v. Ballerino*, 99 Cal. 593, 32 P. 581, 34 P. 329; *Bandini Estate Co. v. County of Los Angeles*, 28 Cal.App.2d 224, 82 P.2d 185; *DeMille v. County of Los Angeles*, 25 Cal.App.2d 506, 77 P.2d 905; cf. *County of Los Angeles v. Ransohoff*, 24 Cal.App.2d 238, 74 P.2d 828, from application of an improper tax rate, *Otis v. Los Angeles County*, 9 Cal.2d 366, 70 P.2d 633, from technical defects in procedure, *Steele v. County of San Luis Obispo*, 152 Cal. 785, 93 P. 1020; *Esterbrook v. O'Brien*, 98 Cal. 671, 33 P. 765; cf. *First Trust & Savings Bank v. Los Angeles County*, 206 Cal. 240, 273 P. 1066, and from inclusion in a single assessment of taxable and nontaxable property. *Third & Broadway Bldg. Co. v. Los Angeles County*, 220 Cal. 660, 32 P.2d 377; *De Fremery v. Austin*, 53 Cal. 380; *Bank of Mendocino v. Chalfant*, 51 Cal. 369; cf. *Associated Oil Co. v. County of Orange*, 4 Cal.App.2d 5, 40 P.2d 887.

Under the authorities cited above, defendants should be permitted to retain the portion of the special district taxes allocable to the value of plaintiffs' improvements minus the value of the bank vault doors and counterlines, and plaintiffs' recovery should accordingly be limited to an amount representing the tax on the latter items. Plaintiffs argue, however, that the established rule, which they style the "equitable offset" doctrine, is inapplicable where, as here, the included fixtures were not separately valued, citing *San Pedro, L. A. & S. L. R. Co. v. Los Angeles*, 180 Cal. 18, 179 P. 393. They further argue that the rule was repu-

diated by this court in *Universal Consol. Oil Co. v. Byran*, 25 Cal.2d 353, 153 P.2d 746. Neither argument finds support in the cases.

[20] In the *San Pedro* case, the entire tax was ordered refunded where a break-water had been included in a single assessment of improvements with a "fill" which admittedly was not an improvement. There, however, the defendant had conceded on appeal that "the judgment should be sustained in so far as the assessment upon improvements is concerned." 180 Cal. at page 27, 179 P. at page 397. For that reason, as stated in *Esterbrook v. O'Brien*, 98 Cal. 671, 674, 33 P. 765, 766, "no question was made as to the proper remedy." On the other hand, in *Third & Broadway Bldg. Co. v. Los Angeles County*, 220 Cal. 660, 32 P.2d 377. Where recovery was sought of taxes paid to the county on a building occupied in part by a public utility whose operative property was not subject to local taxation, this court affirmed a judgment for plaintiff based upon an apportionment of the tax between that part of the building operatively used by the utility and the balance of the structure. In this connection, it might also be noted that while cases of fraudulent overvaluation involve a single "indivisible" assessment, recovery therein is limited to the inequitable portion of the tax. *Universal Consol. Oil Co. v. Byram*, 25 Cal.2d 353, 153 P.2d 746; *Bandini Estate Co. v. County of Los Angeles*, 28 Cal. App.2d 224, 82 P.2d 185; cf. *Mackay v. San Francisco*, 113 Cal. 392, 45 P. 696; *DeMille v. County of Los Angeles*, 25 Cal. App.2d 506, 77 P.2d 905.

[21] *Universal Consol. Oil Co. v. Byram*, 25 Cal.2d 353, 153 P.2d 746, did not alter the rule that one who invokes the aid of equity to recover or defend against an invalid tax must pay the amount of the tax morally and justly due. It did, however, prescribe the procedure to be followed in determining the amount of recovery or payment where, as in the present cases, such determination is dependent upon an exercise of valuation functions and does not involve mere mathematical computations. That was a case in which plaintiffs sought to enjoin the collection of taxes on the

ground of excessive valuations after their applications for reductions of assessments had been denied by the county board of equalization. Plaintiffs deposited with the court an amount equal to their tax liability on the challenged assessments as a condition to the requested relief. The trial court, having found in plaintiffs' favor on all material issues, made reductions in the valuations, computed taxes thereon at the stipulated rate, and ordered payment to defendant of the amount thus determined to be due as well as the return to plaintiffs of the balance of the deposited funds. On appeal, this court held that considerations of due process justified avoidance of the board of equalization's rulings but concluded that the trial court should have remanded the cases to the board for further consideration and action. It so directed the trial court and ordered it to retain the funds on deposit pending determination of equalization matters by the board, following which the funds were to be disbursed accordingly. Upon analogous reasoning, when in the present cases the trial court concluded that with respect to the special assessment district charges the taxing authorities discriminated against plaintiffs by singling out banking fixtures for assessment as improvements and thereby subjecting them to special district taxes which were not levied upon like property of others similarly situated, it should have ordered the cases resubmitted to the board of equalization for determination of the value of plaintiffs' buildings without the included fixtures, retaining jurisdiction of the parties and subject matter until the appropriate judgment could finally be rendered in conformity with the terms of the board's rulings.

#### *Costs*

[22] Finally, defendants complain of the trial court's action in allowing certain items as costs to plaintiffs over defendants' objections. The disputed items consisted of transcripts of the hearings before the board of equalization and various photographs, all of which were introduced as exhibits at the trial. The charges for the transcripts appear on their face to be proper and necessary. Cf. *Whitaker v. Moran*, 23 Cal.App.

758, 139 P. 901; Code Civ.Proc., § 1094.5. The photographs, however, were apparently obtained at the sole instance of plaintiffs for the purpose of showing the alleged discriminatory assessment practices, and, in our opinion, the expense thereof is not a proper item of costs. *Moss v. Underwriters' Report, Inc.*, 12 Cal.2d 266, 83 P.2d 503; *Crabtree v. Houghton*, 191 Cal. 33, 214 P. 846; *Bathgate v. Irvine*, 126 Cal. 135, 58 P. 442, 77 Am.St.Rep. 158; *Miller v. Highland Ditch Co.*, 91 Cal. 103, 27 P. 536.

The judgments are reversed with directions to the trial court to proceed in accordance with the views expressed herein.

SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., and VALLÉE, Justice pro tem., concur.

Rehearing denied; VALLÉE, Justice pro tem., participated in place of TRAYNOR, J.



35 Cal.2d 319

#### **SECURITY-FIRST NAT. BANK v. LOS ANGELES COUNTY et al.**

L. A. 20963.

Supreme Court of California, in Bank.

May 2, 1950.

Rehearing Denied June 1, 1950.

Security-First National Bank, a national banking association, sued County of Los Angeles and others, to recover taxes paid under protest. The Superior Court, Los Angeles County, Joseph W. Vickers, J., rendered a judgment adverse to defendants and defendants appealed. The Supreme Court, Gibson, C. J., held that failure of plaintiff to apply to board of equalization for correction of assertedly erroneous assessment precluded plaintiff from maintaining the action.

Judgment reversed.

#### **I. Administrative law and procedure ◊229 Taxation ◊451**

Generally a taxpayer seeking judicial relief from an erroneous assessment must have exhausted his remedies before the administrative body empowered initially to correct the error.



**2. Administrative law and procedure** Ⓒ229  
**Taxation** Ⓒ451

A taxpayer seeking judicial relief from an erroneous assessment need not have exhausted his remedies before the administrative body empowered initially to correct the error where the attempted assessment is a nullity because the property is either tax exempt or outside the jurisdiction.

**3. Administrative law and procedure** Ⓒ229  
**Taxation** Ⓒ543(2)

Action to recover special assessment district charges could not be maintained where plaintiff had not resorted to board of equalization for relief, notwithstanding asserted error was one in classification of property and tax was assailed as being discriminatory in violation of constitutional mandates or statute. 12 U.S.C.A. § 548.

**4. Taxation** Ⓒ348

The fact that improvements to realty similar to plaintiff's has been systematically classified for tax purposes as personalty and thereby relieved of burden of special assessment district taxes would ordinarily require that plaintiff also be excused from paying such taxes.

**5. Administrative law and procedure** Ⓒ229,  
386**Taxation** Ⓒ98, 543(2)

Plaintiff's bank vault doors and counterlines were taxable in city, county and special assessment district in which they were located, and plaintiff was required to apply to board of equalization for relief before bringing action to recover taxes paid under protest, and vault doors and counterlines were not "tax exempt" so as to relieve plaintiff of necessity of applying to board of equalization for relief before bringing action, because similar property of others had been systematically misclassified as personalty and therefore relieved of burden of a special assessment district taxes, which circumstance would ordinarily require that plaintiff also be excused from paying such taxes.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Tax Exempt".

Harold W. Kennedy, County Counsel, Gordon Boller, Deputy County Counsel, A. Curtis Smith, Asst. County Counsel, Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Leon Thomas David, Asst. City Atty., Louis A. Babior and H. H. MacDonald, Deputy City Attys., Los Angeles, amici curiae on behalf of appellants.

Holbrook & Tarr, W. Sumner Holbrook, Jr., Freda B. Walbrecht and Francis H. O'Neill, Los Angeles, for respondent.

GIBSON, Chief Justice.

This case differs from *Simms v. County of Los Angeles*, Cal.Sup., 217 P.2d 936, in that in the present case plaintiff did not apply to the board of equalization for correction of the assertedly erroneous assessment. The trial court held that plaintiff was not thereby precluded from maintaining this action for recovery of taxes paid under protest. We believe the trial court erred in so holding.

[1-3] It is the general rule that a taxpayer seeking judicial relief from an erroneous assessment must have exhausted his remedies before the administrative body empowered initially to correct the error. *West Publishing Co. v. McColgan*, 27 Cal. 2d 705, 166 P.2d 861; *Dawson v. County of Los Angeles*, 15 Cal.2d 77, 98 P.2d 495; *Luce v. City of San Diego*, 198 Cal. 405, 245 P. 196; *People v. Keith Railway Equipment Co.*, 70 Cal.App.2d 339, 161 P. 2d 244; *DeMille v. County of Los Angeles*, 25 Cal.App.2d 506, 77 P.2d 905; *Los Angeles Shipbuilding & Dry Dock Corp. v. Los Angeles County*, 22 Cal.App.2d 418, 71 P.2d 282. An exception is made when the attempted assessment is a nullity because the property is either tax exempt or outside the jurisdiction. *Brenner v. Los Angeles*, 160 Cal. 72, 116 P. 397; see *Kern River Co. v. County of Los Angeles*, 164 Cal. 751, 755, 130 P. 714; cf. *St. John's Church v. Los Angeles County*, 5 Cal.App. 2d 235, 42 P.2d 1093. But resort to the board of equalization is not rendered unnecessary by the fact that, as in the present case, the error is one in the classifi-

cation of property, *California Domestic Water Co. v. County of Los Angeles*, 10 Cal.App. 185, 101 P. 547; see *Kaiser Co. v. Reid*, 30 Cal.2d 610, 630, 184 P.2d 879, and the tax is assailed as being discriminatory in violation of constitutional mandates, *Luce v. City of San Diego*, 198 Cal. 405, 245 P. 196; *Dawson v. County of Los Angeles*, 15 Cal.2d 77, 98 P.2d 495; *DeMille v. County of Los Angeles*, 25 Cal. App.2d 506, 77 P.2d 905, or section 5219 of the Revised Statutes of the United States, 12 U.S.C.A. § 548. *First Nat. Bank of Greeley v. Board of County Com'rs*, 264 U.S. 450, 44 S.Ct. 385, 68 L.Ed. 784; *Stanley v. Board of Supervisors*, 121 U.S. 535, 7 S.Ct. 1234, 30 L.Ed. 1000.

[4, 5] Plaintiff contends, however, that its bank vault doors and counterlines were "exempt" from taxation under constitutional principles, and that consequently prior application to the board of equalization was not a prerequisite to the maintenance of this action. The contention cannot be sustained. The vault doors and counterlines admittedly were located within the county, city and district in which they were assessed. Clearly, they were property of a nature taxable by defendants. *Trabue Pittman Corp. v. County of Los Angeles*, 29 Cal.2d 385, 175 P.2d 512. The fact that similar property of others had been systematically misclassified as personalty and therefore relieved of the burden of special assessment district taxes would ordinarily require that plaintiff also be excused from paying such taxes. *Simms v. County of Los Angeles*, supra. It does not follow, however, that plaintiff's vault doors and counterlines were tax exempt as claimed. A somewhat similar problem was presented in *Los Angeles Shipbuilding & Dry Dock Corp. v. Los Angeles County*, 22 Cal.App. 2d 418, 71 P.2d 282. That case involved the assessment of a leasehold interest in tidelands owned by the city. Plaintiff contended that since the leasehold had no taxable value, the tax was one on nonexistent property and resort to the board of equalization was not necessary. In rejecting that contention, the court there said, 22 Cal.App.2d at pages 423-424, 71 P.2d at

page 285: "But it does not follow that if the property belongs to a class which is subject to taxation, it is nonexistent property because under the peculiar circumstances existing it is without taxable value. \* \* \*" Thus, in the present case, although plaintiff would have been entitled to recover a discriminatory tax upon its vault doors and counterlines, such property was nevertheless taxable. In fact, the board of equalization could have eliminated the discrimination by directing the assessor to enter the misclassified fixtures owned by others as real property upon the assessment roll, Revenue & Taxation Code, § 1611, in which case plaintiff would not be excused from paying, or entitled to recover, the special district taxes. Plaintiff's failure to make timely application for relief before the board precluded the adoption of that means of equalization.

The judgment is reversed.

SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., and VALLÉE, Justice pro tem, concur.

Rehearing denied; VALLÉE, Justice pro tem., participated in place of TRAYNOR, J.



35 Cal.2d 323

**SECURITY-FIRST NAT. BANK v. BOARD  
OF SUP'RS OF LOS ANGELES  
COUNTY et al.  
L. A. 20903.**

Supreme Court of California, in Bank.

May 2, 1950.

Rehearing Denied June 1, 1950.

Security-First National Bank, a national banking association, sued the Board of Supervisors of the County of Los Angeles and others for writ of certiorari to review and annul action of board of equalization in refusing to reduce petitioner's assessments by eliminating therefrom the value of bank vault doors and counterlines, or for writ of mandate compelling board of equalization to order county assessor to cancel assertedly discriminatory assessments and to enter new assessments, and for writ of man-

date ordering Board of Supervisors to cancel the assessments and taxes subsequently levied thereon on ground that they were void. The Superior Court, Los Angeles County, Joseph W. Vickers, J., rendered a judgment adverse to plaintiff and plaintiff appealed. The Supreme Court, Gibson, C. J., held that permitting introduction upon application for writ of mandate of evidence which was not presented before board of equalization, and which tended to show non-existence of alleged discriminatory assessments, was not prejudicial to petitioner, and that mandate was not available because petitioner had an adequate remedy at law.

Judgment affirmed.

### 1. Mandamus ☞187(9)

Where trial judge had concluded that no discrimination was shown when review was limited to proceedings before board of equalization to obtain relief from allegedly discriminatory taxes, admission on application for mandate ordering board of supervisors to cancel assessment and taxes subsequently levied thereon under statute on ground that they were void, of evidence not presented before board of equalization, and which tended to show nonexistence of discrimination, was not prejudicial to petitioner. Revenue and Taxation Code, § 4986.

### 2. Mandamus ☞3(4)

Where petitioner had adequate remedy at law by action for refund of taxes paid under protest, writ of mandate ordering board of supervisors to cancel assessments and taxes levied thereunder on ground that they were void was not available to petitioner. Revenue and Taxation Code, § 4986.

1. "§ 1611. After five days succeeding the time when notice of the date when the matter will be investigated is sent by the clerk of the county board to all persons interested, the county board may direct the assessor to:

"(a) Assess any taxable property other than State assessed property that has escaped assessment.

"(b) Change the amount, number, quantity, or description of property on the local roll.

"(c) Make and enter new assessments, at the same time cancelling previous

Holbrook & Tarr, W. Sumner Holbrook, Jr., Freda B. Walbrecht and Francis H. O'Neill, Los Angeles, for appellant.

Harold W. Kennedy, in pro. per., County Counsel, Gordon Boller, Deputy County Counsel, A. Curtis Smith, Asst. County Counsel, Ray L. Chesebro, in pro. per., City Atty., Leon Thomas David, Asst. City Atty., Hugh H. MacDonald and Louis A. Babior, Deputy City Attys., Los Angeles, for respondents.

### GIBSON, Chief Justice.

This is an appeal from a judgment denying relief against allegedly discriminatory assessments for the 1947 tax year on buildings owned and occupied by a national bank. The action was brought in the court below upon the theory that the discriminatory assessment practices complained of and found to exist during the 1941-1946 period in *Simms v. County of Los Angeles*, Cal.Súp., 217 P.2d 936, were continued in 1947 and rendered invalid the assessments for that year of petitioner's buildings. Relief was sought in the alternative as follows: (1) writ of certiorari to review and annul the action of the board of equalization in refusing to reduce petitioner's assessments by eliminating therefrom the value of bank vault doors and counterlines; (2) writ of mandate compelling the board of equalization to order the assessor to cancel the assertedly discriminatory assessments and to enter new assessments under section 1611 of the Revenue and Taxation Code<sup>1</sup>; and (3) writ of mandate ordering the board of supervisors to cancel the assessments, and any taxes subsequently levied thereon, under section 4986<sup>2</sup> of the

entries, when any assessment made by him is deemed by the county board so incomplete as to render doubtful the collection of the tax."

2. "§ 4986. All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be canceled by the auditor on order of the board of supervisors with the written consent of the district attorney if it was levied or charged:

"(a) More than once.

"(b) Erroneously or illegally.

"(c) On a portion of an assessment



Revenue & Taxation Code on the ground that they were void.

The record of the proceedings before the board of equalization was introduced at the trial, and additional evidence which tended to show the general assessment practice followed in the County of Los Angeles was admitted on the application for a writ of mandate under section 4986. In connection with the applications for certiorari and for mandate to compel cancellation of the assessments under section 1611, the trial court considered itself limited to a review of the record made before the board of equalization and concluded therefrom that there had been no discrimination during 1947. The court also reached the same conclusion on the basis of the expanded showing which it permitted in connection with the application for a writ of mandate to compel the board of supervisors to cancel the assessments under section 4986.

Petitioner's principal contention is that the trial court's conclusion that discrimination was not shown is inconsistent with the decision reached by the same trial court in *Simms v. County of Los Angeles*, supra. Petitioner argues that the record in this case is substantially the same as that made in the *Simms* case, and that the evidence which showed the banks or their landlords had been discriminated against between 1941 and 1946 also proved the existence of discriminatory assessments during 1947. The evidence in the present case, however, is sufficiently different from that introduced in the *Simms* case to justify the divergent conclusions reached by the trial court.

in excess of the cash value of the property by reason of the assessor's clerical error.

"(d) On improvements when the improvements did not exist on the lien date.

"(e) On property acquired after the lien date by the State or by any county, city, school district or other political subdivision and because of this public ownership not subject to sale for delinquent taxes.

"(f) On property acquired after the lien date by the United States of America if such property upon such acquisition becomes exempt from taxation

In both cases there was evidence that various specific articles of machinery, equipment and trade fixtures, as illustrated by a series of photographs, were in fact assessed as personal property. In the *Simms* case, however, it was stipulated that it was the general practice of the assessor to classify as personalty other property which was similar to that depicted. This stipulation established for the purpose of the *Simms* case that the articles shown in the photographs were much more than mere isolated examples which might not be typical of the assessment practice in Los Angeles County. In the present case, on the other hand, respondents instead of making that stipulation, have contended that the classification made of the property depicted in the photographs was not representative of the general practice followed in assessing similar property, and the trial court found that petitioner had failed to establish what was the general practice of the assessor in 1947 in that regard.

Another material difference between the record in the present case and that in the *Simms* case is that it was proved here that the assessor, early in 1947, reclassified certain trade fixtures which previously had been assessed as personalty. He did so in order to comply with the decision in *Trabue Pittman Corp. v. County of Los Angeles*, 29 Cal.2d 385, 175 P.2d 512, rendered in December, 1946, which held that such fixtures should be assessed as realty. Since the time and personnel available did not permit complete review of all personal property assessments, the assessor selected for reclassification about 10,000 tax statements.

under the laws of the United States.

\* \* \* \* \*

'Property acquired' as used in this section shall include street easements and shall also include other easements for public use where the residual estate remaining in private ownership has a nominal value only.

"No cancellation under subparagraphs (b), (e), (f), \* \* \* of this section shall be made in respect of all or any portion of any tax, or penalties or costs attached thereto, collectible by county officers on behalf of a municipal corporation without the written consent of the city attorney thereof."

This selection included all tax statements covering personalty in an amount of \$10,000 or more which indicated that fixtures were included therein. On 7,500 of the statements, property of the stipulated value of \$6,000,000, which formerly had been assessed as personalty, was reclassified as improvements. These facts tend to show, and the trial court found, that the assessor adopted a reasonable reclassification procedure which was designed to eliminate the more serious errors existing prior to 1947. Any inference that the remaining uncorrected errors formed part of an intentional or systematic scheme of discrimination was thus negated. See *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497; 1 *Cooley, Taxation*, 4th Ed.1924, p. 636.

It cannot be said, therefore, that the trial court reached inconsistent results on substantially identical records.

[1,2] Petitioner also contends that the trial court erred in admitting evidence which previously had not been presented before the board. As noted above, upon the application for a writ of mandate under section 4986, the court permitted both parties to expand the showing made in the administrative hearings. Respondents' evidence, of which petitioner complains, related to the classification and assessment of the bulk of the improvements in the county made either by the assessor or by the State Board of Equalization, and further supported the trial court's conclusion that there had been no proof of discrimination. We are satisfied, however, that the error, if any, was not prejudicial. Since the trial court concluded that no discrimination was shown when the review was limited to the record of the proceedings before the board, it is unlikely that the court would have reached a different result upon the application for mandate under section 4986 if the evidence complained of had not been admitted. Moreover, the writ of mandate is not available to compel the board of supervisors to act under section 4986, because petitioner had an adequate remedy at law by an action for refund, and the judgment denying the writ could be affirmed on this ground. *Vista Irr. Dist. v. Board of Super-*

*visors*, 32 Cal.2d 477, 196 P.2d 926; *Sherman v. Quinn*, 31 Cal.2d 661, 192 P.2d 17.

The judgment is affirmed.

**SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., and VALLÉE, Justice pro tem., concur.**

Rehearing denied; **VALLÉE, Justice pro tem.,** participated in place of **TRAYNOR, J.**



35 Cal.2d 363

**PHELAN v. SUPERIOR COURT IN AND FOR CITY & COUNTY OF SAN FRANCISCO et al.**

**S. F. 17884.**

Supreme Court of California, in Bank.

May 9, 1950.

Proceeding by William Phelan against the Superior Court of the State of California, in and for the City and County of San Francisco, and another, for a writ of mandate to compel the court to strike from its records that portion of an order which reduced a judgment. The Supreme Court, **Gibson, C. J.**, held that a special order after final judgment is appealable regardless of whether it is void, and regardless of whether it is provided for by any of the prescribed methods of procedure.

Alternative writ discharged, and peremptory writ denied.

**Carter, J.**, dissented.

For prior opinion, see 199 P.2d 739.

**1. Mandamus ☞3(1), 168(2)**

A writ of mandate will not be issued if another adequate remedy is available to petitioner; and burden is on petitioner to show that he did not have such a remedy. Code Civ.Proc. § 1086.

**2. Appeal and error ☞112**

Generally, where the law allows an appeal from a judgment or order it is appealable even though void. Code Civ.Proc. § 963, subd. 2.

**3. Appeal and error ☞112**

A special order after final judgment is appealable regardless of whether it is void

and regardless of whether it is provided for by any of the prescribed methods of procedure. Code Civ.Proc. § 963, subd. 2.

#### 4. Appeal and error ⇨82(1)

An order reducing a judgment in amount was a special order after final judgment and as such was appealable. Code Civ.Proc. § 963, subd. 2.

#### 5. Mandamus ⇨4(1)

Where an order is not appealable but is reviewable only upon appeal from a subsequent judgment, factors such as expense of proceeding with a trial, and prejudice resulting from delay, may operate to make that remedy inadequate and justify issuance of a writ of mandate. Code Civ. Proc. § 1086.

#### 6. Mandamus ⇨4(1)

Where there is a right to an immediate review by appeal and that remedy is almost as speedy as a writ of mandate proceeding, appeal should be considered adequate unless petitioner for a writ of mandate can show some special reason why it is rendered inadequate by particular circumstances of his case. Code Civ. Proc. §§ 963, 1086.

#### 7. Mandamus ⇨154(2)

Allegation that petitioner for a writ of mandate had no other plain, speedy or adequate remedy, and that unless writ was issued he would suffer great and irreparable harm and injury was insufficient, without reference to any facts, to sustain petitioner's burden of showing that remedy of appeal was inadequate. Code Civ.Proc. §§ 963, 1086.

#### 8. Mandamus ⇨4(1)

Fact that petitioner for writ of mandate has lost his remedy by appeal will not alone justify resort to a writ mandate in absence of a sufficient excuse for failure to take an appeal. Code Civ.Proc. §§ 963, 1086.

#### 9. Mandamus ⇨4(1)

Where uncertainty had existed with respect to appealability of order in question, and Supreme Court had held that an appeal was not adequate in that type of a

case, a writ of mandate would not be denied because of petitioner's failure to appeal. Code Civ.Proc. §§ 963, 1086.

#### 10. Mandamus ⇨14(1)

Before seeking a writ of mandate in an appellate court to compel action by trial court, a party should first request the lower court to act, and if such request has not been made, the writ ordinarily will not issue unless it appears that the demand would have been futile.

#### 11. Judgment ⇨497(1), 518

Where a writ of mandate is sought on the ground that an order is void on its face, the attack is collateral or at least is governed by rules relating to collateral attack, and in determining whether the order is void, court is limited to a consideration of matters which appear in the judgment roll or are admitted by the parties.

#### 12. Judgment ⇨318

An order modifying a prior judgment by reducing it in amount is proper if made with consent of the parties, and such consent need not be set forth in the order or elsewhere in the judgment roll. Code Civ. Proc. § 670.

#### 13. Judgment ⇨327

Although it is usual for court in reducing amount of a judgment to make a conditional order providing either that a new trial will be denied if part of the judgment is remitted or will be granted unless there is a consent to such reduction, order need not be so conditioned if consent to reduction has already been given.

#### 14. Judgment ⇨470

In collateral attack, every presumption is in favor of validity of judgment or order of a court of general jurisdiction, and any condition of fact consistent with validity and not affirmatively contradicted by the judgment roll will be presumed to have existed.

#### 15. Judgment ⇨470

On collateral attack on a judgment it will be presumed when necessary that parties consented to court's action or waived objection thereto.



16. Mandamus ☞53

Where a plaintiff failed to appeal from an order reducing a judgment in amount, and thereafter sought a writ of mandate for purpose of review, but there was nothing in the judgment roll or admitted by the parties which established invalidity of the order, writ could not be granted on ground that order was void on its face.

Hallinan, MacInnis & Zamloch and Ralph Wertheimer, San Francisco, for petitioner.

Joseph F. Murphy, San Francisco, for respondents.

GIBSON, Chief Justice.

Petitioner recovered a judgment against George O'Brien in the sum of \$2,000 pursuant to a jury's verdict in an action for personal injuries. On O'Brien's motion for a new trial the following order was made: "Motion for new trial denied. Judgment reduced to \$1,250.00." No appeal was taken from either the judgment or the order, and, after the time for appeal had expired, petitioner instituted this proceeding for a writ of mandate to compel respondent court to strike from its records that portion of the order which reduced the judgment, contending that the order, or the portion reducing the judgment, is void and beyond the jurisdiction of the court.

[1] The first question to be determined is whether petitioner had another adequate remedy. Section 1086 of the Code of Civil Procedure provides that the writ of mandate "must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law."<sup>1</sup> Although the statute does not expressly forbid the issuance of the writ if another adequate remedy exists, it has long been established as a general rule that the writ will not be issued if another such remedy was available to the petitioner. *Irvine v. Gibson*, 19

Cal.2d 14, 118 P.2d 812; *People ex rel. Smith v. Olds*, 1853, 3 Cal. 167, 58 Am.Dec. 398. The burden, of course, is on the petitioner to show that he did not have such a remedy.

An appeal is the usual course open to a litigant who believes that the trial court has committed error. The order reducing the judgment from \$2,000 to \$1,250 was a special order after final judgment, and as such it would ordinarily be appealable under subdivision 2 of section 963 of the Code of Civil Procedure which provides that an appeal may be taken "from any special order made after final judgment." See *Balaam v. Perazzo*, 211 Cal. 375, 381, 295 P. 330. It appears, however, that there are conflicting lines of cases, none of which has been overruled, upon the question whether an appeal will lie from a special order after final judgment where the court was without power to make the order.<sup>2</sup> Since petitioner claims that the order here is void, we must decide whether it was reviewable by appeal.

[2] It has long been the general rule in this state that where the law allows an appeal from a judgment or order, it is appealable even though void. *Shrimpton v. Superior Court*, 22 Cal.2d 562, 139 P.2d 889; *Ivory v. Superior Court*, 12 Cal.2d 455, 459-461, 85 P.2d 894; *Casner v. Daily News Co.*, 12 Cal.2d 402, 84 P.2d 1032; *Ewing v. Richvale Land Co.*, 176 Cal. 152, 167 P. 876; *Hildebrand v. Superior Court*, 173 Cal. 86, 159 P. 147; *Anglo-Californian Bank v. Superior Court*, 153 Cal. 753, 96 P. 803; *White v. Superior Court*, 110 Cal. 54, 57, 42 P. 471; *Stoddard v. Superior Court*, 108 Cal. 303, 41 P. 278; *Dyerville Mfg. Co. v. Heller*, 102 Cal. 615, 36 P. 928; *In re Bullock's Estate*, 75 Cal. 419, 17 P. 540; *Livermore v. Campbell*, 52 Cal. 75.

Prior to 1927 special orders made after final judgment were treated as being within the scope of this general rule. *White v. Superior Court*, 110 Cal. 54, 42 P. 471;

1. Section 1103 of the Code of Civil Procedure contains a similar provision with respect to the writ of prohibition.

2. The cases dealing with this question have apparently used interchangeably

the terms "void," "invalid," "in excess of jurisdiction," and "without authority," and it will not be necessary to distinguish them here.

*Stoddard v. Superior Court*, 108 Cal. 303, 41 P. 278, order held appealable either as an order after final judgment or as an injunction; *Livermore v. Campbell*, 52 Cal. 75; *Dyerville Mfg. Co. v. Heller*, 102 Cal. 615, 36 P. 928 (no discussion); *Estate of Duns-muir*, 149 Cal. 67, 84 P. 657 (no discussion). In these cases no attempt was made to distinguish one type of void order from another, and the *White* and *Livermore* cases flatly refused to consider whether the trial court had jurisdiction, denying certiorari upon the ground that in any event an appeal was available. In 1927, however, *Stanton v. Superior Court*, 202 Cal. 478, 261 P. 1001, without citing the prior decisions, departed from the general rule and commenced a new line of cases which deny the right to appeal from certain types of void special orders made after final judgment. There the trial court had granted motions to vacate judgments in favor of defendants in two actions, and subsequently it signed two new judgments likewise in favor of defendants but containing more limited provisions. This court granted a writ of certiorari annulling the new judgments and the orders vacating the original judgments. It held that the orders and subsequent judgments were void because (1) they were not within the inherent power of the trial court, (2) there was no basis for a proceeding under section 473 of the Code of Civil Procedure, and (3) the proceedings were not authorized by section 663 of that code.

In answer to the contention that certiorari would not lie because an appeal was available under sections 663a and 963 of the Code of Civil Procedure the court in the *Stanton* case said 202 Cal. at pages 488-489, 261 P. at pages 1004: "As above stated, these purported orders and subsequent purported judgments are hybrids in our procedure. Orders and judgments which fail to conform to any of the rules of procedure cannot be said to be appealable under section 663a. \* \* \* We are also satisfied that neither of these orders or subsequent judgments can be said to be special orders made after final judgment within the meaning of section 963 of the Code of Civil Procedure, *because such section contemplates*

*orders given by a court having jurisdiction to act.*" (Italics added.) The court incorrectly cited *Diamond v. Superior Court*, 189 Cal. 732, 739, 210 P. 36, as being similar, since the order involved in that case was held not appealable for the reason that an amendment to the code had terminated the right to appeal. The court also cited *Dolan v. Superior Court*, 47 Cal.App. 235, 190 P. 469, and *Prothero v. Superior Court*, 196 Cal. 439, 238 P. 357, but these cases did not consider the rule that certiorari will not lie if an appeal is available.

Since the *Stanton* decision in 1927 some cases have followed it, some have distinguished and limited it, others have seemingly ignored it, and a number have cited and followed the older line of cases. Cases which have either followed it or cited it with approval are: *Whitley v. Superior Court*, 18 Cal.2d 75, 82, 113 P.2d 449; *Treat v. Superior Court*, 7 Cal.2d 636, 62 P.2d 147; *Lankton v. Superior Court*, 5 Cal.2d 694, 696-697, 55 P.2d 1170 (prohibition case); *People v. Superior Court*, 4 Cal.2d 136, 47 P.2d 724; *Carlson v. Superior Court*, 2 Cal. 2d 17, 22, 38 P.2d 149, may be distinguishable on ground order not appealable because not a final judgment; *Felton Chemical Co. v. Superior Court*, 33 Cal.App.2d 622, 92 P.2d 684, (no discussion); *Quevedo v. Superior Court*, 131 Cal.App. 698, 21 P.2d 998; *Delmuto v. Superior Court*, 119 Cal. App. 590, 6 P.2d 1007. The *Whitley* and *Treat* cases contain very broad language indicating that certiorari will lie to annul an order after final judgment whenever the order is made contrary to the authority conferred by a procedural statute or whenever the trial court lacked the power to act as it did. See 18 Cal.2d at page 82, 113 P.2d 449; 7 Cal.2d at page 638, 62 P.2d 147.

The *Stanton* case was distinguished in *Shrimpton v. Superior Court*, 22 Cal.2d 562, 566-567, 139 P.2d 889, 891, which held that an order "rendered in pursuance of section 473" was appealable, and not reviewable by certiorari, whether or not it was invalid, and the court in effect limited the *Stanton* rule to orders which were "not in pursuance of any of the prescribed methods of procedure as defined by the Code of Civil Pro-

cedure." See also *Ivory v. Superior Court*, 12 Cal.2d 455, 85 P.2d 894. The *Stanton*, *Whitley*, *Treat*, and *Lankton* cases were distinguished without approval or disapproval.

A number of cases, without citing the *Stanton* decision, have cited and followed the older cases and have applied the general rule that an appeal will lie from a void order or judgment. Some of these are directly contrary to the *Stanton* rule, and some may be contrary depending upon whether, after careful analysis, it can be said that they fall within the distinction set forth in the *Shrimpton* case. It is unnecessary at this time to do more than list them as examples of the confusion caused by the existence of the two lines of cases. See *Casner v. Superior Court*, 23 Cal.App.2d 730, 74 P.2d 298, followed, as being law of the case, but with additional citation of the older cases, in *Casner v. Daily News Co.*, 12 Cal.2d 402, 84 P.2d 1032; *Colby v. Pierce*, 15 Cal.App.2d 723, 59 P.2d 1046; *Drapeau v. Superior Court*, 5 Cal.App.2d 32, 42 P.2d 728; *Coley v. Superior Court*, 89 Cal.App. 330, 264 P. 1110; see also *Erickson v. Municipal Court*, 219 Cal. 737, 740, 29 P.2d 192; *Christie v. Superior Court*, 218 Cal. 423, 424, 23 P.2d 757.

The *Stanton* case clearly constituted a departure from the general rule that an appeal may be taken from a void order or judgment, and the criticism which the decision has received seems justified. Both final judgments and special orders after final judgment are made appealable by similar language in section 963 of the Code of Civil Procedure, and no condition that the trial court must have jurisdiction to act is set forth with respect to the appealability of either type of decision. As we have seen, it is undisputed that final judgments are appealable, even though void, and there is no more reason for applying the *Stanton* rule to void special orders after final judgment than to void final judgments. (See 31 Cal.L.Rev. 576.)

The practical consequences of the *Stanton* rule are even more unfortunate than

the defects in its legal theory. It has led to considerable confusion, and while it has been followed in some cases, others have distinguished it or ignored it. The limitation adopted in *Shrimpton v. Superior Court*, 22 Cal.2d 562, 139 P.2d 889, is very difficult to apply and in reality adds to the confusion. Under these cases, a litigant would not be safe, in seeking review of a special order after final judgment, unless he both appealed and applied for certiorari or other extraordinary writ, because if it appears that the order is merely erroneous, an application for certiorari will be dismissed *Howard v. Superior Court*, 25 Cal.2d 784, 154 P.2d 849, but if the error turns out to be of the type that renders the order void because not provided for by "any of the prescribed methods of procedure", an appeal will be dismissed. See *Shrimpton v. Superior Court*, 22 Cal.2d 562, 564-567, 139 P.2d 889, and cases there cited. At best the rule is a trap for unwary counsel and places a needless burden upon the appellate courts.

[3, 4] We hold that a special order after final judgment is appealable regardless of whether it is void and regardless of whether it is provided for by any of the prescribed methods of procedure. *Stanton v. Superior Court*, 202 Cal. 478, 261 P. 1001, and the cases following it are overruled.

[5, 6] We must next determine whether the right of appeal furnished petitioner with a plain, speedy and adequate remedy. Where an order is not appealable, but is reviewable only upon appeal from a subsequent judgment, various factors, such as expense of proceeding with a trial and prejudice resulting from delay, may operate to make that remedy inadequate. Where, however, as here, there is a right to an immediate review by appeal, that remedy is almost as speedy as a writ proceeding, under present practice, and should be considered adequate unless petitioner can show some special reason why it is rendered inadequate by the particular circumstances of his case.<sup>3</sup> See *Lincoln v. Superior Court*, 22 Cal.2d 304, 311, 139 P.2d 13.

3. There may be some difference in time under present practice between the cal-

endarings of writs and appeals since it may take longer for records and briefs



[7,8] Although petitioner alleges that he had "no other plain, speedy, or adequate remedy" and that unless a writ of mandate is issued he "will suffer great and irreparable harm and injury," it is obvious that such general allegations, without reference to any facts, are not sufficient to sustain his burden of showing that the remedy of appeal would be inadequate. *Lincoln v. Superior Court*, 22 Cal.2d 304, 311, 139 P.2d 13. The precise question which petitioner is raising here, i. e., the validity of the reduction in the amount of recovery, could have been raised on an appeal from the portion of the order modifying the judgment. Petitioner is not in a position to claim that the remedy of immediate review by appeal is less expeditious than that of mandate because he made no attempt to pursue that remedy, but, instead, waited until after the time in which he could take an appeal had expired and then applied for this writ. Nor will the fact that petitioner has lost his remedy by appeal justify resort to mandate in the absence of a sufficient excuse for his failure to take an appeal. *Andrews v. Police Court*, 21 Cal.2d 479, 133 P.2d 398, 145 A.L.R. 1042.

Petitioner relies, however, on our holding in *Kahn v. Smith*, 23 Cal.2d 12, 14, 142 P.2d 13, 14, that "an appeal is not regarded as adequate in this type of case." There we followed the decisions in *Payne v. Hunt*, 214 Cal. 605, 7 P.2d 302, and *Kraft v. Lampton*, 13 Cal.App.2d 596, 57 P.2d 171, but it appears that the *Payne* and *Kraft* cases did not discuss the question of adequacy and did not give sufficient consideration to the problems involved. The result reached in these cases and followed in *Kahn v. Smith* is inconsistent with the principles above stated relating to the adequacy of an immediate review by appeal, and all three cases are overruled insofar as they are in conflict with the views expressed herein.

Some decisions, in holding that an immediate review by appeal is not an adequate remedy where petitioner seeks to enforce a final judgment, appear to have been based

partly upon the ground that the remedy by appeal would not be as effective as a writ because a reversal on appeal would merely entitle petitioner to renew his motion before the same trial court that had heard it before, without a direct order compelling that court to grant the requested relief. See *Sullivan v. Superior Court*, 185 Cal. 133, 140, 195 P. 1061, (mandate to compel issuance of writ of assistance); *Holtum v. Grief*, 144 Cal. 521, 527, 78 P. 11, (mandate to compel issuance of execution); *McCulloch v. Superior Court*, 91 Cal.App.2d 641, 645-647, 205 P.2d 689, (mandate to strike an order granting a new trial); *La Mar v. Superior Court*, 87 Cal.App.2d 126, 132, 196 P.2d 98, (mandate to correct judgment so that writ of execution might issue); see also *Boust v. Superior Court*, 162 Cal. 343, 122 P. 956; *Garoutte v. Haley*, 104 Cal. 497, 38 P. 194. Insofar as this reasoning proceeds on the theory that the trial court may refuse to abide by the law as set forth in a general reversal on appeal, it is clearly erroneous because it assumes that the lower court will not follow the implied directions of the appellate court, whereas all presumptions are to the contrary.

[9] In view of the uncertainty which has existed in the law with respect to the appealability of the order in question and also in view of the holdings of this court that an appeal is not adequate in a case of this type, petitioner should not be denied the use of the writ because of his failure to appeal. It would obviously be a hardship upon a litigant who has been misled by such uncertainty in the law if we were to resolve the uncertainty and in the same proceeding deny his petition for a writ on the ground that he in fact did have an adequate remedy by appeal.

[10] There is, however, another procedural requirement for the use of the writ of mandate which should be considered. Before seeking mandate in an appellate court to compel action by a trial court, a party should first request the lower court to act. If such request has not been made the writ ordinarily will not issue unless it

to reach this court on appeal than in a writ proceeding, but this difference in

time should not exceed ninety days in any case.

appears that the demand would have been futile. *People v. Romero*, 18 Cal. 89, 91-92; *Bank of America Nat. Trust & Savings Ass'n v. Superior Ct.*, 15 Cal.App.2d 279, 280, 59 P.2d 461; *Friedland v. Superior Court*, 67 Cal.App.2d 619, 628, 155 P.2d 90; see 16 Cal.Jur. 771-773; cf. *Christ v. Superior Court*, 211 Cal. 593, 596, 296 P. 612; *Moore v. Superior Court*, 20 Cal.App. 299, 304, 128 P. 946. In the present case petitioner could have made a motion under section 473 of the Code of Civil Procedure to vacate the portion of the order claimed to be invalid. Instead of making such motion petitioner waited until after the time for appeal had passed and then filed this application for writ of mandate, without ever having presented the matter to the trial court. There is no showing that the question was raised in any manner before the trial court or that it would have been futile to do so.

Petitioner rests his entire case on the claim that the portion of the order reducing the amount of the judgment is void on its face, and he apparently assumes that where this appears it is unnecessary to apply to the trial court for relief before seeking mandate. There may be some basis for making a distinction where an order is void on its face, but orderly procedure would seem to require that a demand be made in the trial court in all cases unless petitioner can show that a demand would have been futile. In any event we need not decide this question because we are of the opinion that petitioner's contention that the order is void on its face cannot be sustained on the record before us.

[11] In passing upon the contention that the order is void on its face, we must keep in mind that where mandate is sought on this ground the attack is collateral or at least is governed by the rules relating to collateral attack. See *Grivi v. Superior Court*, 3 Cal.2d 463, 467, 45 P.2d 181; *Gray v. Hall*, 203 Cal. 306, 313, 265 P. 246; *Howe v. Southrey*, 144 Cal. 767, 769, 78 P. 259. Also, in determining whether the order is void on its face we are limited to a consideration of matters which appear in the judgment roll or are admitted by the parties.

See *Estate of Keet*, 15 Cal.2d 328, 333, 100 P.2d 1045; *Akley v. Bassett*, 189 Cal. 625, 639, 209 P. 576; *Stevens v. Kelley*, 57 Cal. App.2d 318, 324, 134 P.2d 56.

No judgment roll has been presented to us in this proceeding, and the only facts admitted by the pleadings are that judgment for \$2,000 was entered pursuant to a jury's verdict in an action for personal injuries, that the defendant made a motion for a new trial, and that the court then made an order which reads as follows: "Motion for new trial denied. Judgment reduced to \$1,250.00." The question, therefore, is whether on these facts the order, standing alone, is void on its face.

[12, 13] It is well settled, of course, that such an order modifying a prior judgment is proper if made with the consent of the parties. *Draper v. Hellman Com. T. & S. Bank*, 203 Cal. 26, 41, 263 P. 240; *Bentley v. Hurlburt*, 153 Cal. 796, 803-804, 96 P. 890; *Chapin v. Bourne*, 8 Cal. 294, 296; *Benedict v. Cozzens*, 4 Cal. 381, 383; *Hepner v. Libby, McNeill & Libby*, 114 Cal.App. 747, 754, 300 P. 830; *Hughes v. Hearst Publications, Inc.*, 79 Cal.App.2d 703, 704, 180 P.2d 419. There is no statute, rule, or decision which requires that the consent be set forth in the order or elsewhere in the judgment roll. Section 670 of the Code of Civil Procedure, which specifies the contents of the judgment roll, does not mention consents, and no case has been found which has required such a recital or which has held that the lack of a recital renders the order void on its face. Although the usual practice in exercising the power to reduce the amount of a judgment is for the court to make conditional order which provides either that a new trial will be denied if part of the judgment is remitted or that a new trial will be granted unless there is a consent to such reduction, it is not necessary that the order be so conditioned if consent to the reduction has already been given. *Bentley v. Hurlburt*, supra. In the *Bentley* case the court said, 153 Cal. at pages 803-804, 96 P. at page 893, "The fact that the plaintiff's consent to remit preceded the making of any order on the motion for new trial made it unnecessary for the court to make an order condi-



tional in form, giving the plaintiff a certain time within which to file his consent to the reduction."

[14] There is nothing in the record before us which establishes that no consent was given. Petitioner does not even allege that he did not consent to the reduction. On collateral attack every presumption is in favor of the validity of the judgment or order of a court of general jurisdiction, and any condition of facts consistent with its validity and not affirmatively contradicted by the judgment roll will be presumed to have existed. *Wells Fargo & Co. v. City & County of San Francisco*, 25 Cal.2d 37, 40, 152 P.2d 625; *Borenstein v. Borenstein*, 20 Cal.2d 379, 381, 125 P.2d 465. For example, where the record is silent, it will be presumed that process and pleadings were properly served and that due proof of such service was presented to the court. *Mahoney v. Middleton*, 41 Cal. 41, 51; *Canadian & American Mortgage & Trust Co. v. Clarita Land & Investment Co.*, 140 Cal. 672, 675, 74 P. 301. Similarly, notice, or facts rendering it unnecessary, are presumed unless the record shows the contrary, and when the court may shorten time or dispense with notice, it will be presumed that the court did so if the order is silent upon the point. *Guardianship of Hall*, 31 Cal.2d 157, 164, 187 P.2d 396; see 15 Cal.Jur. 68.

[15] Under this general rule it will be presumed, when necessary, that the parties consented to the court's action or waived objection thereto. For example, although there is no rendition of judgment when findings are required unless findings have been made or waived, *Trubowitch v. Riverbank Canning Co.*, 30 Cal.2d 335, 347, 182 P.2d 182; *Aspegren & Co. v. Sherwood, Swan & Co.*, 199 Cal. 532, 534-535, 250 P. 400, it has been held on a judgment roll appeal, where the court was limited to matters appearing on the face of the judgment roll, that a waiver of findings would be presumed unless the record affirmatively showed the contrary. *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal.2d 307, 326, 74 P.2d 761; *Leadbetter v. Lake*, 118 Cal. 515, 50 P. 686; *Mulcahy v. Glazier*, 51 Cal. 626; *Campbell v. Coburn*, 77 Cal. 36, 37, 18 P. 860; see *Cush-*

*ing-Wetmore Co. v. Gray*, 152 Cal. 118, 120, 92 P. 70, 125 Am.St.Rep. 47; *Wilcox v. Sway*, 69 Cal.App.2d 560, 564, 160 P.2d 154. Likewise, while there is a constitutional right to trial by jury, it has been held on appeal that a waiver of a jury trial will be presumed where the contrary does not appear from the record. *Leadbetter v. Lake*, 118 Cal. 515, 516, 50 P. 686. Also, where a case was heard by a pro tem judge or a judge from another county, it was presumed on appeal, when the contrary did not appear from the record, that the judge was regularly assigned or selected and that the parties consented that he so act. *Estate of Kent*, 6 Cal.2d 154, 163-164, 57 P.2d 901; *In re Corralitos Co-op. Drying & Canning Co.*, 130 Cal. 570, 573, 62 P. 1076; *People v. Mellon*, 40 Cal. 648, 655; see *Spahn v. Spahn*, 70 Cal.App.2d 791, 798-801, 162 P.2d 53. In *Estate of Kent*, 6 Cal.2d at page 163, 57 P. 2d at page 906 the court stated: "Stipulations made in open court when required for the regularity of an order are presumed, in the absence of a contrary showing affirmatively presented on the record."

Closely analogous to the problem presented here are cases where the propriety of a judgment depends on the validity of an order vacating a prior judgment. In this situation the courts have applied the collateral attack rule and have held that it will be presumed that there was sufficient proof of facts and circumstances which justified the trial court in setting aside the first judgment, and, further, if the record does not contain an order vacating the first judgment, that the making of such an order will be presumed. *Maloney v. Massachusetts Bonding & Ins. Co.*, 20 Cal.2d 1, 5, 123 P.2d 449; *Freeman v. Spencer*, 128 Cal. 394, 398, 60 P. 979; *Butler v. Soule*, 124 Cal. 69, 72-73, 56 P. 601; *Von Schmidt v. Von Schmidt*, 104 Cal. 547, 550, 38 P. 361; *Moore v. Mott*, 4 Cal.Unrep.Cas. 269, 272, 34 P. 345; see *Halpern v. Superior Court*, 190 Cal. 384, 387, 212 P. 916. Some of the cases dealing with this question have specifically held that consent to vacation of a prior judgment is one of the facts that will be presumed in support of the validity of the latest judgment. *Rooney v. Gray Bros.*, 145 Cal. 753, 758, 79 P. 523; *Galvin v. Palmer*, 134 Cal.



426, 428-429, 66 P. 572; Colton Land & Water Co. v. Swartz, 99 Cal. 278, 282-283, 33 P. 878; Paige v. Roeding, 96 Cal. 388, 391, 31 P. 264; see Hawley v. Gray Bros., etc. Co., 127 Cal. 560, 562, 60 P. 437.

[16] Under these principles, it must be held that the order is not void on its face because there is nothing in the judgment roll or admitted by the parties which establishes its invalidity.

The alternative writ is discharged, and the peremptory writ is denied.

SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

It is apparent to me that the order was void on its face. There is no question that it was made in response to a motion for a new trial. The motion therefore was made and the order reads: "Motion for new trial denied. Judgment reduced to \$1,250.00." In order to be valid, it must be either a conditional order, that is, unless consent is given to the reduction, the new trial is granted, or it must show that consent was given prior to the order of reduction.

That it is necessary that the order, if it qualifies as a conditional one, must specify the condition is apparent from all of the cases which deal with the power of the court to make such orders. (See, 20 Cal. Jur. 207, et seq.) This necessarily follows from the rule that such a conditional order operates *automatically* as an absolute grant or denial of the new trial. As said in Chapman v. Municipal Court, 91 Cal.App.2d 689, 691, 205 P.2d 712, 713: "The order of August 2nd is a conditional or alternative order, which amounted to a granting of a new trial in the event the defendants (petitioners here) should not consent by August 5th to a judgment against them in the sum of \$250; and upon failure of the defendants to so consent, the order became final. August 5th was within the 60-day period. It is well settled in California, as well as in other jurisdictions, that when, in ruling upon a motion for a new trial, the court grants or refuses a new trial upon

a condition, *the compliance or noncompliance with the condition within the time fixed by the order operates as an absolute grant or denial of the new trial, and the status and rights of the parties become finally fixed and determined as of that time.* Brown v. Cline, 109 Cal. 156, 41 P. 862; Holtum v. Greif, 144 Cal. 521, 78 P. 11; Taber v. Bailey, 22 Cal.App. 617, 135 P. 975; Gloria v. A Colonia Portuguesa, 128 Cal.App. 640, 642, 18 P.2d 87; Jennings v. Superior Court, 134 Cal.App. 300, 305, 25 P.2d 246; Sherman v. Mitchell, 46 Cal. 576, 577, 578; Garoutte v. Haley, 104 Cal. 497, 38 P. 194." Obviously, there could not be an automatic denial or granting of the motion unless the order expressed the condition or result. It has been squarely recognized that the condition is an *indispensable* part of a conditional order. If it is indispensable, its absence renders the order void on its face. In Holtum v. Greif, 144 Cal. 521, 524, 78 P. 11, 12, the issue involved was whether a second order eliminating the conditional order was valid. In holding that it was, the court gave as the reason: "The power of the court to make an order for a new trial *conditional* upon payment of costs by the moving party is unquestioned, and a failure to perform the condition converts the order into a denial of the motion. Garoutte v. Haley, 104 Cal. 497, 38 P. 194; Brown v. Cline, 109 Cal. 156, 41 P. 862. *The condition is therefore an essential* part of the order, and the right to revoke it ceases when the power of the court over the order ceases. When the power of the court to set aside the order as to the award of a new trial is at an end, its power to eliminate one of the *substantial* terms of the order must, for the same reasons, be held to have ended." [Emphasis added.] It is clear, therefore, that the order here cannot qualify as a conditional order.

On the other hand, when we have an order that is not conditional, that is, nothing more than a bald reduction of the judgment, it is conceded that such requires the consent of the parties; otherwise it is void. In Bentley v. Hurlburt, 153 Cal. 796, 803, 96 P. 890, 893; the order denying a new trial and reducing the judgment stated that there was consent and on appeal the court

stresses that point. It said: "In the order denying appellant's motion for a new trial it is recited that the judgment is excessive in the sum of \$460.95, and that Bentley *has filed a written waiver of said amount*. The denial of the motion follows these recitals. This, it is claimed, did not obviate the error in the original judgment. It has, however, long been settled in this state that on a motion for a new trial the court may, if the judgment be excessive, make a conditional order denying the motion if the prevailing party will consent to remit the excess and granting it in the absence of such consent. *Benedict v. Cozzens*, 4 Cal. 381; *Chapin v. Bourne*, 8 Cal. 294; *Gillespie v. Jones*, 47 Cal. 259; *Clanton v. Coward*, 67 Cal. 373, 7 P. 787; *Thomas v. Gates*, 126 Cal. 1, 58 P. 315. If, upon such conditional order being made, *the consent to the reduction be filed*, the usual practice has been to enter an absolute order denying the motion. This is, in effect, what happened in the present case. The fact that the plaintiff's *consent* to remit *preceded* the making of any order on the motion for new trial made it *unnecessary for the court to make an order conditional in form*, giving the plaintiff a certain time within which to file his consent to the reduction. The *consent having already been filed*, the court could properly act *upon such consent* and deny the motion at once." [Emphasis added.] Manifestly in making the instant order the court was not acting upon any consent, express or implied. The policy of the law, that where the validity of any order depends upon consent thereto having been given such consent must appear, is clearly expressed in the analogous situation of a judgment by confession: "\* \* \* the statement [authorizing entry of judgment] must be filed with the clerk

of the court in which the judgment is to be entered, who must indorse upon it, and enter a judgment of such court for the amount confessed, with ten dollars costs. The statement and affidavit, with the judgment indorsed, thereupon becomes the judgment roll." (Code of Civil Procedure, sec. 1134.)

The order and proceedings leading up to it show on their face that the order was void and hence there is no room for the presumption adverted to in the majority opinion. It was alleged in the petition and admitted by the answer that the motion for a new trial was made, it was submitted and thereafter the court made the order. This chain of events excludes any consent to reduction. The order is similar to the one in *Johnston v. Southern Pacific Co.*, 150 Cal. 535, 89 P. 348, 11 Ann.Cas. 841, where it was recited that a guardian was appointed on the application of the proposed guardian. It was held that such a recitation showed that the ward had not applied for appointment as required by statute, and hence the order was void on its face.

Finally, there was never any question between the parties concerning whether consent was given to the reduction of the judgment. Respondent makes no such contention and by its silence it may be deemed to have been conceded. In any event, petitioner should be given the opportunity to amend his petition to allege lack of consent. Whether or not it was given should not be a debatable matter. From all that appears, it is doubtful that respondent would deny that it was not given. To brush aside a factual matter readily determinable by such means is not consonant with enlightened justice.

I would therefore grant the peremptory writ of mandate prayed for by petitioner.

35 Cal.2d 343

**GARDNER v. JONATHAN CLUB.**

L. A. 21327.

Supreme Court of California, in Bank.

May 5, 1950.

Action by Beverly Gardner, as assignee of Lambert H. Polderman, against Jonathan Club, a corporation, to recover \$5,500 allegedly contained in an envelope delivered to defendant by Lambert H. Polderman for safekeeping and not returned on demand. The Superior Court, Los Angeles County, Harold B. Landreth, J., rendered summary judgment for plaintiff for only \$250 and the plaintiff appealed. The Supreme Court, Traynor, J., held that Polderman not having indicated the value of the contents of the envelope to the defendant and the defendant not having given Polderman a receipt but merely an identification check, the defendant's liability under the Innkeeper's Act, Civ.Code, §§ 1859, 1860, was limited to \$250.

Judgment affirmed.

Carter and Schauer, JJ., dissented.

Prior opinion, 210 P.2d 743.

**1. Judgment ⇨181(2)**

Issue to be determined on motion for summary judgment is whether plaintiff has presented any facts which give rise to triable issue and not to pass upon or determine the issue itself, that is, the true facts in the case, and if complaint alleges facts that present a triable issue, a summary judgment is improper.

**2. Innkeepers ⇨11(11)**

Prior to 1895 amendment to Innkeeper's Act, an innkeeper, like a common carrier, was liable as insurer for loss of or injury to guests' goods, but under such Act his liability is that of depositary for hire and he is liable for loss caused by his own negligence or dishonesty or that of his employees. Civ.Code, §§ 1859, 1860.

**3. Bailment ⇨31(1)**

If a bailor alleges and proves deposit of property with bailee, demand therefor and failure of bailee to redeliver, burden of proof rests on bailee to explain his failure.

**4. Corporations ⇨383**

A corporation can act only through its employees.

**5. Innkeepers ⇨11(11)**

The \$250 limitation in Innkeeper's Act on innkeeper's liability for loss of or injury to guest's property deposited in innkeeper's safe is applicable even though loss results from theft by innkeeper's employees. Civ. Code, §§ 1859, 1860.

**6. Innkeepers ⇨11(11)**

The \$250 limitation in Innkeeper's Act on innkeeper's liability for loss of or injury to guest's property deposited in innkeeper's safe does not guarantee minimum recovery of \$250 in every case in which property deposited in safe is lost, but to recover \$250 judgment the guest must prove that deposited property was worth that much and innkeeper was informed or had reason to know of such fact, in view of statute limiting liability of depositary to the amount the depositary is informed by the depositor or has reason to suppose the thing deposited to be worth. Civ.Code, §§ 1840, 1860.

**7. Innkeepers ⇨11(11)**

A check which was given by innkeeper to guest depositing envelope containing unidentified amount of money in safe and which stated that check was to be signed only when envelope was called for by guest was merely identification check by which guest could prove his title to envelope and was not "receipt" within Innkeeper's Act limiting innkeeper's liability to \$250 for loss of or injury to guest's property deposited in safe unless innkeeper should have given "receipt" to guest, and hence recovery for loss of envelope allegedly containing \$5,500 was limited to \$250. Civ.Code, § 1860.

**8. Innkeepers ⇨11(11)**

Statutes ⇨223.2(1)

The statute relating to liability of innkeeper for loss of or injury to articles brought into inn by guests and statute relating to liability for loss of or injury to guest's property deposited in safe have common purpose and must be read together,



and under either statute guest wishing protection in excess of limitation provided therein must declare value of property to innkeeper who must expressly assume the greater liability. (Civ.Code, §§ 1859, 1860.

#### 9. Innkeepers § 11(11)

The word "receipt" in Innkeeper's Act limiting innkeeper's liability to \$250 for loss of or injury to guest's property deposited in safe unless innkeeper has given "receipt" to guest means an acknowledgment that specific item has been received with awareness of its nature and value. Civ.Code, § 1860.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Receipt".

#### 10. Innkeepers § 11(11)

The receipt contemplated in Innkeeper's Act limiting innkeeper's liability to \$250 for loss of or injury to guest's property deposited in safe unless innkeeper has given receipt contemplates a receipt for an article worth more than \$250. Civ.Code, § 1860.

Murchison & Myers, R. Bruce Murchison, John B. Myers and Claude B. Cumming, Los Angeles, for appellant.

Fulcher & Wynn, Gibson, Dunn & Crutcher, P. C. Sterry and C. G. Wynn, Los Angeles, for respondent.

1. Civil Code § 1840: "The liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth."

Civil Code § 1859: "The liability of an innkeeper hotel keeper \* \* \* or lodging house keeper, for losses of or injuries to personal property, is that of a depositary for hire; provided, however, that in no case shall such liability exceed the sum of one hundred dollars (\$100) for each trunk and its contents, fifty dollars (\$50) for each valise or traveling bag and contents, ten dollars (\$10) for each box, bundle or package and contents, and two hundred fifty dollars (\$250) for all other personal property of any kind, unless he shall have consented in writing with the owner thereof to assume a greater liability."

Civil Code § 1860: "If an innkeeper

TRAYNOR, Justice.

Plaintiff, as assignee of Lambert H. Polderman, brought this action to recover \$5,500 allegedly contained in an envelope delivered to defendant for safe-keeping and not returned on demand. Defendant moved for summary judgment for plaintiff in the amount of \$250 on the ground that its liability was limited to that amount by Civil Code sections 1840, 1859, and 1860.<sup>1</sup> The motion was granted and plaintiff appeals from the judgment entered thereon.

Plaintiff's assignor was a resident member of defendant club, which rents rooms to members and guests. Pursuant to Civil Code section 1860, defendant maintains a fireproof safe and has posted the prescribed notices. On June 18, 1947, Polderman delivered a sealed envelope (allegedly containing \$5,500) to defendant's desk clerk with the request that it be placed in the safe. The envelope had printed on it the following:

"A Check

1781 This check to be signed when package is deposited.

In accepting this envelope and contents for safekeeping, we assume no liability other than that provided for in the Inn Keeper's Act of this state, which has limited our liability so that in no event can we be liable for more than the amount specified in said Act.

hotel keeper \* \* \* or lodging house keeper, keeps a fireproof safe and gives notice to a guest \* \* \* or lodger, either personally or by putting up a printed notice in a prominent place in the office or the room occupied by the guest \* \* \* or lodger, that he keeps such a safe and will not be liable for [specified articles of personal property] or other articles of unusual value and small compass, unless placed therein, he is not liable; except so far as his own acts shall contribute thereto, for any loss of or injury to such articles, if not deposited with him to be placed therein, nor in any case for more than the sum of two hundred fifty dollars (\$250) for any or all such property \* \* \* unless he shall have given a receipt in writing therefor to such guest \* \* \* or lodger."

The employee accepting this envelope has no authority to accept same if the contents are valued at more than the amount specified in said Act.

The contents of this envelope do not exceed a value of \$\_\_\_\_\_.

Signature of Depositor \_\_\_\_\_

Received by \_\_\_\_\_ Date \_\_\_\_\_ 19 \_\_\_\_

Do Not Detach Until Package Is Called For Delivery only to owner after signature on Duplicate check 'B' is witnessed and compared."

Polderman signed his name on the envelope, but did not indicate the value of its contents in the space designated for that purpose. The clerk took the envelope and detached and gave Polderman the "B" check which provided:

"B Check

1781 This check to be signed only when package is called for in presence of the Clerk on duty.

Signature of Depositor \_\_\_\_\_

Delivered by \_\_\_\_\_ Date \_\_\_\_\_ 19 \_\_\_\_

Package will be delivered only to party originally depositing it, whose signature appears on duplicate check on package."

On September 4, 1947, Polderman presented the "B" check to defendant and requested the envelope, but defendant failed to return it to him. Polderman then assigned his claim to plaintiff for collection. Defendant's liability is controlled by the statutes governing innkeepers, for even the "A" check signed by Polderman made that liability coextensive with that "provided for in the Inn Keeper's Act of this state."

[1] "The issue to be determined by the trial court in consideration of a motion [for summary judgment] is whether or not [plaintiff] has presented any facts which give rise to a triable issue \* \* \* and not to pass upon or determine the issue itself, that is, the true facts in the case." *Eagle Oil & Refining Co. v. Prentice*, 19 Cal.2d 553, 555, 122 P.2d 264, 265; *Walsh v. Walsh*, 18 Cal.2d 439, 441, 116 P.2d 62; *U. S. Fidelity & Guaranty Co. v. Sullivan*, 93 Cal.App.2d 559, 209 P.2d 429. If the complaint alleges facts that present a tri-

able issue, a summary judgment is improper.

[2-4] Before the amendment of sections 1859 and 1860 to substantially their present form in 1895, an innkeeper, like a common carrier, was liable as an insurer for loss of or injury to the goods of his guests. *Mateer v. Brown*, 1 Cal. 221, 227, 52 Am. Dec. 303. Under the statutes as amended, however, his liability is that of a depositary for hire. To impose liability on him for loss of the property of his guests, the loss must be caused by his own negligence or dishonesty or that of his employees. If a bailor alleges and proves the deposit of property with the bailee, a demand therefor, and the failure of the bailee to redeliver, the burden of proof rests upon the bailee to explain his failure. *George v. Bekins Van & Storage Co.*, 33 Cal.2d 834, 839-841, 205 P.2d 1037; *U Drive & Tour, Ltd., v. System Auto Parks, Ltd.*, 28 Cal.App.Supp.2d 782, 784, 71 P.2d 354; *Cussen v. Southern California Savings Bank*, 133 Cal. 534, 537, 65 P. 1099, 85 Am.St.Rep. 221; *Dieterle v. Bekin*, 143 Cal. 683, 687, 77 P. 664. If he fails to prove that the loss did not result from the aforementioned causes, he is liable for that loss under sections 1859 and 1860, but his liability is limited to the specified amounts unless he has assumed a greater liability or has himself stolen the property. Since defendant is a corporation it can act only through its employees. By its motion for summary judgment for plaintiff for \$250, defendant conceded that the loss resulted from the negligence or theft of its employees. Section 1860 limits its liability therefor unless it gave a receipt in writing for the contents of the envelope, and summary judgment for that amount was proper unless such a receipt was given.

[5] It is contended, however, that if the loss resulted from theft by an employee, the \$250 limitation is inapplicable, and plaintiff is therefore entitled to a trial on the issue of theft. We cannot agree. Section 1860 unequivocally limits liability for loss "in any case" to \$250; it does not except losses caused by employees' dishonesty. The same is true of the provision of section 1859 that

"in no case" shall liability exceed the specified amounts. Neither statute furnishes support for the contention that the limitation was not designed to apply to losses resulting from theft by an employee of the innkeeper.

The New York Court of Appeal has interpreted a similar statute as limiting liability in all cases, including that of theft by an employee, in which the property has been lost from the possession of the bailee:

"The Appellate Division has decided that (the statute) does not protect the defendant or limit its liability because the jewelry was stolen by an employee of the defendant, thereby limiting the effect of the section to cases where the property of the guest placed with a hotel for safe-keeping in a safe is stolen by some one not an employee of the hotel. We cannot agree with that construction of the section. There is nothing in the wording of the section which suggests such a limitation of its meaning. \* \* \* The purpose of the section is to protect the hotel from an undisclosed \* \* \* liability. \* \* \*

"During the many years that a statute has been in existence in this state limiting the liability of a hotel to a guest, no case has been decided by this court indicating that such limited liability did not exist in case the property of a guest deposited for safe-keeping was stolen from a hotel by an employee thereof. Such a holding by this court would nullify the purpose of the statute and be in conflict with the spirit and intent thereof.

"We do not hold that section 200 limits the liability of a hotel of \$250 where the value of the articles left for safe-keeping in a safe is not disclosed, and the articles are stolen by the hotel keeper. Such a theft would be by the hotel keeper from the guest and not a theft from the hotel keeper." *Millhiser v. Beau Site Co.*, 251 N.Y. 290, 294-295, 167 N.E. 447, 448; *Goodwin v. Georgian Hotel Co.*, 197 Wash. 173, 184-186, 84 P.2d 681, 119 A.L.R. 788.

Sections 1859 and 1860 are designed to relieve the innkeeper from his insurer's responsibility, "to protect [him] from an undisclosed liability" for the deposited prop-

erty. They are as applicable to losses resulting from theft by employees as to losses from negligence. Theft by an employee is often the cause of such losses, see, *Millhiser v. Beau Site Co.*, 251 N.Y. 290, 294, 167 N.E. 447; *Muehlebach v. Paso Robles Spring Hotel*, 65 Cal.App. 634, 640, 225 P. 19 and cannot be excluded from the operation of sections 1859 and 1860 without vitiating their terms and purpose.

*Muehlebach v. Paso Robles Spring Hotel*, 65 Cal.App. 634, 225 P. 19, does not sustain a contrary conclusion. It was there contended in support of a judgment for the defendant innkeeper that section 1860 imposed no liability for the loss of goods resulting from theft by the innkeeper's employee. The court reversed the judgment, holding that section 1860 did not exempt the innkeeper from all liability for loss caused by an employee's dishonesty. That case decided only that the statutory imposition of liability was applicable to theft by an employee, not that the limitation thereof was not applicable. The court expressly stated that it did not decide the applicability of the \$250 limitation. 65 Cal.App. 634, 648, 225 P. 19, 24. It is clear that the innkeeper is liable for loss caused by his employee's dishonesty, but that his liability is limited by the terms of section 1859 and 1860. In view of defendant's admission of liability by its motion for summary judgment, it is immaterial whether the loss resulted from theft or negligence.

[6] It bears emphasis that section 1860 does not guarantee a minimum recovery of \$250 in every case in which property deposited in a hotel safe is lost. Section 1840 limits the liability of the depository to the amount it "is informed by the depositor, or has reason to suppose, the thing deposited to be worth." To recover judgment for \$250, a plaintiff must prove that the deposited property was worth that much and that the innkeeper was informed or had reason to know of that fact. In this case, however, the question does not arise because defendant waived the requirement of that proof by moving for the summary judgment.

[7] Plaintiff contends that the "B" check is a receipt within the meaning of



section 1860 and that therefore there is no limitation on defendant's liability. We have concluded that the "B" check was not a receipt within the meaning of section 1860 for the contents of the envelope but was merely an identification check by which Polderman could prove his title to the envelope and that plaintiff's recovery was therefore properly limited to \$250.

[8] Sections 1859 and 1860 were designed to cover an innkeeper's liability for all articles of personal property carried by his guests. They have a common purpose and must be read together. In each section, the reason for the exception to the liability limitation is clear. Should a guest wish protection in excess of the statutory limitation he must declare the value of his property to give the innkeeper an opportunity to confirm the estimate of value. He can then refuse to assume the greater liability or if he assumes it he can take proper precautions for the protection of the property. Liability in excess of the statutory limitation is thus based on the innkeeper's agreement to assume it. *Hoffman v. Eastman Kodak Co.*, 99 Cal.App. 436, 438, 278 P. 891; *Providence Washington Ins. Co. v. Hotel Marysville, Inc.*, 60 Cal.App.2d 338, 344, 140 P.2d 698; *Homan v. Burkhart*, 108 Cal.App. 363, 291 P. 624; *Wilson v. Crown Transfer & Storage Co.*, 201 Cal. 701, 714, 258 P. 596; *Goodwin v. Georgian Hotel Co.*, 197 Wash. 173, 184, 84 P.2d 681, 119 A.L.R. 788; *Stoll v. Almon C. Judd Co.*, 106 Conn. 551, 559, 138 A. 479, 53 A.L.R. 1042; *Horton v. Terminal Hotel & Arcade Co.*, 114 Mo.App. 357, 362, 89 S.W. 363; *Pfennig v. Roosevelt Hotel, Inc.*, La.App., 31 So.2d 31, 34; *Whitehouse v. Pickett*, [1908] A.C. 357, 365. Section 1859 unequivocally provides that the innkeeper's liability is limited to the amount specified, unless he consents in writing to assume greater liability. Section 1859 covers all articles brought into the hotel or inn by a guest. Section 1860, relating to small articles of unusual value that are easily lost or misplaced, affords the innkeeper additional protection against liability for loss. If he keeps a safe and posts the prescribed notices, he is exempted from all liability

for such articles unless they are placed in his safe. If he does not keep a safe, section 1859 governs his liability. With respect to articles placed in the safe, the Legislature demonstrated its intention to apply the same limitation on liability, with the same exception, and for the same purpose as that embodied in section 1859. The "receipt in writing" exception of section 1860 requires the same acknowledgment of greater liability as that required by section 1859. *Providence Washington Ins. Co. v. Hotel Marysville, Inc.*, 60 Cal.App.2d 338, 347, 348, 140 P.2d 698.

[9] The reason is clear for the variation in the terms "consented in writing" in section 1859, and "receipt in writing" in section 1860. Section 1859 refers to the property of guests remaining in their possession in the rooms of the inn or hotel; section 1860 refers to articles placed in the safe in the possession of the innkeeper. One ordinarily gives a receipt for goods delivered into his possession but not for goods remaining in the possession of another. As to the latter, therefore, the Legislature required written consent on the part of the innkeeper to assume a greater liability; as to articles deposited in the safe, a written receipt for specific goods of a declared value in excess of the statutory limitation is the equivalent of the written assumption of a greater liability.

This construction is clearly consistent with the provision of Civil Code section 1840 limiting the liability of the bailee to the apparent value of the article unless the depositor informs him that it has greater value. The written acknowledgment of the receipt of goods of a declared value in excess of \$250 would satisfy the information requirement of section 1840. If, however, plaintiff's construction were adopted, the mere act of giving an identification check for a deposit of unknown value would impose unlimited liability even though the bailee was not "informed \* \* \* or [had] reason to suppose" the property was worth more than the statutory limitation. Plaintiff's construction would also render section 1860 meaningless. A bailee will ordinarily give

a depositor a check for the identification of an article deposited with him. Such a check cannot reasonably be construed as an acknowledgment of the receipt of an article of a specific value when the bailee is not informed of that value by the depositor. Unless "receipt in writing therefor" was meant to require more than the bare acknowledgment of receiving something that inevitably accompanies the ordinary bailment, the statutory limitation is completely nullified.

[10] Plaintiff contends, however, that the use of the term "receipt" in section 1860 demonstrates a legislative intention not to accomplish the same purpose by section 1860 as by section 1859. She invokes the definition of "receipt" in *Greer v. Los Angeles Athletic Club*, 84 Cal.App. 272, 281, 258 P. 155, 157: "evidence of the ownership, delivery and identity of the baggage." That definition makes "receipt" the equivalent of an identification check. Receipt, however, is more accurately defined as "a writing acknowledging the taking or receiving of goods or money delivered or paid." Webster's New International Dictionary, p. 2077. The distinction is readily apparent between that definition and the definition of an identification check as "a ticket, certificate, or token, by which ownership or title may be proved, or a thing or person may be identified \* \* \* as a check for a coat, hat, etc; \* \* \* a baggage check." Webster's New International Dictionary, p. 457. By requiring a written receipt as an acknowledgment of having received goods or money delivered, the Legislature clearly intended an acknowledgment that a specific item was received with awareness of its nature and value. Section 1860 refers to responsibility for articles worth more than \$250, and requires a "receipt in writing therefor" in order to impose a greater liability. The receipt must therefore be for an article worth more than \$250. This requirement is not satisfied by the mere acknowledgment of an envelope received without knowledge or information of its contents or their value. There is as much likelihood that an envelope would contain a will, bonds, an insurance policy, a contract, newspaper clippings, as \$5,500

in cash. The "B" check gave the depositor a means of identifying the envelope; it could not be a receipt for whatever it contained when the clerk was not informed what its contents were. See *Providence Washington Ins. Co. v. Hotel Marysville, Inc.*, 60 Cal.App.2d 338, 348, 140 P.2d 698; *Goodwin v. Georgian Hotel Co.*, 197 Wash. 173, 180, 84 P.2d 681, 119 A.L.R. 788; *Kentucky Hotel, Inc., v. Cinotti*, 298 Ky. 88, 91, 182 S.W.2d 27; *Norris v. Manischewitz Broadway Central Hotel, Inc.*, 129 Misc. 329, 221 N.Y.S. 363, 364. The dictum in the *Greer* case is contrary to the terms and purpose of the statute and is disapproved.

It is undisputed that defendant maintained a fireproof safe and posted the prescribed notices thereof, and that plaintiff delivered personal property to defendant for deposit in that safe without informing defendant of the character or value of that property. Defendant by its motion for summary judgment for plaintiff has eliminated any triable issue as to its liability for loss of the property. Since we have concluded that the "B" check was given without information or reason to know the value of that property does not constitute "a receipt in writing therefor," defendant is liable only for \$250 and no triable issue of damages is presented. Summary judgment in the present case is therefore proper.

The judgment is affirmed.

GIBSON, C. J., EDMONDS and SPENCE, JJ., and ADAMS, Justice pro tem., concur.

CARTER, Justice.

I dissent.

I disagree with the result reached by the majority of this Court. In order to reach that result, the majority hold that the "B" check is not a receipt in writing as contemplated by the provisions of section 1860 of the Civil Code.

Assume for the moment that the "A" check had been filled in properly with the amount deposited, the date, signature of depositor and the agent of the defendant who received it, and that it was entirely in order. The "B" check was detached from



the envelope which comprised the "A" check and was given to the bailor. It was not within the contemplation of the parties that this check would be filled in until the depositor had received that which he had left for safe-keeping with the bailee Club, that is, the envelope containing the subject matter of the bailment. If the "A" check had been properly filled in, and if the depositor had actual knowledge of the contents of the envelope, would the bailee have given any different kind of receipt? The majority hold that the "B" check is not such a receipt "in writing" as is contemplated by section 1860 of the Civil Code. The absurdity of this is patent to any one who has had experience in depositing valuables with a hotel for safe-keeping. My experience has been that the bailee who is cognizant of his duties will inquire as to the value of the article bailed, will then place it in an envelope of the proper size, and detach a receipt like the one in the instant case, and then give the receipt to the bailor. The code section makes no provision for any particular form of receipt. As was pointed out in *Providence Washington Ins. Co. v. Hotel Marysville*, 60 Cal. App.2d 338, 348, 140 P.2d 698, section 14 of the Civil Code provides that "writing includes printing and typewriting".

In the *Providence Washington Ins. Co. v. Hotel Marysville* case, *supra*, it clearly appears that the plaintiff was given a *brass check* with which to claim his sample cases. It also there appears that plaintiff knew that the hotel had envelopes with the same type of check attached as the "B" check here and which he might make use of if he desired to impose greater liability upon the innkeeper. It would seem that it should be very apparent to every one that the "B" check was the only type of receipt within the contemplation of the parties, and that no other type of receipt would have been given in any event. Under the majority holding, no bailor may recover more than \$250 for property of whatever value unless he demands something equivalent to an affidavit from the bailee.

The majority opinion states that "It bears emphasis that section 1860 does not guaran-

tee a minimum recovery of \$250 in every case in which property deposited in a hotel safe is lost. Section 1840 limits the liability of the depositary to the amount it 'is informed by the depositor, or has reason to suppose, the thing deposited to be worth.'" Section 1840 reads *in full* as follows: "The liability of a depositary for *negligence* cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth." (Emphasis added.) Thus, it is only where the loss is occasioned through negligence that section 1840 applies. In the instant case, the plaintiff was precluded, because the motion for summary judgment was granted, from a trial on the merits. The defendant, as depositary, was under a duty to account for its failure to return the goods. *George v. Bekins Van & Storage Co.*, 33 Cal.2d 834, 205 P.2d 1037; *Cussen v. Southern California Sav. Bank*, 133 Cal. 534, 65 P. 1099, 85 Am.St.Rep. 221; 13 So. Cal.L.Rev. 164.

I am of the opinion that a summary judgment was improper in that a triable issue was presented, that is, whether the "B" check constituted a receipt in writing as contemplated by section 1860 of the Civil Code, *United States Fidelity & Guaranty Co. v. Sullivan*, 93 Cal.App.2d 559, 209 P. 2d 429, and the judgment should be reversed.

SCHAUER, Justice (dissenting).

I concur in the conclusion reached by Mr. Justice Carter. On the record, for the purposes of this appeal, it must be deemed admitted that defendant, as a bailee for hire, received from plaintiff's assignor (hereinafter called plaintiff) an envelope containing \$5,500, and that subsequently plaintiff demanded and defendant refused to return the subject of the bailment. Furthermore, a receipt in writing prepared by defendant was given to plaintiff. Under these circumstances the burden devolved upon the defendant bailee to return the bailed property or to exculpate itself for its failure so to do (see *George v. Bekins Van & Storage Co.* (1949), 33 Cal.2d 834, 840-841, 205 P.2d 1037; *Downey v. Martin*



Aircraft Service (1950), 96 Cal.App.2d 94, 214 P.2d 581; *U Drive & Tour v. System Auto Parks* (1937), 28 Cal.App.2d Supp. 782, 784, 71 P.2d 354) and a summary judgment on defendant's motion limiting its liability to \$250 was improper.



35 Cal.2d 389

**TOMALES BAY OYSTER CORPORATION  
v. SUPERIOR COURT IN AND FOR  
CITY AND COUNTY OF SAN FRANCISCO.**

S. F. 17963.

Supreme Court of California, in Bank.

May 9, 1950.

Application by Tomales Bay Oyster Corporation for a writ of prohibition directed to the Superior Court of the State of California, in and for the City and County of San Francisco, to stay further proceeding by respondent court under a cross-pleading by James G. Bryant, Director of Employer, Successor to California Employment Stabilization Commission, in an action brought by petitioner against the Commission. The Supreme Court, Gibson, C. J., held that regardless of whether Commission's pleading in action brought by petitioner against Commission were treated as a cross-complaint or counterclaim, the Commission became an independent actor upon filing pleading seeking affirmative relief, and Commission had five years after filing its pleading in which to bring its actions to trial, and dismissal as to the complaint did not constitute or require a dismissal of issues raised by Commission's pleading.

Alternative writ discharged, and pre-employment writ denied.

**1. Prohibition ⚡10(2)**

If superior court was proceeding erroneously after expiration of time prescribed by statute requiring dismissal of action unless brought to trial within five years, it was acting in excess of its jurisdiction, and prohibition would lie to prevent a retrial

of the action where there was no other plain, speedy and adequate remedy at law. Code Civ.Proc. § 583.

**2. Appeal and error ⚡867(1)**

A question not ruled on by trial court in granting motion for new trial would not be considered upon an appeal from the order granting a new trial.

**3. Appeal and error ⚡105**

An order refusing to dismiss action under statute providing for dismissal of action unless brought to trial within five years was not appealable. Code Civ.Proc. § 583.

**4. Pleading ⚡4**

The nature and character of a pleading is to be determined from its allegations, regardless of what it may be called by the parties.

**5. Pleading ⚡142**

Where a pleading meets requirements of both a counterclaim and a cross-complaint, the court may, in its discretion, treat it as either, to the end that substantial justice may be done.

**6. Set-off and counterclaim ⚡9**

A counterclaim may include the right to affirmative relief for damages where original complaint prayed for a money judgment. Code Civ.Proc. § 438.

**7. Judgment ⚡622(2)**

If a counterclaim arises out of transactions set forth in complaint, defendant must set it up or be forever barred. Code Civ. Proc. § 439.

**8. Dismissal and nonsuit ⚡60(2)**

A cross-complaint is not subject to mandatory dismissal under statutory provision for dismissal of action unless brought to trial within five years until lapse of five years from filing of the cross-complaint. Code Civ.Proc. § 583.

**9. Dismissal and nonsuit ⚡60(2), 80**

In action to recover unemployment insurance contributions paid under protest, wherein Employment Stabilization Commission filed a pleading seeking further taxes and penalties allegedly due from

plaintiff, Commission would, regardless of whether its pleadings were treated as a cross-complaint or counterclaim, have five years from filing of its pleading in which to bring its action to trial, and dismissal as to the complaint did not constitute or require a dismissal of issues raised by Commission's pleadings. Code Civ.Proc. §§ 438, 442, 581, subd. 5, 583.

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Fabian D. Brown, San Francisco, for petitioner.

Fred N. Howser, Attorney General, Chas. W. Johnson and William L. Shaw, Deputy Attorneys General, for respondent and real party in interest.

GIBSON, Chief Justice.

Petitioner seeks a writ of prohibition to stay further proceedings under a cross-pleading filed by the California Employment Stabilization Commission in an action brought by petitioner against the commission.

On January 4, 1943, petitioner commenced an action to recover \$20 unemployment insurance contributions paid under protest, alleging that it was not an employer subject to the Unemployment Insurance Act. Gen.Laws, Act 8780d. On March 13, 1943, the commission filed a pleading, entitled "Answer and Counterclaim," which set forth a cause of action "by way of counter-claim" for further taxes and penalties due in the sum of \$1,474.02, together with interest and costs. Immediately thereafter the parties entered into a stipulation that petitioner might have ten days after written notice to answer or otherwise plead to "defendant's cross-complaint." On February 18, 1948, the commission gave notice to plead "to the cross-complaint," and petitioner's answer was filed on February 27. The trial was commenced on March 5, 1948, "upon the pleading of defendant," and the commission

introduced evidence, both oral and documentary, in support of its claim and rested its case. The cause was then continued at petitioner's request until April 23, at which time petitioner's cause of action upon its complaint was dismissed on motion by the commission based on section 583 of the Code of Civil Procedure.<sup>1</sup> The trial was completed on the issues raised by the commission's pleading, and judgment was entered for petitioner. The commission, however, was granted a new trial on December 16, 1948, and no appeal was taken from this order.

When the cause was called for retrial, on February 17, 1949, petitioner moved to dismiss the action set forth in the commission's pleading on the ground that it had not been brought to trial within five years after petitioner's complaint was filed. Trial on the commission's pleading, however, had been commenced within five years after it was filed, and the motion was denied. Petitioner then applied for a writ of prohibition to prevent respondent superior court from proceeding with the trial. An alternative writ was issued and further proceedings were stayed pending determination of whether the application for a peremptory writ should be granted.

Petitioner contends that the commission's pleading was merely a counterclaim and a part of the answer which fell with dismissal of the complaint, and that the trial court had no jurisdiction to proceed with the trial because there was nothing before it. He also argues in effect that trial on the cross-pleading was barred under section 583 of the Code of Civil Procedure because the five year period had run against the complaint.

[1] A preliminary question is presented as to the propriety of the use of the writ to test the jurisdiction of the court to proceed with the trial. It would seem clear that if the commission's pleading fell with dismissal of the complaint, leav-

1. Code Civ.Proc., § 583, provides that an action shall be dismissed on noticed motion, or by the court on its own motion, "unless such action is brought to trial within five years after the plain-

tiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended  
\* \* \*."

ing nothing before the trial court, it was without jurisdiction to proceed. Likewise, if the court is proceeding erroneously after expiration of the time prescribed by section 583 of the Code of Civil Procedure, it is acting in excess of its jurisdiction, and prohibition will lie to prevent a retrial of the action if there is no other plain, speedy and adequate remedy at law. Cf. *Superior Oil Co. v. Superior Court*, 6 Cal.2d 113, 56 P.2d 950; *Andersen v. Superior Court*, 187 Cal. 95, 97, 200 P. 963; *White v. Superior Court*, 126 Cal. 245, 58 P. 450; *Rio Del Mar Country Club v. Superior Court*, 84 Cal.App.2d 214, 190 P.2d 295.

[2, 3] The problem presented here was, of course, not included as a ground of the commission's motion for a new trial, nor was it ruled on by the court in granting the motion. It therefore could not be considered upon an appeal from the order granting a new trial. See *Byxbee v. Dewey*, 128 Cal. 322, 60 P. 847; *Holmes v. Warren*, 145 Cal. 457, 460, 78 P. 954; 2 Cal.Jur. 828-830. The order refusing to dismiss the action was not appealable, and to compel petitioner to submit to an unwarranted retrial of the cause, and then appeal from the judgment if adverse to it, would not afford speedy or adequate relief. *Andersen v. Superior Court*, 187 Cal. 95, 97, 200 P. 963; see also *Superior Oil Co. v. Superior Court*, 6 Cal.2d 113, 119, 56 P.2d 950. The writ may therefore be used to test the jurisdiction of the trial court.

[4, 5] In considering petitioner's contention that the commission's cross-pleading fell with the dismissal of the complaint and that trial of the cross-action was barred under section 583 of the Code of Civil Procedure, we must look to the character of the pleading and the purposes of the section. When the commission's pleading was filed it was denominated a counterclaim, but thereafter it was called and treated as a cross-complaint. The nature and character of a pleading, however, is to be determined from its allegations, regardless of what it may be called by the parties, and it has been held that when a pleading meets the requirements of both a counterclaim

and a cross-complaint the court may, in its discretion, treat it as either, to the end that substantial justice may be done. *Schrader v. Neville*, 34 Cal.2d 112, 207 P.2d 1057; *Terry Trading Co. v. Barsky*, 210 Cal. 428, 434, 292 P. 474; see 10 So. Cal.L.Rev. [1937] 415, 420, 447-448.

[6, 7] The commission's pleading seeks both to defeat petitioner's demand and to recover a money judgment in excess of that demand. Under section 438 of the Code of Civil Procedure, a counterclaim "must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had, \* \* \*" and it has been held that it may include the right to affirmative relief for damages where the original complaint prayed for a money judgment. *Todhunter v. Smith*, 219 Cal. 690, 693, 28 P.2d 916; *Terry Trading Corp. v. Barsky*, 210 Cal. 428, 438, 292 P. 474. A counter-claim may arise out of the transaction set forth in the complaint as the foundation of plaintiff's claim, and if it does the defendant must set it up or be forever barred. Code Civ.Proc. § 439; see *Schrader v. Neville*, 34 Cal.2d 112, 207 P.2d 1057. The pleading of the commission therefore comes within the definition of a counterclaim. However, it also falls within the requirements for a cross-complaint. Section 442 of the Code of Civil Procedure provides that a cross-complaint may be filed whenever the defendant seeks affirmative relief against any party relating to or depending upon the transaction or matter upon which the action is brought. The relief sought by the commission related to the same transaction or matter upon which the action was brought, and the pleading is thus within the express wording of the statute.

It follows that the commission's claim is one which could have been pleaded either as a counterclaim or as a cross-complaint. Under such circumstances, as we have seen, the court may treat it as either, and here, since the commission's pleading meets the requirements for a cross-complaint, and the parties treated it as a cross-complaint after it was filed, there appears to be



no good reason why we should not likewise treat it as such.

[8] It is clear that a cross-complaint is not subject to mandatory dismissal under section 583 until the lapse of five years from the filing of the cross-complaint. See *Pacific Finance Corp. v. Superior Court*, 219 Cal. 179, 182-183, 25 P.2d 983, 90 A.L.R. 384; *Douglas v. Superior Court*, 94 Cal.App.2d 395, 210 P.2d 853. In the *Pacific Finance* case, *supra*, it was said that the code provisions permitting the settlement of cross-claims between the same parties in the same action, in order to prevent a multiplicity of actions, did not change the fact that, for purposes of mandatory dismissal under section 583, "these cross-actions \* \* \* are still distinct and independent causes of action, so that when properly interposed and stated the defendant becomes in respect to the matters pleaded by him, an actor, and there are two simultaneous actions pending between the same parties wherein each is at the same time both a plaintiff and a defendant." 219 Cal. at page 182, 25 P.2d at page 984, 90 A.L.R. 384. The court relied in part on the provisions of section 581 of the Code of Civil Procedure that a plaintiff could voluntarily dismiss an action unless affirmative relief was sought by the cross-complaint or the answer of defendant, and it concluded that the plaintiff had no such control over a cross-complaint as would entitle him to seek its dismissal under section 583 until five years after the filing of the answer thereto.<sup>2</sup>

[9] It follows that if the commission's pleading is treated as a cross-complaint, it did not fall upon dismissal of the complaint, and the court was not required to dismiss the cross-complaint because trial thereon was commenced within five years after it was filed. Hence the court was

within its jurisdiction in proceeding with the trial.

It is not necessary, however, to place our decision on the ground that the pleading here involved is a cross-complaint. We are of the opinion that the same result should obtain if that pleading be considered as a counterclaim which seeks affirmative relief. All the reasoning of the *Pacific Finance* case is equally applicable to such a counterclaim since, in so far as a cause of action is stated, it is in fact a separate action which could have been separately brought and tried. See *Sooy v. Cerf*, 220 Cal. 611, 619, 32 P.2d 365; *Belleau v. Thompson*, 33 Cal. 495. As we have seen, the commission's pleading does not seek merely to defeat or diminish petitioner's claim; it also seeks affirmative relief greatly in excess of that demanded by petitioner, and there is no doubt that a separate action could have been maintained by the commission if petitioner had not previously commenced its action.

Moreover, subdivision 5 of section 581 of the Code of Civil Procedure provides that a plaintiff may voluntarily dismiss his cause of action with prejudice prior to trial, but that the dismissal does not have the effect of dismissing a cross-complaint or counterclaim or of depriving the defendant of affirmative relief sought by his answer. In view of this statutory policy it is obvious that a plaintiff should not be allowed to assert any greater rights merely because he has adopted a course of inaction which eventually results in the involuntary dismissal of his complaint under section 583, and, therefore, he should not be entitled to claim that the involuntary dismissal of his complaint constitutes or requires dismissal of a counterclaim wherein defendant seeks affirmative relief. To hold that such a counterclaim is subject to man-

2. When the dismissal was ordered in the *Pacific Finance* case the five year period ran from the filing of defendant's answer. Section 583 was later amended to make the period run from the filing of plaintiff's complaint. The amendment does not impair the effect of the reasoning in that case but, instead, makes it clear

that the time for bringing any cause of action to trial, whether by complaint or cross-complaint, runs from the first assertion of the cause of action, i. e., the filing of the particular pleading. See *Douglas v. Superior Court*, 94 Cal.App. 2d 395, 210 P.2d 853.

datory dismissal five years after the complaint is filed would in effect penalize an answering pleader by giving him less time to act after the filing of his pleading than he would have if he had brought an independent action, and thus it would be incompatible with the policy of avoiding a multiplicity of actions and of encouraging the settlement of all claims between the parties in a single proceeding whenever possible.

We conclude, therefore, that whether the commission's pleading be treated as a cross-complaint or a counterclaim, the commission became an independent actor upon filing its pleading seeking affirmative relief, that the commission had five years from the filing of its pleading in which to bring its action to trial, and that the dismissal as to the complaint did not constitute or require a dismissal of the issues raised by the commission's pleading.

The alternative writ is discharged, and the peremptory writ is denied.

**SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.**



35 Cal.2d 399

**HOLM et al. v. CITY OF SAN DIEGO et al.**  
L. A. 21216.

Supreme Court of California, in Bank.

May 11, 1950.

Action by Orlando E. Holm and others against the City of San Diego, a municipal corporation, and Ben D. Romero for damages sustained in a collision between automobile driven by named plaintiff, and defendant city's truck operated by codefendant. The Superior Court, San Diego County, William A. Glen, J., dismissed plaintiffs' action, and plaintiffs appealed. The Supreme Court, Carter, J., held that in absence of state statute requiring a claim to be filed under circumstances of present case, plaintiffs were

not required to file claim, and that as to individual codefendant, face of claim indicating where claim was signed and giving detail as to nature, time and place of accident giving rise to claim, was sufficient to give him the necessary information to locate claimants.

Judgment reversed.

Edmonds, Shenk and Traynor, JJ., dissented in part.

Prior opinion, 208 P.2d 777.

#### 1. Automobiles ⇨230

Where plaintiffs sought damages for personal injuries for alleged negligence of city and an employee thereof, in operation of a motor vehicle by employee in course of his employment, and sole basis of liability of defendant city was respondeat superior, and not that negligence consisted of a dangerous or defective condition of any city property or work, plaintiffs were not required to file a claim against city in order to maintain an action for damages. Government Code, §§ 1981, 1982.

#### 2. Municipal corporations ⇨1021

Substantial compliance suffices to satisfy statute requiring claims to be filed with city, to establish a basis for an action against the city. Government Code, §§ 1981, 1982.

#### 3. Municipal corporations ⇨741(2)

Where claimants for personal injuries against city and city employee filed claim which detailed nature, time and place of accident giving rise to claim, and claim indicated that it was signed in one of two towns only 11 miles from each other, both of which had small populations, and neither city nor employee showed it was misled or prejudiced by absence of addresses of claimants from claim, claim was sufficient. Government Code, §§ 1981, 1982.

Sweet, Ault & Warner, San Diego, and C. Rupert Linley, El Cajon, for appellants.

Jean F. DuPaul, City Attorney, and McInnis & Hamilton, San Diego, for respondents.

CARTER, Justice.

Plaintiffs' action for damages for personal injuries is predicated on the alleged negligence of defendants, City of San Diego, and an employee thereof, in the operation of a motor vehicle by the employee in the course of his employment. The sole basis of liability of defendant city is respondeat superior, and there is no claim that the negligence consisted of a dangerous or defective condition of any city property or works. Defendants' demurrer, on the ground that the claim filed by plaintiffs with the city clerk and the employee was defective for lack of plaintiff-claimants' address as required by section 1982 of the Government Code, see also sec. 1981, was sustained and judgment of dismissal followed.

[1] Insofar as the action against defendant city is concerned, the judgment must be reversed for there is no state statute requiring a claim to be filed under the circumstances here presented. *Ansell v. City of San Diego*, Cal.Sup., 216 P.2d 455.

With reference to the defendant city employee and the claim, it appears that, although the claim does not state plaintiff-claimants' address in those words, it does contain the following: It gives in detail the nature, time and place of the accident giving rise to the claim; in listing the items of expense incurred, it mentions expenses for trips "to San Diego from Lakeside". In this connection, defendants claim there is an inconsistency in that in another part of the claim, it is said that one of the claimants was continuously confined in a hospital, but that presented no obstacle or burden in the path of locating claimants. At the end of the claim, just before claimants' signatures, it is stated: "Signed at Lakeside or La Mesa, Calif."

[2,3] Substantial compliance suffices to satisfy the claim statutes. *Knight v. City of Los Angeles*, 26 Cal.2d 764, 160 P.2d 779. The chief purpose of the claim requirement is to enable the city to make an investigation of the claim and give it an opportunity to settle without litigation.

It is plain from the above-mentioned portions of the claim that plaintiffs resided at Lakeside. They had to travel therefrom to San Diego, and it was signed at La Mesa or Lakeside. Those latter towns are only 11 miles from each other and the former had a population, as of the 1940 census, of only 1500, and the latter, 3925. There was sufficient information from which the city authorities, without undue trouble, could locate and interview the claimants, and it does not appear that the city was misled or prejudiced. In *Uttley v. City of Santa Ana*, 136 Cal.App. 23, 25, 28 P.2d 377, 378, the court held that the office address of the claimant's attorney was sufficient compliance, stating: "Even in that state [Washington] it has been held that 'it is sufficient, therefore, if the notice or claim is not calculated to mislead, but contains such evidence of identity of place and person as to enable the investigating officials to make proper investigation when aided by reasonable inquiry. When, therefore, there is no evident intention to mislead, but a bona fide attempt to comply with the law, the notice is sufficient in the absence of any evidence that it did in fact mislead.' \* \* \* The purpose of the statute would seem to be accomplished if an address is given at which or through which the claimant may be found, in order that the city officials may make such investigation of the merits of the claim as may be desired." In *Stewart v. City of Rio Vista*, 72 Cal.App.2d 279, 164 P.2d 274, the only address given was the statement in the verification by the claimant's attorney that he had his office in Vacaville, California. In *Ridge v. Boulder Creek, etc. School Dist.*, 60 Cal.App.2d 453, 140 P.2d 990, 992, the claim stated that the claimants were residents of Santa Cruz County, and one of them, a minor, is a pupil at Boulder Creek Union High School. The court, in holding that to be enough, stated:

"Webster's dictionary defines the word 'address': 'The directions for delivery of a letter; the name or description of a place of residence, business etc., where a person may be found or communicated with.' This definition clearly indicates that the word



'address' is not always synonymous with the word 'residence', although for the purpose of some statutes the courts have so interpreted its meaning. \* \* \*

"In interpreting a similar requirement for filing of a claim in suits against municipalities, the court said in *Uttley v. City of Santa Ana*, 136 Cal.App. 23, 25, 28 P.2d 377, 379: 'The purpose of the statute would seem to be accomplished if an address is given *at which or through which the claimant may be found, in order that the city officials may make such investigation of the merits of the claim as may be desired*. The statute does not definitely require the giving of the claimant's home address or usual business address, and it is conceivable that a claimant might have neither a home address nor a permanent business address. \* \* \* In the absence of any showing that the appellant (municipality) was misled or prejudiced, we think the allegations of the complaint are sufficient to show a substantial compliance with the statute.' In that case the court held that the address of the claimant's attorney within the verified claim was a substantial compliance with the statute which required the claimant's address to be in the verified claim. The situation of claimant Walter Ridge is comparable to that of the claimant in the city case. The recital in the claim that Walter Ridge was a student at Boulder Creek Union High School informed the school district where he could be reached the major portion of the daylight hours. A letter addressed to him there would reach him. An inquiry by the school district at that place would have reached him personally or would have revealed his home address. There is no claim that the school district was misled nor that it could have been misled by the information imparted by way of an address of claimant Walter Ridge. \* \* \*

"In deciding what is in fact substantial compliance with a statute, no weight should be given to the fact that the information imparted was not intended to comply with the statute. The only issue, as we see it and as the doctrine is enunciated in the cases, concerns the purpose of the statute

and whether in fact the acts done subserved the purpose of the statute, complying therewith in substance but not in the exact form prescribed." (Emphasis that of the Court.) The remarks in these are patently applicable here.

The cases relied upon by defendants are not controlling for they involve a total absence from the claim of a means of locating the claimants, or that with such omission actual knowledge by the city is not enough. Here, however, the face of the claim gives the city the information necessary to find claimants.

The judgment is reversed.

GIBSON, C. J., and SCHAUER and SPENCE, JJ., concur.

EDMONDS, Justice (concurring and dissenting).

I cannot follow the reasoning upon which the court bases the conclusion that the plaintiffs substantially complied with section 1982 of the Government Code which requires that "The claim shall specify the name and address of the claimant \* \* \*." It is said that the statutory requirement was met because, in their written statement filed with the city, they declared that it was "Signed at Lakeside or La Mesa." But the mention of these places, with the additional information that the amount of the damages claimed " \* \* \* includes the expense of numerous trips to San Diego from Lakeside for various therapy treatments \* \* \*" does not fulfill the specific mandate of the statute.

Certainly the facts stated in the claim do not bring it within the rule of the decisions which have held compliance to be substantial when information was given from which the claimant's address could be readily obtained. For example, in two cases the address of claimant's counsel was given. *Uttley v. City of Santa Ana*, 136 Cal.App. 23, 28 P.2d 377; *Stewart v. City of Rio Vista*, 72 Cal.App.2d 279, 164 P.2d 274. In another, the claim was against a school district and a recovery was allowed upon a claim by "Walter Ridge, a minor, who is a student at said Boulder Creek

Union High School" because a letter addressed to the pupil at the school would reach him and he could be located at the school the major portion of each day. *Ridge v. Boulder Creek etc. School Dist.*, 60 Cal.App.2d 453, 140 P.2d 990, 992. But in the present case no compliance whatever is shown. The plaintiffs did not state a residence in either of the towns named. From all that appears, they could have been residents of San Francisco who for a short period of time were temporarily in La Mesa or Lakeside. Even if it be inferred that the claimants live in one of the two towns named, it is doubtful that the Legislature ever intended to impose upon a municipality the burden of finding a claimant with no further information than that he resides in a certain city.

If the true purpose of the code provision is to give the city an opportunity to locate the claimant and possibly negotiate a settlement after investigation of the claim, the address of the claimant should be given with a degree of certainty which will provide more than an inference. In *Eppstein v. City of Berkeley*, 52 Cal.App.2d 395, 126 P.2d 365, address of the claimant was not included in the verified claim, and in *Hall v. City of Los Angeles*, 19 Cal.2d 198, 120 P.2d 13, there was no statement of the place where the accident occurred. In each case the claim was held to be fatally defective, although the omitted information was within the actual knowledge of the city.

The court now relies upon the fact that the City of San Diego does not contend that it was misled or prejudiced by the failure to comply with the code provision. But, as indicated by the *Eppstein* and *Hall* cases, such a showing is not a necessary part of the municipality's defense. The point is also made that La Mesa and Lakeside are only eleven miles apart and contain a population of 1500 and 3925, respectively. Judicial notice may be taken of the fact that any 1940 census for California towns was unreliable at the time of the accident which occasioned this litigation, and a claimant should be required to give some specific information by which he may be located. A liberal construction of section 1982 does not mean complete nullifica-

Cal.Rep. 217-218 P.2d-29

tion of it in its most important requirement.

For these reasons I would affirm the judgment as to the individual defendant and reverse it as to the city.

**SHENK and TRAYNOR, JJ., concur.**



97 Cal.App.2d 373

**WEIL v. SUPERIOR COURT IN AND FOR  
LOS ANGELES COUNTY.**

**Civ. 17745.**

District Court of Appeal, Second District,  
Division 2, California.

May 5, 1950.

Petition by Felix J. Weil against Superior Court of the State of California, in and for the County of Los Angeles, for a writ of certiorari to review and annul an order finding petitioner guilty of contempt of court. Francis C. Whelan, the real party in interest, appeared, and filed a demurrer to the petition. The District Court of Appeal, Wilson, J., held that where petitioner's wife appealed from judgment in her favor in divorce action in which petitioner was ordered to pay alimony, appeal by petitioner's wife stayed enforcement of any part of judgment, and petitioner, who did not pay remainder of attorney's fee pending appeal, was not guilty of contempt.

Demurrer overruled, and order finding petitioner guilty of contempt of court and sentencing him to imprisonment annulled.

**1. Appeal and error ☞122**

Where parts of a judgment are so connected that one part cannot be reversed without a reversal of whole judgment, a party cannot appeal from portion of judgment adverse to him, and at same time enforce favorable portions.

**2. Divorce ☞182**

The provisions of a judgment denying a divorce to both sides, but awarding ali-

mony to wife, are inseparable, and same is true of a judgment granting wife a divorce and allowing her an attorney's fee, and where wife appeals from such a judgment, enforcement of all parts of judgment must await disposition of appeal.

### 3. Divorce ⇨182, 221

Attorney's fees for services rendered to a wife in a divorce action are granted to wife for her benefit and are not awarded to her attorney, notwithstanding fees may be made payable to attorney, and her attorney has no greater right, pending an appeal from the judgment, to sum awarded him, than wife has to enforce any other unseverable part of judgment.

### 4. Divorce ⇨269(2)

Where husband, who was ordered in divorce action to pay \$6000 to wife's attorney, paid \$2000 to attorney, and deposited remainder in trust pending wife's appeal from decree on ground she was coerced by trial judge to seek divorce instead of separate maintenance, all parts of judgment had to await disposition of appeal, and husband was not guilty of contempt for failure to pay wife's attorney fees.

### 5. Divorce ⇨221

In divorce action, a wife's attorney has no separate equity in counsel fees awarded to her, but his right thereto is derived from his client.

### 6. Divorce ⇨221

The relation an attorney for a party, in a divorce case, has in the subject matter of the action arises solely out of his employment, and he has no interest in subject matter under statute providing that when attorney's fees are allowed, they may, in the discretion of the court, be made payable in whole or in part to the attorney. Civ.Code, § 137.5.

### 7. Divorce ⇨261

Under statute providing that when attorney's fees are allowed in a divorce action, they may, in discretion of court, be made payable in whole or in part to attorney, attorney can enforce order allowing fees only by obtaining and levying an execution. Civ.Code, § 137.5.

### 8. Divorce ⇨221, 261

Statute providing that when attorney's fees are allowed, they may, in discretion of court, be made payable in whole or in part to attorney, allows fee to and for benefit of wife, and does not enlarge attorney's rights to enforce order for payment of fee. Civ.Code, § 137.5.

### 9. Contempt ⇨67

Where husband was satisfied with judgment awarding divorce to wife and ordering him to pay attorney's fees, consented to its provisions, intended to comply with it, and did not appeal therefrom, but wife appealed and time within which husband could have appealed, expired, husband would be granted certiorari to obtain relief from judgment in contempt proceedings instituted by wife's attorney after husband's failure to pay counsel fees awarded by court. Code Civ.Proc. § 1068.

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Pacht, Warne, Ross & Bernhard, Clore Warne, Bernard Reich, Rudolph Pacht, Beverly Hills, for petitioner.

No appearance for respondent Superior Court.

Francis C. Whelan, Los Angeles, real party in interest, in pro. per.

WILSON, Justice.

Petition for a writ of certiorari to review and annul an order of the superior court finding petitioner guilty of contempt of court and sentencing him to imprisonment in the county jail. No appearance has been made for respondent Superior Court. Francis C. Whelan, the real party in interest, has appeared and filed a demurrer to the petition.

Petitioner, Felix J. Weil, instituted an action in the superior court against his wife, Helen K. Weil, for a divorce. She answered and filed a cross-complaint for separate maintenance. The case was tried before The Honorable Wm. S. Baird, Judge. At the close of the trial Mrs. Weil amended her cross-complaint and prayed for a divorce. With petitioner's consent an interlocutory judgment of divorce was granted in her favor, which, among other



things, ordered petitioner to pay directly to Francis C. Whelan, attorney for defendant and cross-complainant, the sum of \$6,000 as attorney's fee in the action, payable in three installments of \$2,000 each on or about 30, 60 and 90 days, respectively, from the date of entry of the judgment. Petitioner paid the first installment of \$2,000. Before the second installment became due Mrs. Weil substituted herself in propria persona and made a motion for a new trial, asserting misconduct on the part of the trial judge in allegedly exercising duress and coercion upon her to amend her cross-complaint against her will so as to pray for a divorce which she did not want instead of separate maintenance which she desired. Her motion was denied. She then appealed from the whole of the judgment.

Petitioner being satisfied with the consent judgment did not appeal but, taking the position that the judgment would stand or fall inseparably and that the defendant's appeal from the entire judgment absolved him pending the appeal from further compliance with its provisions, did not pay the balance of the attorney's fee. To indicate his good faith and his willingness to comply with the judgment he deposited with his attorneys the sum of \$4,000 in trust to be paid to Mr. Whelan in accordance with the final determination of the court in connection with the latter's claim for counsel fee.

Mr. Whelan obtained an order directing petitioner to show cause why he should not be adjudged guilty of contempt of court for disobedience of the interlocutory judgment. The order to show cause came on for hearing before The Honorable Mildred L. Lillie, Judge. Petitioner moved for an order vacating the order to show cause on the ground, among others, that the court was without jurisdiction to make the order or to punish petitioner for contempt. The motion to vacate the order

was denied and the court adjudged petitioner in contempt and sentenced him to imprisonment in the county jail. Execution of the sentence was suspended on condition that within 10 days after the making of the order petitioner pay the sum of \$4,000 to Mr. Whelan. For a review of the court's order this proceeding was instituted.

[1,2] Where parts of a judgment are so connected that one part cannot be reversed without a reversal of the whole judgment, a party cannot appeal from the portion adverse to him and at the same time enforce the favorable portions. *McCaleb v. McCaleb*, 32 Cal.App. 648, 649, 163 P. 1045; *Preluzsky v. Pacific Co-operative Cafeteria Co.*, 195 Cal. 290, 293, 232 P. 970. The provisions of a judgment denying a divorce to both sides but awarding alimony to the wife are inseparable. *McCaleb v. McCaleb*, supra. The same is true as to a judgment granting a divorce to the wife and allowing her an attorney's fee. Should she appeal, the enforcement of all parts of the judgment must await the disposition of the appeal.

Prior to the enactment of section 137.5\* of the Civil Code, Stats.1937, ch. 183, p. 479, amended Stats.1947, ch. 951, p. 2220, the allowance of attorney's fees against the husband in a divorce action was required to be made to the wife. An order directing payment directly to the wife's attorney was void. *Keck v. Keck*, 219 Cal. 316, 322, 26 P.2d 300; *Stevens v. Stevens*, 215 Cal. 702, 704, 12 P.2d 432; *McManus v. Montgomery*, 12 Cal.2d 397, 84 P.2d 787. Hence the attorney had no direct, substantive or proprietary interest in the allowance made to the wife. His right was indirect and derivative.

[3-5] The attorney's right to the amount allowed for counsel fees for his services rendered to a wife is no more proprietary and direct by virtue of sec-

\* Section 137.5 reads: "In all actions for divorce or annulment or separate maintenance in which the court grants to the wife or husband, as the case may be, attorney's fees in the prosecution or defense of the action, as the case may be,

such fees may, in the discretion of the court, be made payable, in whole or in part, to the attorney entitled thereto, and judgment may be entered and execution levied accordingly."

tion 137.5 of the Civil Code than before its enactment. That section provides that when attorney's fees are allowed they may, in the discretion of the court, be made payable in whole or in part to the attorney. Notwithstanding the fees may be made payable to the attorney, they are granted to the wife for her benefit and are not awarded to her attorney. Although the fee may be made payable to him, he has no greater right, pending an appeal from the judgment, to the sum awarded than has the wife to enforce any other unseverable part of the judgment. Since Mrs. Weil has appealed from the entire judgment she cannot enforce any part of it. She would have been unable to compel payment of the attorney's fee had payment been ordered to her instead of to her attorney; consequently the latter, having no greater right, cannot enforce the provision relating to such fee. A wife's attorney has no separate equity in counsel fees awarded to her. His right thereto is derived from his client.

[6] Such relation as an attorney for a party to a divorce case has in the subject matter of an action arises solely out of his employment. He had no "interest" in the subject matter prior to the enactment of section 137.5 and that section does not invest him with any interest therein. *Telander v. Telander*, 60 Cal.App.2d 207, 210, 140 P.2d 204.

[7] Since previously to the enactment of section 137.5 attorney's fees for the wife were payable to her and an order for payment to her attorney was void, cases cited, *supra*, any proceeding against the husband for the enforcement of an order for the payment of such fee was required to be conducted in her name. That section of the code gives the attorney one remedy, one method of enforcing the order, and one only, and that is to obtain and levy an execution. Section 137 of the Civil Code provides that the court may require one spouse to pay support money, costs and attorney's fees to the other spouse. Such an order will require payment of any and all such amounts to the spouse and "may be enforced by the court

by such order or orders as in its discretion" the court may from time to time deem necessary. This includes contempt proceedings as well as the levy of an execution. Section 137.5 does not give such a broad power of enforcement of an order for payment of the fee directly to the attorney as is provided in section 137. The method of enforcement of such order is expressly limited to the levy of an execution.

[8] When the court had no option but to order the attorney's fees paid to the wife, should she have failed to pay the money to her attorney after she had received it he would be deprived of his compensation. Section 137.5 corrected this injustice by providing for payment directly to the attorney, but the fee still is allowed to and for the benefit of the wife and the attorney's rights are not enlarged by that section.

The method by which a judgment may be enforced is a matter of statutory regulation. The fact that section 137, which has been in force in some form since 1872, places no limitation on the manner of enforcement of an order for payment of support, attorney's fees and costs to the spouse and section 137.5, which was added to the code in 1937, provides the levy of an execution as the sole method of enforcement of an order made thereunder, signifies that the Legislature had a different intention as to the manner of enforcement of the orders made under the respective sections. *Estate of Garthwaite*, 131 Cal.App. 321, 326, 21 P.2d 465; *Southern Pacific Co. v. McColgan*, 68 Cal.App. 2d 48, 54, 55, 156 P.2d 81; *People v. Valentine*, 28 Cal.2d 121, 142, 169 P.2d 1.

[9] Mr. Whelan contends that a writ of certiorari will not lie to review the order adjudging petitioner in contempt for the reason that he had a plain, speedy and adequate remedy at law by an appeal from the interlocutory judgment insofar as the decree required payment of the attorney's fee. Petitioner was satisfied with the judgment, consented to its provisions and intended to comply with it, hence he did not appeal therefrom. The time within

which he could have appealed had long since expired when Mr. Whelan commenced his efforts to enforce payment of the counsel fee. Therefore he has no remedy at law and certiorari is the proper method of obtaining relief. Code Civ.Proc., sec. 1068. His willingness to comply with the judgment is shown by his deposit of the unpaid balance of the counsel's fee with his attorneys to be paid in accordance with the final determination of the action.

Since the entire judgment is in favor of Mrs. Weil and her appeal therefrom stays enforcement of any part of it, should she succeed on her appeal in procuring its reversal the provision requiring payment of the attorney's fee will fall with the other parts of the decree.

The demurrer of Francis C. Whelan to the petition is overruled. The order finding petitioner guilty of contempt of court and sentencing him to imprisonment is annulled.

MOORE, P. J., and McCOMB, J., concur.



97 Cal.App.2d 378

WEIL v. WEIL.  
Application of WEIL.  
Civ. Nos. 17327, 17497.

District Court of Appeal, Second District,  
Division 2, California.

May 5, 1950.

Divorce action by Felix J. Weil against Helen K. Weil. Defendant filed a cross-complaint for separate maintenance, and later amended her cross-complaint and prayed for a divorce. The Superior Court of Los Angeles County granted defendant a divorce on her cross-complaint, and defendant appealed. Plaintiff filed a petition for supersedeas to suspend enforcement of judgment and order for issuance of execution thereon, and defendant demurred to the petition.

The Court of Appeal, Wilson, J., held that no part of judgment was enforceable until defendant's appeal therefrom was finally determined, and that plaintiff not having appealed from judgment was not required to file an undertaking staying its execution, but that where he was ready, able, and willing to comply with judgment, he was entitled to writ of supersedeas to suspend enforcement of judgment and an order for issuance of writ of execution thereon.

Demurrer overruled and writ issued.

#### 1. Appeal and error ⇐460(2)

Where plaintiff was ready, able and willing to comply with judgment granted in favor of cross-claimant, and he did not appeal from judgment, but his failure to comply with judgment was occasioned solely by cross-claimant's appeal, and execution was not necessary to enforce payment, plaintiff would not be required to file an undertaking staying execution of judgment.

#### 2. Appeal and error ⇐82(5), 460(2)

The order for issuance of an execution is a special order made after judgment, and is appealable, and an appeal therefrom stays all proceedings in trial court upon matters embraced in order from which appeal is taken. Code Civ.Proc. § 963, subd. 2.

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Pacht, Warne, Ross & Bernhard, Clore Warne, Bernard Reich, Rudolph Pacht, Beverly Hills, for petitioner.

No appearance for Defendant.

Francis C. Whelan, Los Angeles, real party in interest, in pro. per.

WILSON, Justice.

Petition for writ of supersedeas to suspend the enforcement of (1) a judgment of the superior court, and (2) an order for the issuance of a writ of execution thereon. Francis C. Whelan, the real party in interest in this proceeding, has demurred to the petition on the ground that it does not state facts sufficient to entitle plaintiff to the writ. The facts with reference to the judgment and the appeal therefrom and the questions of law relating to the enforcement of the judgment are set forth



in the opinion this day filed in *Weil v. Superior Court*, Cal.App., 217 P.2d 975.

Prior to the institution of the contempt proceedings referred to in that opinion Mr. Whelan sought, by application to the superior court for a writ of execution, to enforce that portion of the judgment ordering the payment of attorney's fees. His motion was heard by the Honorable William B. McKesson, Judge, who granted it notwithstanding plaintiff's protest that defendant's appeal suspended the judgment and barred the right of the court to order an execution for its enforcement. Plaintiff has appealed from the order granting the motion.

For the reasons stated in *Weil v. Superior Court*, supra, no part of the judgment is enforceable until defendant's appeal therefrom shall have been finally determined.

[1] Plaintiff not having appealed from the judgment was not required to file an undertaking staying its execution. Since he was ready, able and willing to pay the attorney's fees in full at the times directed by the judgment, and since his failure to pay the balance directly to Mr. Whelan was occasioned solely by defendant's appeal, an execution was not necessary to enforce payment.

[2] The order for the issuance of an execution, a special order made after judgment, is appealable, Code Civ.Proc., sec. 963, subd. 2, and the appeal therefrom stays all proceedings in the trial court upon the matters embraced in the order from which the appeal was taken. *Peterson v. Lampton*, 46 Cal.App.2d 751, 754, 116 P.2d 952; *Helvey v. Castles*, 73 Cal.App.2d 667, 674, 167 P.2d 492.

The demurrer of Francis C. Whelan to the petition is overruled. A writ of superedeas will issue staying further proceedings to enforce the judgment for attorney's fees until the appeals from the judgment and from the order directing issuance of execution shall have been finally determined.

MOORE, P. J., and McCOMB, J., concur.

**BOSWELL et al. v. MOUNT JUPITER  
MUT. WATER CO. et al.**  
Civ. 17299.

District Court of Appeal, Second District,  
Division 2, California.

May 10, 1950.

Rehearing Denied May 26, 1950.

Hearing Denied July 6, 1950.

Action by Olive E. Boswell and others against the Mount Jupiter Mutual Water Company and others to obtain a judgment that the plaintiffs were the duly elected directors of the named defendant. From a judgment of the Superior Court, Los Angeles County, Wilbur C. Curtis, J., which among other things directed that a meeting of stockholders be called for purpose of electing a board of directors, the defendants Lena Moss and Arthur Moss appealed. The District Court of Appeal, Moore, P. J., held that a resignation as secretary and treasurer was not tantamount to or effective as a resignation as director, in view of fact that resignation was never accepted and that officer thereafter actually served as a director.

Affirmed.

#### 1. Waters and water courses ☞238

Resignation as secretary and treasurer of mutual water company was not tantamount to or effective as a resignation as director, in view of fact that resignation was never accepted and that officer actually served as a director thereafter.

#### 2. Waters and water courses ☞238

If there were three directors of mutual water company and they did not all sign a waiver of notice and consent to holding of special meeting, then, in absence of such notice to an absent director, special meeting was not duly assembled, and its acts, including the levy of assessments, were not valid.

#### 3. Waters and water courses ☞238

A valid special meeting of mutual water company's board of directors could not be held unless a notice of proposed meeting were given to director or his waiver of notice was obtained and thereafter attached to minutes of meeting, and where such was not done assessments levied at such meetings, were void, irrespective of fact that minutes were captioned "regular."

**4. Waters and water courses** ⇨238

Where assessments levied by mutual water company were void because the special meetings at which the assessments were levied were not duly convened, attempt of corporate officers to sell or cancel shares under purported assessments was void, and stockholders' meeting which was subsequently held for purpose of electing directors without advance notice having been given to holders of shares which the officers had attempted to sell or cancel was not duly assembled.

**5. Trial** ⇨377(2)

Where court had fully discussed merits of action and given reasons for finding against defendants, denial of motion to reopen case was not abuse of discretion.

**6. Corporations** ⇨283(3)

Under statute providing that court may determine person entitled to office of director or may order a new election and direct such other relief as may be just and proper, if the court "determines" a fact, it thereby makes a finding, and if it directs the directors to do an act it makes an "order", though the decree is captioned a "judgment." Corporations Code, § 2238.

**7. Waters and water courses** ⇨238

Under statute providing that court may determine the person entitled to the office of director or may order a new election and direct such other relief as may be just and proper, an order that board of mutual water company should call a meeting of stockholders for purpose of electing a board of directors within 30 days from notice of entry of judgment, and that board do every act necessary so that meeting should be valid, was not objectionable because it was designated "judgment" or on the ground that it required the directors to do indefinite acts. Corporations Code, § 2238.

**8. Evidence** ⇨317(2), 471(29)

In action for judgment that plaintiffs were duly elected directors of mutual water company, testimony of accountant as to his recollection of commissioner's interpretation as to whether issue of certain shares was valid was properly rejected because

hearsay and because incompetent as an attempt to decide legal question for the court.

**9. Appeal and error** ⇨1050(1)

In action to obtain a judgment that plaintiffs were the duly elected directors of mutual water company, admission of testimony that certain stockholder had never paid assessments on its shares was not prejudicial.

Eugene L. Wolver, Los Angeles, for appellants.

Olive E. Boswell and Theodore Rosenthal, Los Angeles, for respondents.

MOORE, Presiding Justice.

Respondents' action was brought to obtain a judgment that they are the duly elected directors of defendant corporation and that none of the individual defendants is a director thereof. Findings were waived and the court decreed "that the purported election of April 19, 1948, was invalid"; that the directors of the water company are Lena Moss, Arthur Moss and Manuel Moss; that the board of directors of the corporation forthwith make available to plaintiffs a list of its shareholders with the names and addresses "of all the persons to whom stock has ever been issued"; and that the board of directors of the corporation "shall call a meeting of the stockholders of said corporation for the purpose of electing a board of directors \* \* \* within thirty days from notice of entry of judgment; that the board of directors do every act necessary so that said meeting shall be a valid meeting of the shareholders of said corporation."

It appears that at a shareholders' meeting held on April 19, 1948, nominations of directors were made and a majority of the shares present were cast for appellants and defendant Whitney. Respondents challenged the election on the ground that many shareholders of record had not received notice of the meeting. While no finding was made of the number of the outstanding shares at the time of the April meeting the record discloses that levies of three separate assessments on the stock

had been attempted at special meetings; that in many instances attempts were made to cancel shares for nonpayments of such attempted levies. Thereupon the holders of such stock as had been so cancelled were not given notices of the meeting to be held on April 19, 1948. A document dated December 31, 1946, filed by defendants as an exhibit was mailed to the stockholders. From this it appears that in 1945, 144 shares were cancelled leaving then 152 shares in good standing. During 1946, out of 211 shares, 123 were cancelled for nonpayment of assessments leaving only 88 shares on December 31, 1946, in good standing. In 1947 sixty-six additional shares were issued and another assessment was attempted as a result of which 42 shares were cancelled leaving 112 shares in good standing on December 31, 1947.

But Arthur Moss, the secretary, testified that in 1947 "we sent notices to each stockholder that was in good standing as of the last assessment in 1946 \* \* \* we could not send assessment notices to all of them because all of them had not paid their assessments in '45." He further testified to taking off the 144 who had not paid assessments in 1945, the 123 who had not paid assessments in 1946, and 42 who had not paid in 1947 and sent notices only to the rest for the April meeting, 1948.

We now turn to a consideration of the meetings of the directors to ascertain whether the levies of assessments on the stock were legally made.

#### Meeting Not Regularly Assembled

[1,2] The meetings of 1945, 1946 and 1947 at which the assessments were levied were special meetings and were not duly convened. It is at once evident that only two directors participated in the meetings. Contrary to appellants' contention, Manuel Moss had not resigned nor did he ever resign as director. Although appellants contend that his resignation as secretary and treasurer is tantamount to a resignation as director, the contention is vain for the reasons that (1) the resignation was as secretary and treasurer to be effective after the meeting of May 3, 1946, and was never accepted and (2) he actually served as di-

rector thereafter. Appellants admitted at the trial that there were three directors but that only two were acting. If there were three directors and they did not all sign a waiver of notice and consent to the holding of the meeting, then in the absence of such notice to an absent director as is required by law the meeting was not duly assembled and its acts are not valid.

[3] The board meetings of June 3, 1946, and June 1, 1947, were special; only two directors were present and the third director did not sign a waiver on the records of the meeting, nor was a notice of the meeting forwarded to him. The fact that the minutes were captioned "regular" is immaterial. The by-laws provide for regular meetings on the first Tuesday at 4 p. m. The meeting of June 3, 1946, was held on Monday and the meeting of June 1, 1947, was held on Sunday. Before a valid special meeting could have been held in either of the two years a notice of the proposed meeting should have been given to Manuel Moss or his waiver of notice should have been attached to the minutes of each meeting. The argument and supporting authorities, *Porter v. Lassen County Land and Cattle Company*, 127 Cal. 261, 59 P. 563 and *Pennington v. George W. Pennington Sons*, 27 Cal.App. 57, 148 P. 947, that the vote of a majority of an existing though depleted board is a valid exercise of the directive powers of a corporate board are not pertinent where there exists a full board and the meeting has not been properly called.

[4] By virtue of such irregularities the assessments levied on the two dates are void. *Cheney v. Mexican Petroleum*, 158 Cal. 342, 343, 111 P. 92, 32 L.R.A., N.S., 16. Of course, if the assessments were void the attempt of the corporate officers either to sell or to cancel the shares under the purported assessment are void. Since all the shares cancelled for nonpayment of the purported assessments in 1945, 1946 and 1947 were in good standing on April 19, 1948, and since holders of only 154 shares were given advance notice, the stockholders' meeting on that day for the purpose of electing directors was not duly assembled.



Appellant contends that if the assessments were legally levied the certificates of the delinquent shares were properly cancelled. Such argument is irrelevant in view of the conclusion that the assessments were not valid. The decision in *Castello v. Central Eureka Mining Company*, 85 Cal.App.2d 772, 193 P.2d 968, settled the question of the sufficiency of a resolution levying an assessment and of the notice of the assessment. The legality of the meeting which levied the assessment there was not questioned.

Aside from the failure of the directors properly to assemble their meeting of 1947 it was illegal on account of another defect in the assessment and a consequent defect in the stockholders' meeting of April, 1948. From the corporation's financial statement of January 1, 1947, there were 631 shares outstanding. It is also established that on 200 shares the assessments of 1946 were paid. Since holders of only 154 shares were notified of the 1947 assessment, it was thereby rendered invalid even though the directors' meeting of 1947 had been duly assembled.

Still another vice in the assessment of 1947 is found in the failure to assess 300 shares standing in the name of Shell Realty Corporation. They were purchased in 1946. Since they were either not assessed in 1947 or if assessed they were not cancelled for nonpayment, the discriminatory character of the board's action rendered it illegal.

[5] Appellants contend that the court erred in denying their motion to reopen the case. The court had fully discussed the merits of the action and given reasons for finding against appellants when their counsel made his motion stating that "I can probably show a resignation by Mr. Moss subsequent to that time." The court's denial was based upon the observation that where a corporation has kept its minute book "in a very informal and irregular manner" the court should stand "on the record as it now exists." There was no abuse of discretion.

[6, 7] Appellants complain of the form of the judgment and because it is designat-

ed "judgment" and requires the directors to do indefinite acts. It is true that the statute, Corporations Code, sec. 2238, uses the phrases: "the court may determine the person entitled to the office of director or may order a new election \* \* \* and direct such other relief as may be just and proper." If the court "determines" a fact it thereby makes a finding. If it directs the directors to do an act or acts it makes an "order" even though the decree is captioned a "judgment." The order that the board "shall call a meeting of the stockholders for the purposes of electing a board of directors \* \* \* within thirty days from the notice of entry of judgment; that the board \* \* \* do every act necessary so that said meeting shall be a valid meeting" requires nothing more to be done than to comply with the law and with the by-laws of the corporation. It is true that Manuel Moss is not a party to the action but that does not prevent a finding that he is a member of the board nor does it relieve appellants of the duty of dealing with him as a director. Compliance with the judgment requires no unreasonable effort on the part of appellants or of the board.

[8] Appellants assign as prejudicial errors two orders for the rejection and admission of certain evidence. The evidence rejected was the testimony of the accountant who had examined the books about April 1, 1948. He informed appellants' counsel that the stock authorized to be issued to Shell Realty Corporation was not pursuant to the permit of September 10, 1946. The testimony offered was the accountant's recollection of the Commissioner's interpretation as to whether the issue of certain shares was valid despite the fact that they were issued prior to the performance by the corporation of a condition precedent specified in the permit. Such testimony would have been hearsay and also incompetent as an attempt to decide a legal question for the court. The decision in *People v. Ferguson*, 134 Cal.App. 41, 24 P.2d 965, is inapplicable. There the advice of the Commissioner of Corporations was admitted to show the good faith of the accused.

[9] As to the assignment of the ruling which admitted evidence objected to, the witness Moss was over objection allowed to tell that the Shell Realty Corporation never paid assessments on its 300 shares. Appellants contend that (1) the negative answer was "of course *No*" since the Shell Realty could not have paid an unlevied assessment; (2) "had a jury been present the answer could have been highly prejudicial." But no jury was present and the court's decision was not based upon the negative answer to the question, but rather upon a consideration of all the facts in evidence.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.



97 Cal.App.2d 407

**SLAVIN v. CITY OF GLENDALE et al.**  
Civ. 17314.

District Court of Appeal, Second District,  
Division 1, California.  
May 9, 1950.

Rehearing Denied May 31, 1950.

Hearing Denied July 6, 1950.

Amelia B. Slavin brought action against the City of Glendale, and others, for assault and battery committed by police officers of the city. The Superior Court of Los Angeles County, Kurtz Kauffman, J., sustained a demurrer to the third amended complaint, without leave to amend, and plaintiff appealed. The Court of Appeals, Doran, J., held that the action was barred by plaintiff's failure to file a claim at any time, and that the city was not estopped from raising this defense.

Judgment affirmed.

**1. Municipal corporations** ⚡741(1)

The charter requirement that no action be brought on any claim or demand against City of Glendale until demand therefor has been presented and rejected

was applicable to claim for assault and battery committed by police officers.

**2. Estoppel** ⚡62(5)

That city officials allegedly advised plaintiff that her claim could be adjusted and settled and that she should wait and see what would develop did not estop city from relying on plaintiff's failure to file claim at any time.

**3. Pleading** ⚡254

Where demurrer to original complaint against city and its police officers in an official capacity was sustained because of failure to allege filing of claim, plaintiff could not avoid the sustaining of a demurrer to third amended complaint alleging substantially the same facts, by adding a cause of action against police officers as individuals.

Paul S. Crouch, Los Angeles, for appellant.

Henry McClernan, City Attorney, Glendale, John W. McElheney, Deputy City Attorney and City Prosecutor, Hollywood, for respondents.

DORAN, Justice.

The appeal herein is from a judgment entered after the sustaining, without leave to amend, of a demurrer to the third amended complaint. Plaintiff's complaint alleges damages resulting from an assault and battery committed by certain police officers of the City of Glendale. To the original complaint, defendants demurred on the ground that the city was not liable for the type of tort alleged, and that plaintiff had not filed a verified claim for the damages, as required by the city charter and ordinance. This demurrer was sustained.

Likewise a demurrer was sustained to an amended complaint, the second count of which named the individual defendants without specifying them as police officers of the city. A second amended complaint was held demurrable without leave to amend as to the City, and with leave to amend in respect to the individual defendants. This complaint, in the first count made additional allegations of estoppel to excuse plaintiff's

failure to file a written claim. Thereafter a third amended complaint was filed similar to the preceding pleading except that the City of Glendale was no longer named as a defendant; the factual basis for an estoppel was expanded, and in the second count the allegation that the individual defendants were "of the city of Glendale," was omitted. Demurrer thereto was sustained without leave to amend. Judgment was then entered for the respondents.

[1] As stated in appellant's brief, the first question involved in this appeal is, "Did the failure of the appellant to file a claim with the City of Glendale and its officers preclude the appellant from maintaining her first cause of action?" Amplifying this point appellant argues that "the claim she has against the respondents is not the usual ordinary type of claim which should (under the city ordinances) be filed"; that it has been held in other states that in certain exceptional cases, nuisance, for example, plaintiff could maintain action although the required claim had not been filed. Appellant cites no California cases on the subject, and the cases from other states are in no manner similar to the present litigation.

Answering this contention, respondents quote Article XI, Section 5 of the Charter of the City of Glendale, as amended, providing that "No action shall be brought on *any claim or demand for money or damages* against the City or any Board, Commissioner or officer thereof, until a demand for the same has been presented as provided in this Charter or by ordinance and rejected in whole or in part". (Italics added.) Ordinance No. 2100 enacted June 27, 1946, provides that "All claims for damages, founded in tort", against the City "or any board, commissioner, officer or employee, must be in writing, verified and presented to the City Clerk, and to the \* \* \* officer or employee against whom it is intended to bring the action, within ninety (90) days after the tort from which the damages arose"; further that "No action shall be brought against the City \* \* \* or any \* \* \* officer or employee thereof" un-

less such claim has been presented as required, and rejected in whole or in part.

Various cases are cited in respondents' brief sustaining the validity of these requirements, such as Kornaherns v. City and County of San Francisco, 87 Cal.App. 2d 196, 196 P.2d 140. In Cathey v. City and County of San Francisco, 37 Cal.App.2d 575, 576, 99 P.2d 1109, 1110, the court says: "The language of the charter section is plain and requires no interpretation or construction. \* \* \* such a demand is a condition precedent to the action, and a complaint failing to allege demand fails to plead a cause of action". In construing a similar statute requiring filing of a claim, it was said in Huffaker v. Decker, 77 Cal. App.2d 383, 389, 175 P.2d 254, 257, that "The statute merely places upon him (plaintiff) a reasonable procedural requirement to the maintenance of his action".

[2] As appellant's second point it is argued that assuming the necessity for filing a claim as a prerequisite to bringing action, "it is respectfully submitted that appellant has plead in her first cause of action sufficient facts to show an estoppel against the respondents". In Paragraph V of the Third Amended Complaint it is alleged that plaintiff "intended to file a claim with the City of Glendale and officers thereof, \* \* \*. That the said officers were fully advised of her grievance \* \* \* and that Plaintiff requested of said officials \* \* \* what procedure she should take and said officials \* \* \* advised the Plaintiff that her claim could be adjusted and settled and advised her to wait and see what would develop. That said officials did not advise the Plaintiff to file a written, verified claim \* \* \* but assured her that her grievance \* \* \* would be properly taken care of", and that plaintiff relied upon such representations.

Appellant bases his estoppel argument upon the case of Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323, in which the governmental agency was held estopped by the acts of its agents from setting up plaintiff's failure to file a claim within the required 90 day period. In that



case a formal claim was filed but not within the proper period. The Farrell case refers to Redlands High School District v. Superior Court, 20 Cal.2d 348, 125 P.2d 490, 497, and appellant emphasizes the following language of Justice Carter in a concurring opinion in the latter case: "I concur in the conclusion \* \* \* upon the sole grounds that a failure to file a claim as required by section 2.801 of the School Code is not a jurisdictional prerequisite to the commencement \* \* \* of an action".

In the Farrell case it appears, as noted in respondents' brief, that "the agents had obtained a full statement from plaintiff, advised her not to employ counsel and told her she could wait until she knew the extent of her injuries before she stated the amount she claimed". Respondents also call attention to the fact that there is no jurisdictional question here involved, hence, the remarks of Justice Carter in the Redlands case furnish no authority for appellant's contention. And in the majority opinion of the Redlands case, 20 Cal.2d at page 358, 125 P.2d at page 495 it is said: "Any plaintiff, therefore, must fulfill the mandatory requirement that a verified claim be filed as a prerequisite to maintaining a suit". At page 360 of the Redlands case in 20 Cal.2d, at page 496 of 125 P.2d the court says: "That requirement, however, is one which goes to the elements of the plaintiff's right to recover rather than to the power of the court. Judgment in favor of the plaintiff in the absence of such a claim is a grievous error of law and a violation of statute".

In Johnson v. Fresno County, 64 Cal. App.2d 576, 149 P.2d 38, 39, the court held that the doctrine of equitable estoppel had not been extended to completely excuse the filing of the required claim but only to excuse the filing within the required period in a proper case. The court in the Johnson case said: "If plaintiff had filed a claim within a reasonable time thereafter he would have brought himself within the Farrell case. This he did not do".

[3] Finally, appellant contends that the Second Cause of Action, which was added after sustaining of a demurrer to the original complaint, states a cause of action

against the defendants as individuals; therefore, appellant should have been permitted to go to trial on that issue. It will be recalled that the original complaint stated but one cause of action,—against the defendant city and its police officers acting in an official capacity. The new cause of action against the individual defendants alleged the same acts of assault and battery but omitted the allegations that such persons were acting as police officers. By so doing it was obviously sought to bypass the controversy concerning plaintiff's failure to file a claim.

Respondent's brief answers the above contention by quoting from Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 716, 128 P.2d 522, 524, 141 A.L.R. 1358, as follows: "If any verified pleading contains an allegation which renders a complaint vulnerable, the defect cannot be cured simply by omitting the allegation, without explanation, in a later pleading". Likewise in Neal v. Bank of America, 93 Cal.App.2d 678, 209 P.2d 825, 827, the court says: "Plaintiff's so-called 'amended complaint' consists solely of a mere reiteration, in two separate but substantially identical paragraphs, of the common count in the original complaint. No attempt is made to state new facts, or to state the facts more fully, or to bring in any new parties. \* \* \* Facts once alleged, however, cannot be withdrawn from consideration by merely filing an amended pleading omitting them without explanation".

Careful examination of the record and briefs herein fails to disclose any reversible error. Appellant's threefold argument to the effect that the filing of a claim for damages as required by charter and ordinance, was not a necessary prerequisite to bringing action; that if necessary, the defendants are estopped to assert such defense; and that in any event the action should be allowed to go to trial against the police officers as individuals, is not persuasive in any of its several parts.

The basic fact which must be recognized is that plaintiff's cause of action, however stated, was one for assault and battery committed by police officers of the City of Glen-

dale. Plaintiff did not and could not allege that the required claim had been filed as required by the law, either within the 90 day period or at any other time. In an attempt to state a cause of action plaintiff drafted three different complaints which were substantially similar, to which demurrers were successively sustained. As stated in respondent's brief, "appellant should not be allowed to breathe life into a complaint by omitting facts, previously alleged in a verified pleading, which made it fatally defective."

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



97 Cal.App.2d 366

**FRESNO CITY LINES, Inc. et al. v.  
HERMAN.**  
Civ. 4044.

District Court of Appeal, Fourth District,  
California.

May 4, 1950.

Action by Fresno City Lines, Inc. and another, against J. P. Herman for damages from collision between bus and automobile at street intersection. From a judgment of the Superior Court, of Fresno County, Philip Conley, J., in favor of plaintiffs, the defendant appealed. The District Court of Appeal, Mussell, J., held that the question of contributory negligence was one of fact for the jury.

Affirmed.

#### 1. Automobiles ⇨171(4)

Bus had right of way over automobile approaching intersection from right if bus had entered intersection when automobile was still approximately fifty feet away from it. Vehicle Code, § 550(a).

#### 2. Automobiles ⇨245(14)

Whether bus driver after observing automobile approaching intersection from

right was justified in proceeding across intersection was question of fact for jury, as was also the question of whether driver should have applied his brakes before and after collision.

#### 3. Automobiles ⇨208

Where control mechanism of bus was damaged by impact of collision and front wheels were locked, failure of driver to apply brakes after the impact was not contributory negligence.

#### 4. Automobiles ⇨201(1), 245(14)

Where motorist admittedly saw bus approaching intersection, failure of bus driver to sound horn was not proximate cause of collision and was not negligence as a matter of law.

#### 5. Automobiles ⇨245(61)

In action by owner and by driver of bus for damages from collision with automobile, whether bus driver increased severity of his injuries by negligently failing to stop bus immediately after collision, whether bus was overloaded and was being driven at excessive speed, and whether it was equipped with proper horn, were questions of fact for jury and it was within province of jury to determine whether such matters, if true, constituted proximate cause of collision.

#### 6. Automobiles ⇨242(8)

In action by owner and by driver of bus for damages from collision with automobile, motorist had burden of proving contributory negligence.

#### 7. Negligence ⇨136(9)

Contributory negligence is not established as a matter of law unless only reasonable hypothesis is that such negligence exists, and evidence must point unerringly to that conclusion.

#### 8. Appeal and error ⇨999(3)

##### Automobiles ⇨245(80)

In action by owner and by driver of bus for damages from collision with automobile at intersection, whether owner and driver were contributorily negligent was question of fact and finding of jury thereon would not be disturbed.

**9. Trial** ⚡296(3)

In action by driver and by owner of bus for damages from collision with automobile, instructions referring to "each side," "both sides," and "one side," in case were not grounds for reversal, in view of an additional instruction that each plaintiff's case should be determined separately, as if two separate actions were being tried.

**10. Appeal and error** ⚡1033(5)

Where instructions were modifications of similar instructions offered by the defendant, and as modified and given they were more favorable to the defendant than those requested by him, defendant could not complain.

**11. Trial** ⚡252(8)

In action by owner and by driver of bus for damages from collision with automobile, where there was no evidence that brakes of bus were defective or that condition of brakes was a cause of collision, refusal to give instruction offered by motorist in language of statute containing table of stopping distances, was not error. Vehicle Code, § 670(a).

**12. Evidence** ⚡358

In action for damages from intersection collision, where map or diagram consisting of a pen and ink drawing of what purported to be the intersection involved was received for illustrative purposes only, and although it was not drawn to scale, figures on it were correct as to dimensions, and marks were placed thereon in open court by witnesses illustrating their testimony and depicting relative position of objects, admission was not error.

**13. Damages** ⚡39, 113

Reasonable cost of repairing damaged bus, in amount less than difference between market value of bus immediately before and immediately after injury, was correct measure of damages under circumstances, and in addition to cost of repairs bus company was entitled to damages for loss of use during time necessarily consumed in making repairs.

**14. Witnesses** ⚡379(10)

In action by owner and by driver of bus for damages from collision with auto-

mobile, where driver testified as a witness on direct examination, counsel for motorist was properly permitted on cross-examination to read, for purposes of impeachment, those portions of driver's deposition which he considered contradictory or at variance with his testimony, but was not entitled to read portions which were not contradictory, and refusal to permit such additional reading was proper. Code Civ.Proc. § 2042.

**15. Trial** ⚡59(2)

Trial court had discretion to regulate order of proof at trial. Code Civil Proc., § 2042.

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Louis J. Coelho, Fresno, for appellant.

Dearing, Jertberg & Avery, Fresno, for Fresno City Lines, Inc.

Harold A. Parichan, Fresno, for James W. Crane.

MUSSELL, Justice.

Action for personal injury and property damages arising out of an intersection collision of motor vehicles.

Defendant appeals from a judgment for plaintiffs in an action brought to recover damages to a bus owned by plaintiff Fresno City Lines, Inc. and for damages for personal injuries sustained by plaintiff James W. Crane, who was driving the bus at the time of the collision.

A jury trial was had which resulted in a verdict for the plaintiff bus company in the sum of \$4,484.65 and in favor of plaintiff Crane for \$1,700.

The collision occurred at 5:30 P. M., February 14, 1948, at the intersection of Modoc Street and Hawes Avenue in Fresno. Modoc Street extends north and south and Hawes Avenue east and west. At the time of the accident plaintiff Crane was driving the bus in a southerly direction on Modoc Street and defendant Herman was driving his automobile in an easterly direction on Hawes Avenue. The two vehicles collided at a point in the intersection approximately three feet north of the south curb line of Hawes Avenue and 22 feet east of the west curb line of Modoc Street.



Crane approached the intersection at a speed of 15 to 17 miles per hour and when 10 to 15 feet north of the intersection, slowed down to approximately 10 to 15 miles per hour, looked to the right and left and then saw defendant's automobile approaching in an easterly direction on Hawes Avenue, approximately 100 feet from the intersection. Crane was unable at this point to estimate the speed of defendant's car, but, believing that the defendant would stop, he proceeded into the intersection. When the bus had reached the position of about 8 feet south of the north curb line of Hawes Avenue, the defendant's car was about 50 feet west of the west curb line of Modoc Street. Crane then attempted to avoid the accident by accelerating his speed to get out of the intersection and by turning slightly to the left to permit the defendant to turn right and south on Modoc Street. The vehicles collided and the front of defendant's car struck and embedded itself into the side of the bus at about the right front wheel thereof. This impact damaged the steering mechanism of the bus and forced it to run head on and out of control into a tree located on the east side of Modoc Street between the curb line and sidewalk and approximately 40 feet south of the point of impact.

Plaintiffs suffered their respective damages both by reason of the original collision and from the effect of the bus striking the tree.

Defendant contends that the judgment should be reversed and argues that the plaintiffs were guilty of contributory negligence; that erroneous instructions were given to the jury; that the trial court erroneously admitted in evidence a map or diagram; that the damages awarded were excessive; and that the trial court erred in refusing to permit the defendant to read plaintiff James W. Crane's deposition during his cross-examination.

Defendant's first contention is that the weight of the evidence shows that plaintiffs were guilty of contributory negligence in that Crane did not apply the brakes on the bus; that he did not blow his horn or

give any other warning of impending danger; that he attempted to "beat" the defendant through the intersection and that he increased the severity of his injuries and damage to the bus by failing to apply his brakes after the impact.

[1-3] Several witnesses testified that the bus had entered the intersection when the defendant's automobile was still approximately 50 feet away from it. Plaintiff Crane, in such circumstances, had the right of way. Vehicle Code, Section 550 (a). Whether Crane, after observing the approaching car of defendant, was justified in then proceeding across the intersection was a question of fact for the jury. *Couchman v. Snelling*, 111 Cal.App. 192, 196, 295 P. 845; *Page v. Mazzei*, 213 Cal. 644, 3 P.2d 11; *McQuigg v. Childs*, 213 Cal. 661, 663, 3 P.2d 309; *Theren v. Hodorowicz*, 17 Cal.App.2d 653, 656, 62 P.2d 749. Likewise, the question of whether plaintiff Crane should have applied his brakes before and after the collision presented a factual question. *Enz v. Johns*, 112 Cal. App. 1, 5, 6, 296 P. 115; *Pewitt v. Riley*, 27 Cal.2d 310, 317, 163 P.2d 873. In this connection, there is substantial evidence that the control mechanism of the bus was damaged by the impact; that Crane had no control of the vehicle; that its front wheels were locked and that there was no time to apply the brakes. Even if Crane had been able, and had time, to apply his brakes after the impact, his failure to do so would not have constituted contributory negligence under the law. *Swart v. Acme Express & Drayage Co.*, 102 Cal.App. 615, 618, 619, 283 P. 358.

[4] It is conceded that Crane did not blow the horn on the bus, but defendant, by his own admission, was aware of the approaching bus and saw it when he was 50 to 60 feet from the intersection. It is apparent that since the defendant saw the bus coming, there was no necessity for the blowing of the horn and the failure so to do cannot be said to have been a proximate cause of the accident nor was it an omission which constituted negligence as a matter of law. *Giovannoni v. Union Ice*

Co., 108 Cal.App. 190, 192, 193, 291 P. 461; *Nix v. Woodworth*, 11 Cal.App.2d 322, 325, 326, 53 P.2d 765.

[5] It is argued that plaintiff Crane increased the severity of his injuries by negligently failing to bring the bus to a stop immediately after the collision; that the bus was overloaded and was being driven at an excessive speed and that it was not equipped with a proper horn. These were all questions of fact for the jury and it was within the province of the jury to determine whether such acts, if true, constituted a proximate cause of the collision.

[6-8] The burden of proving contributory negligence was upon the defendant and the rule is that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion. *Anthony v. Hobbie*, 25 Cal.2d 814, 818, 155 P.2d 826; *Pewitt v. Riley*, 27 Cal.2d 310, 316, 163 P.2d 873; *Jacoby v. Johnson*, 84 Cal.App. 2d 271, 274, 190 P.2d 243. We cannot say that the evidence before us is such that the sole inference to be drawn is one of plaintiffs' negligence which proximately contributed to their injuries and damages. The question, therefore, is one of fact and the finding of the jury thereon will not here be disturbed.

[9,10] Defendant's second contention is that certain instructions were erroneous. They are as follows:

"Each side in this action claims to be entitled to damages from the other, the plaintiffs under their complaint, and the defendant, as cross-complainant, under his cross-complaint. The burden is upon each party to prove by a preponderance of the evidence that the opposing party was negligent and that such negligence was a proximate cause of the accident in question."

"If you find that both sides were negligent and that the negligence of each was a proximate cause of the accident, then neither side may recover, because each then would have a good defense of contributory negligence.

"But if you find that one side was free from negligence that contributed in any degree as a proximate cause of the collision, and that the opposing party was guilty of negligence which was a proximate cause of the accident, then the former is entitled to recover compensation for his or its damages from the latter, and you will thereupon assess such damages."

The objection to these instructions is apparently made on the theory that they would require the jury to find against both plaintiffs if either of them was contributorily negligent and that the jury was required to find against the plaintiff Crane even though only the plaintiff Fresno City Lines was contributorily negligent and that both plaintiffs were put on a "side". However, the jury found that the plaintiffs were not contributorily negligent and there is no evidence in the record from which the jury could have found that there was any contributory negligence on the part of Fresno City Lines, Inc. (apart from negligence imputed to it from the contributory negligence of Crane, if any) which was the proximate cause of the collision. Since it was admitted that Crane neither attempted to apply the brakes on the bus, nor to blow the horn, a defect in either the brakes or the horn could not be a proximate cause of the collision. Furthermore, the court gave the following instruction: "Although there are two plaintiffs in these consolidated actions, the case of each is separate from and independent of, that of the other. The law permits them to join as plaintiffs solely because their claims involved the same accident. However, their rights, if any, are separate, not joint. The instructions given you apply to each plaintiff unless otherwise stated, and you will determine each plaintiff's case separately, to the same effect as if you were trying two separate actions." It is conceded that this instruction is a correct statement of the law. Since the jury was told that the instruc-



tions applied to each plaintiff unless otherwise stated and that each plaintiff's case should be determined separately to the same effect as if two separate actions were being tried, we can find no reversible error in the instructions complained of. The two instructions were modifications of similar instructions offered by the defendant and as modified and given, they were more favorable to the defendant than those requested by him. Under such circumstances, the defendant may not complain. *Wright v. Foreman*, 86 Cal.App. 595, 603, 604, 261 P. 481; *Holcomb v. Long Beach Investment Co.*, 129 Cal.App. 285, 295, 19 P.2d 31; *Pozzobon v. O'Donnell*, 1 Cal.App.2d 151, 154, 36 P.2d 236; *Kashevaroff v. Webb*, 73 Cal.App.2d 177, 183, 166 P.2d 306.

[11] Defendant complains that the court erred in refusing to give defendant's offered instruction in the language of Vehicle Code section 670(a), table of stopping distances. Where, as here, there is no evidence to show that the brakes were defective or that the condition of the brakes was a cause of the collision, there was no error in refusing the instruction. *Craig v. Boyes*, 123 Cal.App. 592, 598, 11 P.2d 673; *Lombard v. Swall*, 2 Cal.App.2d 59, 63, 37 P.2d 696; *Ketchum v. Pattee*, 37 Cal. App.2d 122, 129, 98 P.2d 1051.

[12] Plaintiff's contention that the trial court erroneously admitted in evidence the map or diagram is without merit. The map or diagram was a pen and ink drawing of what purported to be the intersection in question. While it was not drawn to scale, the figures on it were correct as to dimensions and the diagram was clearly explained. Witnesses testified as to the width of the streets between the curb lines. Marks on the diagram were placed thereon in open court by the witnesses illustrating their testimony and depicting the relative position of objects with respect to each other and to the intersection. The diagram was received in evidence for illustrative purposes only and there was no error in its admission. *Silvey v. Harm*, 120 Cal.App. 561, 570, 571, 8 P.2d 570.

[13] Defendant next contends that the damages awarded were excessive. In this connection there was substantial evidence that the reasonable cost of repairing the damaged bus was the sum of \$2,984.65. This amount was less than the difference between the market value of the bus immediately before and immediately after the injury to it and is the correct measure of damages under the circumstances. *Menefee v. Raisch Improvement Co.*, 78 Cal. App. 785, 248 P. 1031; *Marshall v. Golden State Milk Co.*, 113 Cal.App. 43, 297 P. 109; *Moore v. Levy*, 128 Cal.App. 687, 18 P.2d 362; *Valencia v. Shell Oil Co.*, 23 Cal.2d 840, 147 P.2d 558. In addition to the cost of repairs, plaintiff Fresno City Lines was, under the evidence, entitled to damages for loss of use during the time necessarily consumed in making the proper repairs. There was evidence that the use of the bus was lost for 125 days during the time it was being repaired and that the reasonable rental value of the vehicle was in excess of \$25.00 per day. The testimony would have supported a greater amount than that awarded by the jury and we find no merit in the contention that the damages awarded were excessive, nor do we find any merit in defendant's contention that the damages awarded plaintiff Crane were excessive because of his alleged contributory negligence after the impact, which increased or aggravated the damages. There was no finding of contributory negligence as against plaintiff Crane.

[14, 15] Finally, it is contended that the court erroneously refused to permit counsel for defendant to read the entire deposition of plaintiff Crane during his cross-examination. Crane was called as a witness for plaintiffs and on cross-examination, counsel for defendant was properly permitted to read for purposes of impeachment those portions of the deposition which he considered contradictory or at variance with his testimony. To read those portions of the deposition which were not contradictory to his testimony was not permissible on cross-examination. *People v. Lambert*, 120 Cal. 170, 175, 176, 52 P. 307. The court had discretion to regulate the



order of proof at the trial. Code Civ.Proc. § 2042; Kern County Finance Co. v. Iriart, 26 Cal.App.2d 483, 487, 79 P.2d 763. There is no indication in the record that the court refused or would have refused to permit the reading of the entire deposition as a part of defendant's case. In fact, the court suggested to counsel that the deposition might be offered when presenting his own case. The ruling was proper.

Judgment affirmed.

GRIFFIN, Acting P. J., and SHEPARD, Justice pro tem., concur.



97 Cal.App.2d 380

**STATE EMPLOYEES' RETIREMENT SYSTEM v. INDUSTRIAL ACCIDENT COMMISSION et al.**

Civ. 7752.

District Court of Appeal, Third District,  
California.

May 5, 1950.

Proceeding by the State Employees' Retirement System against Industrial Accident Commission of the State of California and Virginia Lund, widow of Karl Lund, deceased, to review an award of death benefits by the Commission for widow and her minor children. The District Court of Appeal, Sparks, J., pro tem., held that death arose out of and in the course of employment.

Affirmed.

**1. Workmen's compensation** ⚡1939

District Court of Appeal in reviewing evidence is not permitted to substitute its views for those of Industrial Accident Commission and annul an award unless there is no substantial evidence to support the findings and order.

**2. Workmen's compensation** ⚡1935

District Court of Appeal is required to indulge all reasonable inferences which may be drawn legitimately from the facts

in order to support the findings of the Industrial Accident Commission and in doing so all that is required is reasonable probability not absolute certainty.

**3. Workmen's compensation** ⚡1939

District Court of Appeal must search record to discover whether evidence is reasonably susceptible of the inferences drawn by Industrial Accident Commission in support of its conclusion, and upon favorable discovery must affirm award.

**4. Administrative law and procedure** ⚡789  
**Workmen's compensation** ⚡1939

An award of the Industrial Accident Commission cannot be annulled because there are two conclusions which fairly may be drawn from the evidence, both of which are reasonable, the one sustaining and the other opposing the right to compensation.

**5. Workmen's compensation** ⚡659

Where game warden was authorized to sleep while on night duty in territory which was under surveillance for illegal spotlight killing of deer, and warden died from inhaling of carbon monoxide which infiltrated into automobile from running motor, while he was in bed, into which interior of automobile could be converted, death "arose out of and in the course of employment," although he had been in company of female companion who was also found dead in bed.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Arose Out of and In the Course of Employment".

Fred N. Howser, Atty. Gen., Lenore D. Underwood, Deputy Atty. Gen., for petitioner.

Donald Gallagher and Royle A. Carter, San Francisco, amici curiæ.

T. Groezinger, San Francisco, Geo. C. Faulkner, Novato, for respondents.

SPARKS, Justice pro tem.

This is a proceeding upon writ of review of a death benefit award made by the Industrial Accident Commission in favor of the widow and three minor children of

Karl Lund, deceased. Petitioner State Employees' Retirement System seeks an annulment of the award, on the grounds that respondent Commission had acted without and in excess of its powers and that the evidence was insufficient to justify the findings of fact.

The decedent, Karl Lund, was employed as a game warden by the Department of Natural Resources. As such officer his duties were to enforce the provisions of the Fish and Game Code, and in so doing he had no regular or prescribed hours of duty. At times he was required to go on night patrol and to station himself in isolated areas where infractions of the Fish and Game Code might occur. An automobile equipped with a two-way radio was furnished him by his employer. The car was also so equipped that it might be converted into a bed, and it was permissible for him, while on night patrol, to sleep in the car.

On June 13, 1948, the deceased went on duty at 10:00 o'clock in the morning. According to the entries in his diary he went on patrol to "Napa State Hospital, Socal, thence to Cuttings Wharf, Brown's Valley to Oakville night patrol Trinity Road." At 2:58 p. m. on the 13th Lund reported by radio to the sheriff's office that he was in service. No further reports were received from him. On the 14th, Lund not having returned or checked in by radio, a search was made for him. At a point sixteen or eighteen miles from Napa, the car furnished Lund by the State was found. It was parked about twenty feet off a side road, facing into a hill. This side road was a slight distance from the Oakville-Trinity Mountain road. It was in "wild" country and where, according to Lund's superior officer, apprehensions were made of violators hunting deer at night with spotlights. About twelve feet to the rear of the State car there was another automobile parked. Investigation revealed that the interior of the State car had been converted into a bed, and on this bed were found the dead bodies of Karl Lund and of a woman, Chelsea Miami. The bodies were clad respectively only in shorts and panties and were partially covered by a blanket.

The ignition switch, radio and heater of the car were all turned on and the gasoline tank was empty. All of the doors and windows were closed with the exception of one side wing-window which was slightly open. Lund's clothes, boots and gun were in the back of the car and under the seat. The deaths were attributed by the coroner to carbon monoxide poisoning, the vapor of which apparently had infiltrated into the car from the running motor and been inhaled while the deceased were lying on the bed. Approximate time of death was fixed as between 1:00 and 3:00 a. m. of June 14th. Herminia Miami, the sister of Chelsea, testified that Chelsea had received a telephone call at their home from Lund shortly before 9:00 p. m.; that he had asked Chelsea to meet him, and within a few minutes after receiving the call Chelsea had changed to slacks and left in her own car.

There was no rule or regulation of the Department by whom Lund was employed which prohibited any of the game wardens, while on duty, from having company.

Upon the facts adduced at the hearing, summary of which has been given above, respondent Industrial Accident Commission made its finding that Karl Lund had sustained injury occurring in the course of and arising out of employment proximately causing his death from inhalation of carbon monoxide fumes. A petition for rehearing was granted by respondent Commission, and after a further hearing respondent affirmed its findings of fact theretofore made.

Petitioner contends that these findings are irrational for the reason that the evidence shows that deceased met his death while on a personal adventure, and that in so doing he had deviated from the scope of his employment and from his duties as fish and game warden.

[1-4] In reviewing the evidence we are not permitted to substitute our views for those of the Commission and annul an award unless there is no substantial evidence to support the findings and order. *Riskin v. Industrial Accident Comm.*, 23 Cal.2d 248, 254, 144 P.2d 16. On the contrary, we are required to indulge all reasonable inferences which may be drawn

legitimately from the facts in order to support the findings of the Commission, and in doing so all that is required is reasonable probability; not absolute certainty. *Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 19 Cal.2d 622, 122 P.2d 570, 141 A.L.R. 798; *Pacific Indemnity Co. v. Industrial Accident Comm.*, 28 Cal.2d 329, 339, 170 P.2d 18. It is the duty of a reviewing court to search the record to discover whether the evidence is reasonably susceptible of the inferences drawn by the Commission in support of its conclusion, and upon favorable discovery to affirm the award. *Coborn v. Industrial Accident Comm.*, 31 Cal.2d 713, 192 P.2d 959. Neither may the award be annulled because there are two conclusions which fairly may be drawn from the evidence, both of which are reasonable, the one sustaining and the other opposing the right to compensation. *George L. Eastman Co. v. Industrial Accident Comm.*, 186 Cal. 587, 200 P. 17; *Western Pac. R. R. Co. v. Industrial Accident Comm.*, 193 Cal. 413, 224 P. 754; *Hartford Accident & Indemnity Co. v. Industrial Accident Comm.*, 202 Cal. 688, 262 P. 309, 58 A.L.R. 1392; *Bethlehem Steel Co. v. Industrial Accident Comm.*, 70 Cal. App.2d 382, 161 P.2d 59. Nor may an award be rejected solely on the basis of moral or ethical considerations.

Measured by these rules we note in reviewing the record the following facts and circumstances in support of respondent's findings: That Lund, as a fish and game warden, had no regular or fixed hours of employment; that frequently he did patrol duty at night for the purpose of intercepting violators of the fish and game laws; that the last entry in his diary sets forth his itinerary for the 13th and concludes, "to Oakville night patrol Trinity Road"; that his diary also discloses that he had been on night patrol on the preceding evening. His death having occurred between 1:00 and 3:00 a. m. does not therefore justify any conclusion that it happened outside of the hours of his employment. As to the place of his death, the evidence shows that he had stationed himself in a territory which was under surveillance for the illegal spotlight killing of deer. The two-way radio

with which the car was equipped was turned on so that Lund could not only have received messages from headquarters, but if need be could have sent them. While on such duty he was not only permitted to, but it was contemplated that he could convert the car into a bed (for it was so equipped), and that he might retire thereon or sleep. There was no rule that forbade his having company while on duty. The testimony of Captain Shea in this regard is as follows:

"[Mr. Faulkner] Q. \* \* \* Now, would you—is there any order or rule or regulation of the department that prohibits you, while you're sitting there in your car or stationed in your car or in bed in your car, from talking to anybody that comes along? A. Definitely not.

"Q. Is there any rule or regulation prohibiting that person from getting into the car and sitting down with you, having a smoke or a chat? A. No, there isn't.

"Q. Is there any rule or regulation of the department that prohibits you or any of the men, any of the game wardens, from—while on duty—from talking or entertaining or enjoying the company of other people? A. No, there's no regulation to that effect.

"Q. No rule against it? A. No rule against it."

And finally, his death was occasioned from carbon monoxide poisoning from the use of equipment furnished him by his employer.

[5] From this and other facts and circumstances in the record, we cannot say there was not substantial evidence to support the findings of the Commission, or that the findings were irrational. In doing so we are well aware of the contrary inferences which might have been drawn from the same set of facts. The secluded spot in a remote area could have been selected by Lund for its advantages as a rendezvous in which to conduct an illicit love affair. The manner in which the cars were parked, the state of partial dishabille in which the bodies were found, the fact that Lund had divested himself of his uniform and placed his gun and boots underneath the seat, all are circumstances from which the trier of



facts might have reasonably concluded that he had either abandoned or deviated from his duty. However, as stated above, it is not our province to resolve these facts or to substitute our own views for those of the Commission. Lund, while acting in the scope of his employment, was permitted to drive to isolated spots where game violators might be found. It was a matter of discretion with him whether or not at such times he converted the car into a bed and slept. In so doing he was acting within the course of his employment. *California Casualty Indemnity Exchange v. Industrial Accident Comm.*, 5 Cal.2d 185, 53 P.2d 758. There was no rule which forbade him from having company while on duty, and the presence of a woman in the car with him does not necessarily compel a conclusion that he had thereby either abandoned his employment or deviated therefrom.

There being a choice between two inferences reasonably deducible from the evidence, we cannot say that the Commission acted without or in excess of its powers or that its findings of fact were unreasonable.

The award is affirmed.

ADAMS, P. J., and PEEK, J., concur.



97 Cal.App.2d 361

WELLS v. BROWN.

Civ. 4040.

District Court of Appeal, Fourth District,  
California.

May 4, 1950.

Hearing Denied June 29, 1950.

William R. Wells brought action against Bus Brown to recover for death of a 15 month's old pure-bred Weimaraner registered female dog under complaint charging in first count that death of dog was caused by negligent operation of automobile by defendant, and charging in second count that defendant without reasonable cause shot and

killed the dog. The Superior Court of Fresno County, Philip Conley, J., rendered a judgment for plaintiff on a verdict for \$1500, and the defendant appealed. The District Court of Appeal, Fourth Appellate District, Griffin, Acting P. J., held that verdict would not be set aside because the two counts were inconsistent, and that verdict was not excessive under the evidence.

Affirmed.

#### 1. Pleading ⚡53(1)

A plaintiff may plead inconsistent causes of action stated in as many ways as plaintiff believes his evidence will show, and he is entitled to recover if one well pleaded count is supported by the evidence.

#### 2. Negligence ⚡119(4)

Under pleadings of inconsistent causes of action, plaintiff may rely on any one of the alleged acts of negligence as the proximate cause of his claimed damage, or on all of such alleged acts as operating together or concurrently in causing it.

#### 3. Trial ⚡330(5)

Where several allegedly negligent acts are pleaded, a general verdict for plaintiff will not be set aside for want of evidence to support it if there is sufficient evidence of negligence to support one of the counts.

#### 4. Trial ⚡330(5)

Where plaintiff charged in first count that defendant, while driving his automobile, negligently ran over dog, causing death of dog, and charged in second count that defendant, without reasonable cause, shot and killed the dog, and it did not appear whether verdict for plaintiff was on first count or second count, and there was sufficient evidence to sustain verdict as to second count, verdict would not be set aside because the two counts were inconsistent.

#### 5. Damages ⚡139

A verdict of \$1500 for death of 15 months old purebred Weimaraner registered female dog, was not excessive.

Ray W. Hays, William M. Miles, Fresno,  
for appellant.

Nicholas H. Dubsick, Marvin E. Helon, Fresno, for respondent.

GRIFFIN, Acting Presiding Judge.

Action for damages for the death of a dog. Plaintiff owned a 15-months old pure-bred Weimaraner registered female dog. The complaint charges in the first count that defendant, while driving his automobile on Clovis Avenue in Fresno, in a careless and negligent manner, caused his car "to hit and run over" said dog, and as a direct and proximate result thereof defendant "caused the death \* \* \* of the dog." Damages in the sum of \$3000 were claimed.

In the second count it is alleged that at said time and place defendant "without reasonable cause, shot and killed" the dog, to plaintiff's damage in a like sum. Defendant denied the allegations of each count but, alleged, as to the second count, that the dog had been so critically and seriously injured that the only humane thing to do was to destroy it. It is then alleged that plaintiff was guilty of contributory negligence in allowing the dog to run loose upon the highway. The jury returned a verdict for plaintiff on "both the first \* \* \* and second \* \* \* causes of action" and assessed damages at \$1500. Defendant appealed from the judgment and argues that under the verdict and pleadings he has been held responsible for two inconsistent wrongs and that at least one is entirely unsupported by the evidence. The inconsistency is claimed to be that in the first cause of action plaintiff alleged that defendant negligently drove his car over the dog and as a result thereof the dog died; that the evidence clearly shows that the dog did not die as a result of the driving of the car but died as a result of the gunshot later inflicted; that since each cause of action claimed the same amount of damages for the killing of the dog, the counts were inconsistent and a verdict could not be supported, based on both causes of action.

Defendant also contends that the court committed error in instructing the jury pertaining to the first count, i. e., "If the defendant negligently operated his auto-

mobile and his negligence was a proximate cause of the striking of plaintiff's dog, you must find in favor of the plaintiff for the value of the dog." It will be noted that the italicized portion of the instruction is not consistent with the pleadings in the first count.

The facts surrounding the accident and killing, as related by defendant, are that he was an off-duty police officer from Selma; that he was driving south on Clovis Avenue (which was about 30 feet wide) in his car, about 4:30 p. m., accompanied by his wife and two boys. He was proceeding in his right-hand lane. Another car was ahead of him proceeding in the same direction. It was a clear day. Defendant said he noticed a little boy with the dog walking behind him, going south, a short distance off of the highway near his right-hand lane when he was about 75 feet from the boy; that when his car was about 15 to 20 feet from him the dog started across the highway at about a 45-degree angle; that defendant slowed down and turned to his left to avoid the dog but caught it on the right front wheel. He testified that he was watching the road all the time and traveling about 40 miles per hour; that he did not sound his horn but did slow down to 15 miles per hour when he struck the dog, applied his brakes and stopped the car within six or eight feet. The dog was injured, blood was coming from its mouth, and it was lying near the center of the highway and near the right-hand door of his car; that the dog appeared to him to be suffering from serious injuries so he went to a neighboring house, obtained a gun, shot the dog and buried it. The collar contained the name of a veterinarian, whom he called the next morning, obtained the name of the owner of the dog and went to his house and explained the matter.

A witness produced by plaintiff testified that he was driving on Clovis Avenue that afternoon, proceeding in a southerly direction about 30 miles per hour; that he saw the dog about 100 yards in front of him running down the right-hand paved portion of the highway; that he blew his horn, the dog ran to his left and defendant's car was just then passing his car, travel-

ing about 45 miles per hour on the left side of the highway with both left front and rear wheels off the oiled surface; that the dog ran out in front of defendant's car and was struck by its bumper and rolled under the center of defendant's car and ended up on the east or left-hand side of the oiled surface about 12 feet behind the car; that the dog was bleeding from the mouth and had been injured and that he told defendant where he thought he could find the owner; that he then drove away.

A veterinarian testified that he performed a post-mortem on the dog; that he found no broken bones; some organs were bruised and there was evidence of some bleeding at the mouth, but he found no injury that would directly kill the dog except the bullet wound in the head.

It appears from the complaint that the two counts are inconsistent. One alleges damages in the sum of \$3000 for defendant's negligence in operating his automobile as a result of which plaintiff's dog was killed. In the second count plaintiff seeks the same sum by reason of the fact that defendant shot and killed the dog without reasonable cause.

[1-3] There is no prohibition against pleading inconsistent causes of action stated in as many ways as plaintiff believes his evidence will show, and he is entitled to recover if one well pleaded count is supported by the evidence. *Froeming v. Stockton Electric R. R. Co.*, 171 Cal. 401, 153 P. 712, Ann.Cas.1918B, 408; 21 Cal. Jur. pp. 64-65, sec. 39; 19 Cal.Jur. p. 676, sec. 99. It has been held that, under such pleadings plaintiff may rely upon any one of the alleged acts of negligence as the proximate cause of his claimed damage, or upon all of said acts as operating together or concurrently in causing it. Likewise, where several acts are pleaded, a general verdict for the plaintiff will not be set aside for want of evidence to support it if there is sufficient evidence of negligence to support one of the counts. *Camozzi v. Colusa Sandstone Co.*, 26 Cal.App. 74, 147 P. 107, 112; *Worley v. Spreckels Bros. Commercial Co.*, 163 Cal. 60, 124 P. 697;

*Verdelli v. Gray's Harbor etc. Co.*, 115 Cal. 517, 47 P. 364, 778; 19 Cal.Jur. 675, sec. 99.

The ultimate recovery sought in the instant case was for the death of the dog. The jury fixed that sum at \$1500. Whether the jury found that the death was occasioned by the negligence of defendant in operating his automobile or because defendant shot and killed the dog without reasonable cause is problematical.

[4] While the question of the sufficiency of the evidence to establish the negligence of plaintiff in killing the dog, under the first count, may be questioned, there is sufficient evidence to sustain the verdict as to the second count.

*Shields v. Oxnard Harbor District*, 46 Cal.App.2d 477, 116 P.2d 121, furnishes the answer to this question. There plaintiff brought an action against defendant predicated upon the provisions of sec. 400 of the Vehicle Code in one count and on the provisions of sec. 402 of the same code in the second count, all arising out of the same accident and injury. A general verdict for plaintiff was obtained. The court said that this form of verdict is permitted, citing sec. 625 of the Code of Civil Procedure, and then held, 46 Cal.App. 2d at page 491, 116 P.2d at page 130 that:

"A general verdict imports findings in favor of the prevailing party on all material issues and, if there is substantial evidence to sustain a verdict on one count which is unaffected by error, the fact that there is not sufficient evidence to sustain the necessary findings of fact upon another count to support a verdict, or that there have been errors in connection with such other count, will not justify a reversal of the general verdict. \* \* \*"

(See, also, *Hume v. Fresno Irrigation District*, 21 Cal.App.2d 348, 69 P.2d 483; *Estate of Hellier*, 169 Cal. 77, 145 P. 1008; *Hopping v. City of Redwood City*, 14 Cal. App.2d 350, 58 P.2d 379; *Leoni v. Delany*, 83 Cal.App.2d 303, 188 P.2d 765, 189 P.2d 517.

[5] The only remaining question is the sufficiency of the evidence to support the amount of damages awarded. A witness



was sworn who testified that he had had considerable experience with dogs and that he did a great deal of hunting with them; that the Weimaraner, a German dog, was a new breed, and was supposed to be an all-around hunting dog; that he possessed one of these dogs and was acquainted with the dog that was involved in this accident; that he was familiar with the value of these dogs on the market today; that he would say that there were about 9000 tentative orders or applications on hand for this breed of dogs in the United States; that if an outsider wants such a dog he must join the Weimaraner Club and abide by their rules and regulations as to breeding them before such a dog is sold; that considering the market value of this particular dog on the date it was killed, "That dog would be worth from three to five thousand dollars". Although there is evidence that this particular dog, when much younger, cost its owner the sum of \$300, this figure is not conclusive of its market value at the time it was killed. It cannot be said that the evidence does not sustain the verdict in this respect. *Roos v. Loeser*, 41 Cal.App. 782, 786, 183 P. 204.

Judgment affirmed.

MUSSELL, J., and SHEPARD, Justice pro tem., concur.

Hearing denied; SCHAUER, J., dissenting.



97 Cal.App.2d 473

**MERRILL v. DUSTMAN.**

**Civ. 17217.**

District Court of Appeal, Second District,  
Division 3, California.

May 12, 1950.

Hearing Denied July 6, 1950.

Caroline E. Merrill brought action against Freeman E. Dustman, executor of the estate of Almira E. Thomas, deceased, to recover for services rendered the deceased as a cook, housekeeper, and practical nurse. The Superior Court of Los Angeles County,

Thurmond Clarke, J., rendered a judgment in favor of the defendant and an order denying the motion of the plaintiff for a new trial, and the plaintiff appealed. The District Court of Appeal, Second Appellate District, Division Three, Vallée, J., held that as plaintiff had contracted with the deceased to render such services for \$5 a week and room and board plus a bequest of \$1,000 and household furniture and furnishings, and a devise to plaintiff of a life estate in residence property, plaintiff was not entitled to recover the reasonable value of the services.

Judgment affirmed and appeal from order dismissed.

#### 1. Wills ⚡714

A legacy to a creditor pursuant to a previously executed contract between creditor and testator that such legacy should constitute a satisfaction of the testator's debt, has the intended effect.

#### 2. Wills ⚡714

Where there is an understanding between parties that one rendering services to the testator shall be compensated therefor in his will, a bequest or devise of property equal to or exceeding just amount of claim extinguishes it.

#### 3. Executors and administrators ⚡205(1)

If testatrix who had contracted with cook, housekeeper, and practical nurse to make a bequest and devise to her in addition to board and room and \$5 a week, if she would take care of testatrix during remainder of testatrix' life, had failed to make the bequest, then the cook, housekeeper and practical nurse could have recovered the reasonable value of services for which she had not been compensated.

#### 4. Wills ⚡714

Where testatrix made a contract with cook, housekeeper and practical nurse that if she would care for testatrix during the remainder of testatrix' life for \$5 a week and board and room, then testatrix would bequeath \$1,000 to her and household furniture and furnishings and devise a life estate in residence, and testatrix made such a bequest and devise, cook, housekeeper, and practical nurse could not recover from the testatrix' estate after her death the reasonable value of services rendered in addition to amount left her by will.

**5. Wills ⚡66**

Contract and will are to be considered together to ascertain whether will constitutes performance of the contract.

**6. Executors and administrators ⚡221(5)**

In action by cook, housekeeper, and practical nurse against executor of estate of deceased testatrix to recover the reasonable value of services rendered to the testatrix, wherein executor contended that cook, housekeeper and practical nurse was not entitled to recover the reasonable value of the services because of contract with testatrix to work for room and board and \$5 a week if testatrix would bequeath her \$1,000 in cash and furniture and furnishings in home and devise a life estate in residence, evidence was sufficient to support finding that testatrix actually paid the \$5 a week.

**7. Executors and administrators ⚡221(5)**

In action by cook, housekeeper, and practical nurse against executor of estate of deceased testatrix to recover the reasonable value of services rendered to the testatrix, wherein executor contended that cook, housekeeper and practical nurse was not entitled to recover the reasonable value of the services because of contract with testatrix to work for room and board and \$5 a week if testatrix would bequeath her \$1,000 in cash and furniture and furnishings in home and devise a life estate in residence, evidence was sufficient to sustain finding that reasonable market value of services rendered was \$10 a week plus food and housing.

**8. Executors and administrators ⚡221(5)**

In action by cook, housekeeper, and practical nurse against executor of estate of deceased testatrix to recover the reasonable value of services rendered to the testatrix, wherein executor contended that cook, housekeeper, and practical nurse was not entitled to recover the reasonable value of the services because of contract with testatrix to work for room and board and \$5 a week if testatrix would bequeath her \$1,000 in cash and furniture and furnishings in home and devise a life estate in residence, judge could fix value of services from description of the services.

**9. Appeal and error ⚡1071(5)**

In action by cook, housekeeper, and practical nurse against executor of estate of deceased testatrix to recover the reasonable value of services rendered to the testatrix, wherein executor contended that cook, housekeeper and practical nurse was not entitled to recover the reasonable value of the services because of contract with testatrix to work for room and board and \$5 a week if testatrix would bequeath her \$1,000 in cash and furniture and furnishings in home and devise a life estate in residence, alleged erroneous finding that fair and reasonable market value of services rendered was only \$10 a week plus food and housing, was not reversible error, since the reasonable market value of the services performed was immaterial.

Robert M. Newell, Los Angeles, for appellant.

William B. Etheridge, Pasadena, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from an adverse judgment in an action on a claim against an estate for compensation for services rendered.

June 15, 1943, plaintiff Caroline E. Merrill was employed as cook, housekeeper and practical nurse by the decedent Almira E. Thomas. The employment was verbal; it continued to July 17, 1947, the date of death of Mrs. Thomas. Plaintiff filed a claim against the estate for \$7,435 as the reasonable value of the services rendered at the rate of \$150 a month in addition to room and board. The claim was rejected and this action followed. The defense was that plaintiff had been compensated for all services rendered; and the court so found.

The court also found that the contract on the part of Mrs. Thomas was to give plaintiff her room and board and \$5 a week; and if plaintiff stayed with her until her death, to bequeath to her \$1,000 cash, the furniture and furnishings in her home and to advise a life estate in her

residence property to her. Mrs. Thomas, in her will admitted to probate, bequeathed to plaintiff \$1,000, and the household furniture and furnishings, and devised to plaintiff a life estate in the residence property, all owned by Mrs. Thomas at the time of her death. The will did not say that the bequests and devise were in payment for services performed. The court found further "that the gifts, devises and bequests to the plaintiff, as contained in the Last Will and Testament of Almira E. Thomas, were specifically intended, understood and agreed by and between the plaintiff and Almira E. Thomas solely as partial performance of the agreement by and between the plaintiff and Almira E. Thomas as hereinabove found, and not as independent gifts, devises or bequests irrespective of said agreement, or without respect to any claims or rights to claims at any time had by plaintiff against Almira E. Thomas or her estate." The court further found that the value of the bequests and devise, the \$5 a week, and the room and board greatly exceeds the reasonable value of the services performed by plaintiff. Plaintiff appeals from the judgment and from an order denying her motion for a new trial.

[1-4] The first point urged for reversal is to the effect that since the will did not say that the bequests and devise were made pursuant to or in performance of decedent's obligation to plaintiff, they cannot be treated as such. A legacy to a creditor made pursuant to a previously executed contract between the creditor and the testator that such legacy should constitute a satisfaction of the testator's debt is held to have the intended effect.<sup>1</sup> Where there is an understanding between the parties that one rendering services

to the testator shall be compensated therefor in his will, a bequest or devise of property equal to or exceeding the just amount of the claim extinguishes it.<sup>2</sup> In that case the party does not have an election since he has agreed to look to the testamentary benefit for compensation.<sup>3</sup> If the testatrix had not made the bequest or devise, plaintiff could have recovered the reasonable value of the services for which she had not been compensated.<sup>4</sup> But where the provisions made in the will are in accord with the contract, there is no room for recovery of the reasonable value of the services rendered thereunder.<sup>5</sup>

In *Estate of Cutting*, 172 Cal. 191, 155 P. 1002, Ann.Cas.1917D, 1171, the testator, in an antenuptial contract, promised that he would cause \$250 a month to be paid to the woman he intended to marry if they married and she survived him. They married and she survived him. In a postnuptial codicil to his antenuptial will he directed his executors to provide from the remainder of his estate an annual income of \$3,000, payable monthly, to his wife in accordance with the antenuptial agreement. The court held that the codicil was executed in order to perform the promise contained in the antenuptial agreement and that by the codicil the promise in the executory agreement was executed.

[5] Plaintiff relies on *White v. Deering*, 38 Cal.App. 433, 177 P. 516. That action was to recover the reasonable value of services as nurse, housekeeper and secretary rendered a decedent, after rejection of a claim against the estate. The will of the decedent gave the plaintiff a piano, books, Haviland China and "my fifty shares of Arcade Park stock or the sum of \$1,500.00 as she may elect. If the shares are sold in my lifetime I reserve the right to redeter-

1. *McLaughlin v. Webster*, 141 N.Y. 76, 82, 35 N.E. 1081, 1082; *In re Cartledge's Estate*, 118 Misc. 131, 192 N.Y.S. 838, 840.

2. *In re Somerville's Estate*, 2 Con. 86, 20 N.Y.S. 76, 77; *In re Cartledge's Estate*, 118 Misc. 131, 192 N.Y.S. 838, affirmed 203 App.Div. 899, 197 N.Y.S. 902, in turn affirmed 236 N.Y. 515, 142 N.E. 265; *Rubert v. Rubert*, 126

Mich. 589, 85 N.W. 1118; Anno. 83 A.L.R. 39.

3. *Alerding v. Allison*, 31 Ind.App. 397, 68 N.E. 185, 187.

4. *Long v. Rumsey*, 12 Cal.2d 334, 341, 342, 84 P.2d 146; *Bogan v. Wiley*, 72 Cal.App.2d 533, 536, 164 P.2d 912.

5. *Eaton v. Benton*, 2 Hill, N.Y., 576, 578.



mine the amount to be given to Miss White." The court held that the trial court did not err in not requiring the plaintiff to elect "whether she would proceed with the trial or would accept the legacies in full payment for her services" because the bequests were unconditional and unqualified, and evidence deors the will could not be received to show that the testatrix intended the bequests to be in full compensation for the services performed. The case is not in point. The claim in the White case was unliquidated. So far as appears from the opinion, there was no agreement by the decedent to compensate the plaintiff. In the present case the decedent agreed to bequeath and devise the identical property given in the will. The case before us involves not only the satisfaction of an obligation but also performance of a contract. Language in the opinion in the White case which appears to support plaintiff's contention was dictum. The true rule is that the contract and the will are to be considered together to ascertain whether the will constitutes performance of the contract.<sup>6</sup>

We have assumed, as the contrary is not suggested, that the estate of Mrs. Thomas is in such condition that the bequests and devise have been, or will be, distributed to plaintiff. We conclude that the court did not err in determining that the bequests and devise made by the will constituted performance of the contract and satisfied decedent's obligation to plaintiff.

[6] The next contention is that a finding that decedent paid plaintiff \$5 a week from June 13, 1943, to July 17, 1947, is not supported by any competent evidence. T. W. Ward, who was decedent's attorney, testified that in January, 1945, plaintiff, in the presence of decedent, stated that she was receiving \$5 a week as spending money, her room and board, and that she was to receive \$1,000 cash, the furniture and furnishings of the house, and a life estate

in the property from the estate, and that she was entirely satisfied. On the same occasion decedent, in the presence of plaintiff, said plaintiff was receiving \$5 a week in cash. Plaintiff did not dispute the statement. On numerous occasions thereafter, until the death of Mrs. Thomas, plaintiff told Mr. Ward that the \$5 a week arrangement was perfectly satisfactory. Plaintiff had access to decedent's money and did her banking for her. Plaintiff was in contact with Mr. Ward on a number of occasions after the death of Mrs. Thomas but did not, at any time until she presented her claim on October 10, 1947, mention "that she had anything coming from the estate of Mrs. Thomas, outside of the provisions of the will." The foregoing evidence is sufficient to support the finding that decedent paid plaintiff \$5 a week from June 13, 1943, to July 17, 1947.

[7-9] Plaintiff next contends that a finding "that the fair and reasonable market value of the services of the plaintiff during the period from June 15, 1943 to and including July 17, 1947 was and is the sum of Ten Dollars (\$10.00) per week, plus food and housing \* \* \*" is not supported by any competent evidence. Prior to her employment by decedent, plaintiff had been employed at an average of \$9.23 and \$10.38 a week, plus room and board, and was willing to go to work for decedent for \$10 a week. In June or July, 1943, the executor had a conversation with plaintiff and decedent in which he stated he thought plaintiff should have \$10 a week. Plaintiff replied "I am satisfied with five dollars a week. I will take care of Mrs. Thomas." That was in addition to room and board. The evidence is sufficient to support the finding concerning the value of the services. The case is one in which it was competent for the trial judge to determine the worth of the services from the evidence as to their nature and extent. Where the services are of a non-technical

6. Cf. *Grimm v. Grimm*, 26 Cal.2d 173, 177, 157 P.2d 841; *In re Estate of Crane*, 6 Cal.2d 218, 57 P.2d 476, 104 A.L.R. 1101; *In re Estate of Whitney*, 171 Cal. 750, 754, 760, 154 P. 855; *In re Estate of Wyss*, 112 Cal.App. 487,

492, 297 P. 100; *In re Estate of Hurley*, 28 Cal.App.2d 584, 588, 83 P.2d 61; *In re Estate of Belknap*, 66 Cal.App. 2d 644, 152 P.2d 657; Anno. 104 A.L.R. 1104; 117 A.L.R. 1001; 125 A.L.R. 1021.

nature, as in the present case, the judge may fix the value from a description of the services performed.<sup>7</sup> Further, even if the finding were unsupported by competent evidence, the error would not be ground for reversal. Plaintiff agreed to perform the services in consideration of receiving \$5 a week, room and board, and the bequests and devise. She received the consideration she agreed to accept. The reasonable market value of the services performed was immaterial.

Judgment affirmed. Appeal from order denying motion for new trial dismissed.

SHINN, P. J., and WOOD, J., concur.



**DELZELL et al. v. DAY et al.**

Civ. 17244.

District Court of Appeal, Second District,  
Division 1, California.

May 2, 1950.

Rehearing Denied May 23, 1950.

Hearing Granted June 29, 1950.\*

Action by Raymond L. Delzell and others, against Patrick J. Day, and others, to recover for personal injuries and property damages sustained in a collision between plaintiffs' automobile and defendants' truck. The Superior Court of Los Angeles County, Henry M. Willis, J., entered judgment in favor of defendants against two of plaintiffs, and in favor of third plaintiff for \$750 against defendants, and plaintiffs appealed. The District Court of Appeal, Drapeau, J., held that record disclosed substantial evidence in connection with inferences, which could be reasonably be drawn therefrom, to support each and every finding of fact upon which verdict of jury was necessarily predicated.

Judgment affirmed.

White, P. J., dissented

**1. Appeal and error** ⇨201(2)

In the absence of an assignment of alleged misconduct of trial judge as error, and a request to trial court to instruct jury to disregard it, error cannot be predicated on alleged misconduct unless harmful result of alleged misconduct of trial judge cannot be obviated by appropriate instructions.

**2. Appeal and error** ⇨1046(5)

In action by driver and passengers in automobile for injuries sustained when automobile while making left turn off highway was struck by defendants' overtaking truck, statement by trial judge during plaintiff's opening argument to jury that he would not give an instruction that vehicle code requires that an automobile should not follow another too closely, on ground that defendant could not have been passing plaintiffs' automobile and following too closely at same time, was not prejudicial.

**3. Appeal and error** ⇨1060(1)

In action by driver and passengers in automobile for injuries sustained when their automobile while making left turn off highway was struck by defendants' overtaking truck, where jury was adequately instructed on meaning of negligence and ordinary care, refusal to permit plaintiffs' counsel to finish statement concerning nature of locality, width of street and its residential character was not prejudicial error where plaintiffs' counsel was permitted to explain that he wanted to comment on general surroundings in regard to whether truck driver's acts immediately prior to accident were those of a reasonably prudent person.

**4. Trial** ⇨260(4)

In action by driver and passengers in automobile for injuries sustained when their automobile while making left turn off highway was struck by defendants' overtaking truck, where jury was fully instructed on effect and value of testimony as well as credibility of witnesses, failure to instruct jury as to effect of portions of de-

7. In re Estate of Reinhertz, 82 Cal.App. 2d 156, 160, 185 P.2d 858, 186 P.2d

\* Subsequent opinion 223 P.2d 625.

755; Trumbo v. Bank of Berkeley, 77 Cal.App.2d 704, 712, 176 P.2d 376.

position of witnesses who testified, was not error.

**5. Trial ⇨252(20)**

In action by driver and passengers in automobile for injuries sustained when their automobile while making left turn off highway was struck by defendants' overtaking truck, refusal to give instruction relating to right of father of one of plaintiffs to recover for loss of services of his daughter, who was in high school, in absence of proof of loss of services except for duties daughter said she performed in home, was not error.

**6. Trial ⇨252(8)**

In action by driver and passengers in automobile for injuries sustained when their automobile while making left turn off highway was struck by defendants' overtaking truck, where evidence showed that collision was not a rear-end collision, refusal to give special instruction covering so-called rear-end collision rule was not error.

**7. Trial ⇨260(8)**

In action by driver and passengers in automobile for injuries sustained when their automobile while making left turn off highway was struck by defendants' overtaking truck, where full instructions were given on use of horns on highways, and of applicability of statute requiring horns or warning devices on motor vehicles, failure to give special instruction covering defendant's failure to sound his horn was not error. Vehicle Code, § 671.

**8. Trial ⇨252(8)**

In action by driver and passengers in automobile for injuries sustained when their automobile while making left turn off highway was struck by defendants' overtaking truck, where evidence showed that it was not until last fifty feet prior to collision that truck driver came into close proximity with automobile, when truck driver was attempting to pass just as automobile turned left in front of him, refusal to give special instruction quoting statute requiring motor vehicle not to follow too closely, was not error. Vehicle Code, § 531(a).

**9. Trial ⇨241**

In action by driver and passenger in automobile for injuries sustained when their automobile while making left turn off highway was struck by defendants' overtaking truck, inclusion in instruction of statute providing that no person shall stop or suddenly decrease speed of a vehicle on a highway without first giving an appropriate signal, was not erroneous. Vehicle Code, § 544(a-c).

**10. Trial ⇨296(4)**

In action by driver and passengers in automobile for injuries sustained when their automobile while making left turn off highway was struck by defendants' overtaking truck, where full and fair instructions were given on negligence and contributory negligence giving of instructions on imminent peril and unavoidable accident was not prejudicial.

**11. Trial ⇨241**

In action by driver and passengers in automobile for injuries sustained when their automobile while making left turn off highway was struck by defendants' overtaking truck, where jury was fully instructed with respect to various sections of statute applicable to situation, instruction that truck driver had a legal right to pass a vehicle at point of accident, subject to exercise of ordinary care and observance of provisions of statute which did not recite which sections of statute should be observed, was not erroneous.

**12. Appeal and error ⇨1066**

In action by driver and passengers in automobile for injuries sustained when their automobile while making left turn off highway was struck by defendants' overtaking truck, where plaintiffs admitted that instruction with respect to examination of jurors regarding their interest in insurance company was among instructions filed by plaintiffs at outset of trial in anticipation that such a question might be asked, giving of that instruction was harmless.

**13. Appeal and error ⇨1170(9)**

In order to justify a reversal because of erroneous instruction, or failure to give



a proper instruction, it must appear that there was a miscarriage of justice under the judgment rendered. Const. art. 6, § 4½.

**14. Automobiles** ⇨245(15, 81)

In action by driver and passengers in automobile for injuries sustained when their automobile while making left turn off highway was struck by defendants' overtaking truck, evidence of negligence and contributory negligence was for jury.

**15. Appeal and error** ⇨1004(1)

**Damages** ⇨208(1)

The amount of recovery is a question of fact to be determined by the jury, and an appellate court is without authority to disturb the verdict if there is any substantial evidence to support it.

**16. Damages** ⇨131(1)

\$750 damages for severe injuries from which plaintiff apparently had recovered at time of trial, where doctor and medical bills of plaintiff amounted to \$169.50, was proper.

**17. Appeal and error** ⇨1023

Where record disclosed substantial evidence in connection with inferences which could be reasonably drawn therefrom to support facts as well as each and every finding of fact upon which verdict of jury was necessarily predicated, and record disclosed slight errors which may have been committed during trial but which were not of such serious character as to unduly prejudice rights of appellants, judgments would be affirmed.

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A. V. Falcone, Los Angeles, for appellants.

C. F. Jorz, Los Angeles, for respondents.

DRAPEAU, Justice.

By the instant action plaintiffs seek to recover for personal injuries and property damage sustained by them in a collision between their automobile and a pickup truck owned by the partnership and operated by defendant Day.

The plaintiff Beatrice Delzell, driving a Pontiac sedan, was returning to her home

located on the north side of Sherman Way, about 400 feet east of its intersection with Hazeltine Street, Van Nuys, California. Sherman Way is thirty feet wide with ten feet paved sections on either side of a white center line and five feet unpaved shoulders beyond the paved sections. With her daughter, plaintiff Norma Delzell, seated beside her, plaintiff was proceeding easterly on Sherman Way. She made a boulevard stop at Hazeltine and observed a car traveling in the same direction about a block or so behind her. When she was about half way between Hazeltine and her residence she again noticed the car following her which was then about 50 feet east of Hazeltine. Plaintiff proceeded easterly close to the right side of the street and when she was about 100 feet west of her driveway, she "made a left-hand signal with a straight arm" and began to edge over into the center of the highway. When she reached a point about 50 feet west of her driveway, she again noticed the other car which was then about 100 feet to her rear. When 15 or 20 feet west of the driveway, she completed her left-hand turn and was struck by the car following her. Her car was knocked against a tree just east of the driveway and as a result she and her daughter were severely injured and the Pontiac badly damaged.

The rear car, a Hudson half-ton pickup truck, admittedly was being driven by defendant Day in the course of his employment. He testified that he observed the Pontiac ahead of him as he approached Hazeltine. After he made the boulevard stop at that intersection, he proceeded easterly on Sherman Way at a speed of about 35 miles per hour. Plaintiff's car was then about half a block ahead of him traveling on the right side of the street close to the center line. When plaintiff's car was "practically to the driveway" and defendant Day was about 10 feet to the rear thereof, the latter speeded up, "pulled around" to the left over the white line into the west-bound lane in order to pass plaintiff, just as her car "pulled into the driveway." Defendant swerved to the right and threw on his brakes, but too late. The left front of his truck hit the rear of the

Pontiac knocking it against the tree to the east of the driveway.

Defendant testified that he did not sound his horn; that he was looking straight ahead and did not see any left-turn signal from the other car.

The jury rendered separate verdicts (1) in favor of defendants and against plaintiffs Raymond L. and Beatrice Delzell; (2) in favor of plaintiff Norma Delzell for \$750 against defendants.

From the ensuing judgments entered in accordance with the verdicts, appeals have been taken by Raymond L. Delzell and Beatrice Delzell, his wife; and by Norma Delzell, which have been consolidated for decision by this court.

It is first contended that the trial court was guilty of prejudicial misconduct which consisted of alleged persistent and consistent interference by unnecessary statements and comments which it is claimed raised questions and suspicions with respect to appellants' witnesses and evidence, thereby creating in the minds of the jury a state of uncertainty, confusion and prejudice as to various phases of appellants' case, resulting in the judgments adverse to them. Appellants cite thirty instances of such alleged misconduct by page and line of the reporter's transcript. However, an examination thereof discloses that appellants' counsel except for the incident numbered 30, did not assign the same as error at the trial but did in fact acquiesce in what was said by the trial judge.

[1] It is well-established that "Unless the harmful result of the alleged misconduct of the trial judge cannot be obviated by appropriate instructions of the trial court, error cannot be predicated in this court on such alleged misconduct in the absence of (a) assignment of such misconduct as error, and (b) a request to the trial court to instruct the jury to disregard it." *Church v. Payne*, 36 Cal.App.2d 382, 400, 97 P.2d 819, 829. See, also, *Metzenbaum v. Metzenbaum*, 96 Cal.App.2d 197, 214 P.2d 603; and *Burns v. California Milk Transport*, 89 Cal.App.2d 70, 77, 200 P.2d 43.

[2] Incident numbered 30 refers to two instances which occurred during the opening argument to the jury at which no reporter was present, resulting in the filing in this court of an engrossed settled statement. Referring to the first instance of alleged misconduct, it appears from such settled statement that plaintiffs' counsel told the jury that the court would instruct it that the Vehicle Code required that an automobile should not follow another too closely, whereupon the trial judge interrupted and stated that he would not give such an instruction. Counsel then argued that plaintiffs should not be precluded from submitting to the jury all the various legal theories supported by the evidence, particularly that defendant's automobile was about ten feet behind plaintiffs' car when he started to pass it at a speed of 40 miles per hour, which justified the application of the provisions of the code regarding following too closely. To this the court replied in substance that "the jury had common sense and common sense showed that you could not be passing and following too closely at the same time." Counsel then requested the court to admonish the jury and to instruct it to disregard the argument and to decide the case upon the evidence and the court's instructions. This the court refused to do, stating he wanted the jury to hear and consider everything occurring as a part of the argument. Counsel then made a motion for a mistrial, which was denied.

Appellants urge that the court in effect determined the evidence for the jury and told them that respondent Day was passing and not following too closely or too fast. The argument assumed that the accident was a rear-end collision which is contrary to the implied finding of the jury based on substantial evidence, to-wit: that as defendant swung out to pass plaintiff the latter made a left-hand turn in front of him without signifying her intention to do so. Hence no prejudice resulted to appellants' cause by reason of the alleged misconduct.

[3] The second instance occurred when plaintiffs' counsel stated "That from the

nature of the locality, the width of the street and its residential character—", and was interrupted by defendants' counsel objecting to any argument "on speed limit in a residential district," which objection was sustained by the court. Plaintiffs' counsel then explained what he had in mind further stating that it was impossible for the court or counsel to anticipate what he was going to say until he had completed his statement, hence that no proper objection or ruling thereon could be made. He then requested permission to pursue the matter further outside the hearing of the jury. This the trial judge refused to do, stating he was going to see that the case was tried according to Hoyle; that plaintiffs' counsel had referred to a residential zone which did not apply to the case; that the prima facie speed limit likewise had no application to the case; that if he had permitted the statement to be completed the harm would then have been done and he wanted to avoid that. Plaintiffs' counsel then moved for a mistrial because of the prejudicial effect of the trial judge's statement in that it raised an inference that counsel was trying to put something over. That motion was denied, whereupon counsel requested the court to admonish the jury to disregard the colloquy and decide the case impartially on the evidence and the court's instructions. Again the judge refused plaintiffs' request, stating he would instruct the jury at the proper time.

Appellants urge that this occurrence shows the court's consistent interference with their case, his favoring of respondents' case, his clear conveyance to the jury that "appellants had to be carefully watched and that everything they did was suspect."

While it was probably error not to have permitted counsel to finish his statement, nevertheless he was allowed to explain that he only wanted to discuss the physical facts and the general surroundings in regard to whether defendant Day's acts immediately prior to the accident were those of a reasonably prudent person. The jury was adequately instructed on the meaning of negligence and ordinary care. In the circumstances, no prejudice resulted by reason of such error.

Appellants next cite as error the refusal of the court to give certain instructions requested by them:

[4] (a) Regarding depositions of appellant wife and respondent Day, as to the effect of which the jury should have been instructed. Only portions of the depositions were read in evidence, but both parties testified at the trial. Although the jury was not instructed as to the effect of the depositions, it was very fully instructed on the effect and value of testimony as well as the credibility of witnesses.

[5] (b) Special instruction covering appellant father's right to recover for loss of his daughter's services.

The daughter in this case was a student and was graduated from high school in June following the accident. The court properly refused this instruction, there being no evidence of loss of services by her father, except for household duties which she said she performed in the home.

[6] (c) Special instruction covering the so-called rear-end collision rule.

There was no error in refusing to give this instruction because it is clear from the evidence that this was not a rear-end collision. As stated in *Davenport v. Stratton*, 24 Cal.2d 232, 254, 149 P.2d 4, 15: "Even though an instruction is couched in proper language it is improper, if it finds no support in the evidence, and the giving of it constitutes prejudicial error if it is calculated to mislead the jury. 24 Cal.Jur. p. 830, § 95, and the authorities there cited."

[7] (d) Special instruction covering respondent Day's failure to sound his horn. The jury was fully instructed on the use of horns on the highways and the applicability of section 671 of the Vehicle Code to the instant situation.

[8] (e) Special instruction quoting section 531(a), Vehicle Code, requiring motor vehicles not to follow too closely and applying this section to the instant cause. Although respondent Day was following appellant's car, that of itself is insufficient to establish that he was following her too closely. The evidence did show that it



was not until the last fifty feet prior to the collision that respondent came into close proximity with appellant's car when he was attempting to pass to the left thereof just as she made a left-hand turn in front of him. As stated in 24 Cal.Jur. 826, sec. 92: "A litigant requesting it is entitled to proper instructions presenting his theory of the case, based upon the pleadings and the proofs. And if the parties to an action rely upon different theories, instructions should be given, when requested, as to each. But it is obvious that such an instruction is erroneous \* \* \* if it is unsupported by evidence." Such is the situation here.

[9] (f) Special instruction quoting section 544(a) and (b) of Vehicle Code requiring signals of vehicles intending to turn. It is here urged that an instruction quoting only subdivisions (a) and (b) of the cited section should have been given instead of the instruction which was given quoting subdivisions (a), (b) and (c), since the latter subdivision has reference to stopping or sudden decrease of speed without a signal.

Whether appellant Beatrice Delzell gave any signal of her intention to make a left-hand turn is the point upon which this case turns. She testified she gave it; respondent Day said he did not see any signal. By its verdict in favor of Day, the jury impliedly found that Mrs. Delzell gave no signal of her intention to make a left-hand turn. As a result the inclusion in the instruction of subdivision (c) of the cited section was not erroneous.

[10] Appellants also complain of certain instructions given by the court at the request of respondents: (1) Instruction B.A.J.I. 137 on imminent peril; (2) Instruction B.A.J.I. 134 on unavoidable accident on the ground that these were persuasive suggestions to the jury that appellant wife was guilty of contributory negligence. In view of the full and fair instructions which were given on the subjects of negligence and contributory negligence, the giving of the instructions complained did not prejudice appellants' cause.

[11] Appellants object to the giving of the following instruction: "I charge you that the defendant, Patrick J. Day, had a legal right to pass a vehicle at the point of the accident, subject to the exercise of ordinary care and observance of the provisions of the Vehicle Code." It is claimed that this instruction is ambiguous because it does not recite *which* sections of the code should be observed. The jury was fully instructed with respect to the various sections of the Vehicle Code applicable to the situation, hence there was no error in omitting them from the cited instruction.

Appellants urge error in certain instructions given by the court on its own motion, in that the court either quoted portions of code sections inapplicable to the case or failed to explain or qualify them. An examination of these instructions discloses they were properly given.

[12] Although appellants complain that the court erroneously gave instruction B.A.J.I. 139 with respect to examination of jurors re interest in insurance company, they admit that this was "among the instructions filed by appellants at the outset of the trial" in anticipation that such a question might be asked. No harm resulted from the giving of this instruction.

[13] It is established law that in order to justify a reversal because of the giving of an erroneous instruction, or the failure to give a proper instruction, it must appear that there was a miscarriage of justice under section 4½ of article VI of the constitution of this state. 19 Cal.Jur. 747, sec. 145.

[14] It is contended that the verdict and judgment against appellants husband and wife are not supported by the evidence. An examination of the record discloses that the evidence adduced at the trial herein presented issues of fact for the jury on the questions of negligence and contributory negligence of the parties. The jury having decided these questions adverse to appellants husband and wife upon conflicting evidence, this court is powerless to intervene.

[15, 16] Appellants further complain that the judgment in favor of appellant daughter for \$750, "in our present economic state, is a nominal amount and is not compensatory." It is conceded that Miss Delzell apparently had recovered at the time of trial and that her doctor and medical bills were \$169.50. As has been many times reiterated, the amount of recovery is a question of fact to be determined by the jury, and an appellate court is without authority to disturb the verdict if there is any substantial evidence to support it.

The record in this case discloses substantial evidence in connection with the inferences which may be reasonably drawn therefrom to support the facts hereinbefore recited as well as each and every finding of fact upon which the verdict of the jury was necessarily predicated. *Church v. Payne*, 36 Cal.App.2d 382, 393, 97 P.2d 819.

[17] While some slight errors may have been committed during the trial, they were not of such a serious character as to unduly prejudice the rights of appellants. They do not therefore justify a reversal of the judgments.

For the reasons stated, the judgments appealed from are affirmed.

DORAN, J., concurs.

WHITE, Presiding Justice.

I dissent. Conceding that the Judge sitting with a jury has plenary rights with reference to the orderly conduct of the case on trial, including the duty of declaring the law applicable to the facts and the legal effect thereof, there is in my judgment, no warrant in the law or lawful authority for a judge to so inject himself into the trial of a jury case by persistent and constant interference by way of unnecessary or unjustified statements and comments from which it can reasonably and rightfully be deduced that the jury was influenced thereby in the rendition of its verdict.

In the instant case, during the *voir dire* examination of prospective jurors, appel-

lants' counsel inquired of one of them, "Do you have any particular, fixed opinion about a rear-end collision?", to which he received a response, "No, nothing whatsoever." Appellants' counsel then inquired, "If the Court should instruct you in substance during the trial of this case that, generally speaking, the mere fact that a rear-end collision occurred would give some evidence of negligence on the part of the car in back, unless it happened because of the negligence of the car in front, would you follow such an instruction?"

Respondents' counsel then interposed an objection, saying, "I know the Court won't grant any such instruction, and you wouldn't recognize the accident in this case from the remark he made."

Thereupon, the Court said, "Well, let's not get excited about it. It doesn't excite me. *I never heard of such a law*, and I won't give it." (Emphasis added.)

The Court's statement that "I never heard of such a law" undoubtedly conveyed to the jury the impression that there was no such law or rule. But there is such a rule. See *O'Connor v. United Railroads of San Francisco*, 168 Cal. 43, at page 47, 141 P. 809; *Gornstein v. Priver*, 64 Cal.App. 249, at page 255, 221 P. 396; *Wright v. Ponitz*, 44 Cal.App.2d 215, at page 219, 112 P.2d 25; *Shannon v. Thomas*, 57 Cal.App.2d 187, at page 194, 134 P.2d 522. It was improper for the court by its comment to remove appellants' theory of their case from the jury at the very outset of the trial.

Again, when appellants' counsel inquired of a venireman on *voir dire*, "Mr. Falcone (Appellants' counsel): Mr. Colahan, do you have any fixed opinion about people who are involved in collisions, striking a car ahead of them from the rear, either for or against such a car?", respondents' counsel made the objection, "Now, I submit that that is misleading. It is inflammatory—". Thereupon, the following ensued:

"Mr. Falcone (appellants' counsel): I take exception to Mr. Jorz' (respondents' counsel) remarks.

"Mr. Jorz: The remarks he is making is inflammatory, and I object to it as im-

material, to begin with, and it is improper questioning of jurors.

"Mr. Falcone: I take exception to Mr. Jorz' statement, and I cite it as misconduct and ask the Court to instruct the jury to disregard it.

"The Court: No. I will not assign it as misconduct. *It is proper criticism to make.* The question wasn't proper. The objection is sustained to it." (Emphasis added.)

There was nothing "inflammatory" about the question nor was there any justification for the Court to advise the prospective jurors that for respondents' counsel to so characterize it was "proper criticism".

During the examination of respondent Day, driver of one of the vehicles involved in the collision, we find the following:

"By Mr. Falcone (appellants' counsel): How old are you, Mr. Day?

"A. Twenty-four.

"Q. Now, at the time of the accident, did you have an operator's license?

"A. No. I think I had an expired chauffeur's license.

"Q. An expired—

"A. Yes.

"Q. Expired in '44?

"Mr. Jorz: I object to this as immaterial, your Honor. I think that is incompetent. The question of a license is immaterial if he is an experienced driver under the authority of *Stryant v. Cannon*. That is one of my own cases in which they held just that.

"The Court: Yes. It is immaterial whether he had a license or an expired license. The question is, Did he drive properly?

"Mr. Falcone: Well, your Honor, I don't agree with that statement of the law, and I suggest that Mr. Jorz make his objection without discussing—

"Mr. Jorz: I made my objection and cited the authority.

"The Court: The possession of a license or lack of possession of a license doesn't necessarily cause an accident.

"Mr. Falcone: No.

"The Court: And an accident is not attributable to the lack of a license if the possession of the license had nothing to do with it.

"I will instruct the jury at the right time. Go on and ask your questions. I will rule on proper objections.

"Mr. Falcone: Well, your Honor, I want to make my observations, too. I don't think—

"The Court: It isn't necessary to make observations. Counsel should avoid it. Mr. Jorz made an objection. I am sustaining it on the ground that it is immaterial whether he had a license or not."

In both his comments and argument on the law, as well as in his ruling, the trial judge was in error. The questions were preliminary. The lack of a license might be due to physical incapacity or other disqualification to have one. The inability or failure of respondent driver to secure a license upon the expiration of his prior one, if such a situation were developed, might well affect his right and capacity to drive a motor vehicle and, if a causal connection was shown between respondent Day's non-possession of a license and the accident, the jury might draw reasonable inferences of negligence therefrom. *Poe v. Lawrence*, 60 Cal.App.2d 125, 130, 131, 140 P.2d 136.

On another occasion during the examination of respondent Day, the latter was asked by appellants' counsel, "Was your car at the time of the impact completely north of the center line or was the right side of your truck on the center line?

"A. I would say it was the other side of the center line.

"Q. North of it?

"A. Yes.

"Q. About 3 or 4 feet?

"A. I wouldn't say that. Maybe not that far.

"The Court: If the right side of his truck was 3 or 4 feet north of the center line, his left wheels would be riding the imaginary curb over there; bumping into the trees.



"Mr. Falcone: Your Honor, I didn't testify to that.

"The Court: But you suggested he was 3 or 4 feet north of the center line.

"Mr. Falcone: On the contrary, I take exception to the Court's statement. I was quoting his testimony yesterday, and I challenge the record. He said 3 or 4 feet north of the center line.

"Mr. Jorz: I submit, if the Court please, these questions were asked and answered over and over again yesterday, and it is nothing but a repetition of yesterday.

"The Court: *I have no recollection of his saying 3 or 4 feet over. I think I would have recorded it as quickly then as I did now, that it would throw his truck way up against the property line.* (Emphasis added.)

"Mr. Falcone: *I request that the record be re-read.*

"The Court: *No. It is too much trouble. Ask him the question direct.*" (Emphasis added.)

After further discussion regarding the Court commenting upon the evidence, the Judge again said, "Yes. I commented on it because I have no memory of his ever having said that before, and I suggested that if he had said it before, I think I would have caught him up as quick as I did you when you said it, because I know the width of automobiles, and the width that you have got there of the side of the street is only 10 feet—".

Again the Court was wrong because the record, which appellants' counsel desired to have read, shows that the witness had testified that the right side of his truck was north of the center line. He also testified that he was behind appellants' vehicle, and that the back end of it was 3 or 4 feet north of the center line. This line of testimony was important to appellants' avowed theory of the case. The questioning by appellants' counsel was proper, but the Court stated his erroneous version of the evidence and argued about it.

Another instance, which in my judgment, strongly militated against appellants was the statement by the trial Court that

testimony relating to respondent Day, driver of the truck involved, having been drinking was immaterial. In that regard, a police officer called as a witness on behalf of respondents testified that upon contacting respondent Day at the scene of the accident, "I could detect that he had been drinking some alcoholic beverages. I asked him if he had been drinking, and he said, 'Yes.' We asked him where, and he said at the Live Oaks Cafe west of there on the corner at Vay Nuys."

On redirect examination, with reference to the question of respondent Day having been drinking, the Court in sustaining an objection said, "Yes, if it is civil, it doesn't apply unless you prove he was intoxicated. He says he had been drinking." This was clearly erroneous and amounted to a declaration to the jury that unless appellants proved respondent Day was intoxicated, the effect of his drinking had no bearing on his negligence. It is the law that in an action such as this, to recover damages based on alleged negligence, a plaintiff is allowed to prove and the jury should consider all of the circumstances present at the time of the happening of the accident. And certainly, the extent of respondent Day's alcoholic condition at the time of the collision with appellants' vehicle became of vital importance. It was grievous error to exclude it from the jury's consideration, and equally grievous to advise the jury that it was immaterial. *Purcell v. Goldberg*, 34 Cal.App.2d 344, 348, 93 P.2d 578.

I have not here set forth all of the assignments urged by appellants because to do so would unduly prolong this already lengthy opinion. Suffice it to say that the foregoing coupled with some twenty-five other claims of prejudicial misconduct and erroneous statements or rulings, in my opinion, deprived appellants of that fair and impartial trial to which they were entitled. I am impressed from the foregoing that it would be but natural for the jury to believe that the Judge looked with disfavor upon appellants' theory and testimony concerning the circumstances of the collision.

The words of the Court in *McMinn v. Whelan*, 27 Cal. 300, 319, may appropriate-

**BALDIE v. BANK OF AMERICA NAT.  
TRUST & SAVINGS ASS'N et al.**

Civ. 14350.

District Court of Appeal, First District,  
Division 2, California.

May 18, 1950.

ly be quoted here: "From the high and authoritative position of a Judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it in his power by words or actions, or both, to materially prejudice the rights and interests of one or the other of the parties. By words or conduct he may on the one hand support the character or testimony of a witness, or on the other may destroy the same, in the estimation of the jury; and thus his personal and official influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the other."

The majority opinion makes reference to the general rule requiring an assignment of alleged misconduct and a request to the trial court to instruct the jury to disregard it, without which, error cannot be predicated in this court on such claimed misconduct. While, as pointed out in the majority opinion, appellants did on one occasion make the required assignment, as to the other instances of alleged misconduct, it is my opinion that most, if not all of them, come within the exception to the rule just enunciated, in that an admonition of the trial judge to the jury to disregard his claimed misconduct would not remove the prejudicial effect thereof. Appellants are therefore, not precluded from urging such error on appeal.

Prejudice of course, is a matter of degree. An incident or incidents, in the light of one record might not be prejudicial and reversible error, but similar incidents in the light of another record might be highly prejudicial. The evidence in the case at bar was most conflicting, and the question of who was responsible for the accident was a close one. The errors claimed could therefore, have easily tipped the scales in favor of respondents and have resulted in a miscarriage of justice.

The situation presented by the record before us, in my opinion, presents a situation that has transcended so far beyond the rule of judicial fairness as to render a new trial necessary.

I would reverse the judgment.

Mary Irene Baldie brought two actions, consolidated for trial, against August Pacheco and against Joseph Bullock, after whose death the action against him was continued against the Bank of America National Trust & Savings Association, a corporation, and another, as executors of decedent's estate. From judgments of the Superior Court in and for the county of San Mateo, A. R. Cotton, J., for defendants, plaintiff appeals. The District Court of Appeal, Dooling, J., affirmed the judgment for defendant Pacheco and reversed the judgment for defendant executors, 217 P.2d 111, and held in a supplemental opinion, Nourse, P. J., that the costs on the appeals should be apportioned on the basis of the portions of the transcripts and briefs devoted to each case.

Order directing apportionment of costs on appeal.

**Costs  241**

Where two appeals by different parties from judgments in two actions, consolidated for trial, are presented on one clerk's and one reporter's transcript and one set of briefs, but pleadings, evidence and arguments are separate, costs should be apportioned on basis of portions of transcripts and briefs devoted to each case. Rules on Appeal, rule 26(a).

Jonathan H. Rowell, Redwood City, for appellant.

Frank v. Kington, Redwood City, for respondents.

NOURSE, Presiding Justice.

Counsel have asked us to clarify the apportionment of costs on the two appeals. Under the Rules on Appeal, rule 26(a), the prevailing party is entitled to his costs.

These appeals were presented on one clerk's and one reporter's transcript and one set of briefs. However the pleadings, evidence and arguments are separate. Respondent Pacheco is entitled to costs against appellant on his appeal and appellant is entitled to costs on the Bullock appeal. The costs should be apportioned on the basis of the portions of the transcripts and briefs devoted to each case.



97 Cal.App.2d 443

**ALBERDING v. PRICHARD et al.**  
Civ. 17393.

District Court of Appeal, Second District,  
Division 2, California,  
May 10, 1950.

Action by Max Alberding against W. H. Prichard (sued as W. H. Pritchard) and Hal Ritter, for injuries suffered as a result of plaintiff having had his foot crushed by the defendant's truck. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered judgment for the plaintiff and the defendants appealed. The District Court of Appeal, Moore, P. J., held that evidence warranted charge to jury on doctrine of last clear chance.

Judgment affirmed.

**1. Automobiles** ⇨246(58)

In action for injuries suffered as a result of plaintiff having had his foot crushed by defendant's truck which backed into driveway in which plaintiff was working, evidence justified giving of instruction on doctrine of last clear chance.

**2. Negligence** ⇨141(9)

In determining whether record contains evidence sufficient to justify court in giving instruction on doctrine of last clear chance, reviewing court must consider all evidence admitted by trial court, must ignore conflicts and view evidence in light

most favorable to contention that doctrine is applicable, indulging every reasonable inference supporting application of doctrine and if after such review doctrine can apply under any reasonable view of evidence, instruction is proper.

**3. Negligence** ⇨83.7

Knowledge of the plaintiff's peril can be imputed to a defendant when the former's situation is such as should impress the mind of a reasonable person that plaintiff is in a position of imminent danger.

**4. Automobiles** ⇨246(58)

In action for injuries sustained when plaintiff's foot was crushed by defendant's truck, testimony of plaintiff and of other witnesses that plaintiff had been for several minutes prior to truck's actual backing into driveway, in the identical position that he was when struck, and testimony of driver that he clearly saw plaintiff near cement mixer when plaintiff was in a perilous position in narrow driveway into which defendant was backing and absence of a rear window in truck, justified determination that defendant had actual knowledge of plaintiff's situation warranting instruction on doctrine of last clear chance.

Syril S. Tipton, Los Angeles, for appellants.

John O. Akin, Long Beach, for respondent.

MOORE, Presiding Justice.

In an action for personal injuries respondent recovered judgment for damages suffered as a result of having his foot crushed by appellants' truck. On the day of the accident respondent was in the employ of a construction company which was erecting certain residential buildings on 52nd street in the city of Maywood. Earlier in the day appellant Ritter, employee of defendant Pritchard, had delivered a truck load of the material necessary for cement to the premises. The cement mixer was set back about 65 feet south from the curb and in a driveway between a completed residence to the west and another in the course



of construction to the east. The driveway was approximately 17 feet in width and was soft dirt. Ritter had delivered his first load of materials in the presence of respondent without incident. Between the time of his first delivery and the arrival of his second, some sacks of cement had been delivered in the same driveway. In order to make way for Ritter's second cargo the employees on the job moved the cement so that Ritter could back into the driveway and approach close to the mixer. Respondent assisted in moving the sacks, then he turned his attention to the motor of the mixer which was running. While he was kneeling and working on the motor and facing to the southeast, Ritter backed the 5½-ton truck with its 8-ton cargo down the driveway to the mixer where it crushed the right foot of respondent.

The sole ground of appeal is the jury instruction on the doctrine of the last clear chance. (BAJI 205, p. 310.\*) Appellant emphasizes the second and third elements listed in the six facts, the concurrent existence of which is essential to the application of the doctrine.

[1-3] The record discloses evidence from which it can be reasonably inferred that respondent was unaware of the im-

pending danger. It consists of (1) the testimony of appellant Ritter that respondent was working at the mixer at the time appellant was backing his truck up the driveway; (2) his testimony that the motor of the mixer was running; (3) respondent's testimony that he did not hear the truck; did not know it was backing in at the time; (4) was at work on the motor of the mixer; (5) was facing in the direction opposite to that from which the truck was approaching; (6) he had not seen the truck's tracks previously made. Such evidence is sufficient basis for the assumption that respondent was totally unaware of the impending danger in his position or that it was physically impossible for him through the exercise of ordinary care to escape from the danger. In considering whether the record contains evidence sufficient to justify the court in giving an instruction upon the doctrine of last clear chance, the reviewing court must consider all the evidence admitted by the trial court. It must ignore conflicts and view the evidence in the light most favorable to the contention that the doctrine is applicable, indulging every reasonable inference supporting the application of the doctrine. If after such review and consideration the doctrine can apply under any reasonable view of the evidence the instruc-

• "There has grown up in our law a certain reasoning process that we sometimes call to our aid in analyzing the facts of an accident case, and which is known as the doctrine of last clear chance. It is permissible to use the doctrine only after we first find, and you may not use it unless and until you first shall have found, that in the events leading up to the accident in question, both the plaintiff and defendant were negligent.

"The doctrine of last clear chance may be invoked if, and only if, you find from the evidence that these six facts existed:

"First: That plaintiff, by his own negligence, got himself into a position of danger.

"Second: That thereupon, either it was physically impossible for him through the exercise of ordinary care to escape from the danger, or he was totally unaware of impending danger in his position.

"Third: That the defendant had actual knowledge of plaintiff's situation.

"Fourth: That it appeared to the defendant, or would have appeared to him

in the exercise of ordinary care, that plaintiff either was unaware of the danger impending in the situation or was unable to escape therefrom through the exercise of ordinary care.

"Fifth: That after the defendant acquired actual knowledge of plaintiff's perilous situation, he had a clear opportunity to avoid the accident and could have done so by exercising ordinary care.

"Sixth: That the defendant did not avail himself of that opportunity, but by negligent conduct proximately caused the accident.

"If all the conditions just mentioned are found by you to have existed with respect to the accident in question, then you must find against the defense of contributing negligence, because under such conditions the law holds the defendant liable for any injury suffered by the plaintiff and proximately resulting from the accident, despite the negligence of the plaintiff."

tion is proper. Knowledge of the plaintiff's peril can be imputed to a defendant when the former's situation is such as should impress the mind of a reasonable person that the plaintiff is in a position of imminent danger. *Jones v. Yuma Motor Freight Terminal Company*, 45 Cal.App.2d 497, 500, 114 P.2d 438.

Appellants base their contention on the fact that three of respondent's own witnesses testified that they heard the truck and were near respondent at the time of the accident and that the truck had made previous deliveries to the same spot leaving visible tire tracks. In addition to such testimony appellants asserted that respondent had five years' experience as a laborer on construction jobs and had worked at the premises in question for five days. However, despite such testimony the evidence adopted by the trial court as a basis for its assumption of respondent's unawareness was substantial and reasonable.

With reference to the third element in the instruction appellants contend that it is not shown by the evidence that appellant Ritter had actual knowledge of plaintiff's situation. They base their contention upon the following facts: (1) testimony that the driveway was approximately 17 feet wide but the space between the mixer and the western edge of the driveway was about 10 feet only within which Ritter was compelled to drive the truck; (2) respondent's testimony that he had been kneeling in his position beside the motor for four or five minutes during which time his foot extended west of the mixer about six inches into the path of the truck. Appellants argue that it is "highly improbable" that respondent's foot remained steady and in the same position for the length of time asserted by him and that it must be shown that the foot remained in the exact position in order to establish that it was in a position of peril. From their own arguments on the unlikelihood of the foot's remaining in the same position appellants conclude that the jury could not have had a clear picture of respondent's position of peril. Needless to say, it was the evidential inferences drawn by the trial judge as to wheth-

er the defendant had actual knowledge of plaintiff's situation which warranted the giving of the instruction. (3) Ritter testified that as he backed he saw the "men working around the mixer." Appellants concede that Ritter saw respondent from time to time as he was backing the truck into the driveway and that he saw respondent a few seconds before the collision. But they contend that Ritter did not have a clear and unobstructed view; that his vision was obstructed by a four-foot stack of sacks of cement just north of the mixer; that the bed of the truck blocked his vision through the window; that the truck was 21 feet long.

In view of such facts which appear in the evidence appellants argue that (1) all the essential elements must be present before a negligent plaintiff may rely upon the doctrine of the last clear chance, *Girdner v. Union Oil Company*, 216 Cal. 197, 202, 13 P.2d 915; *Palmer v. Tschudy*, 191 Cal. 696, 700, 218 P. 36; *Johnson v. Sacramento Northern Ry.*, 54 Cal.App.2d 528, 531, 129 P.2d 503; (2) there must be substantial evidence to establish the presence of these elements, *Keller v. Arden Farms*, 59 Cal. App.2d 506, 139 P.2d 47; (3) Ritter's actual view of respondent some considerable distance from the place of the accident does not necessarily make the doctrine applicable. *Thompson v. Los Angeles, etc., Ry.*, 165 Cal. 748, 134 P. 709; *Smith v. Aggola*, 27 Cal.App.2d 750, 81 P.2d 997; *Dalley v. Williams*, 73 Cal.App.2d 427, 166 P.2d 595.

[4] Again appellants ignore the fact that it was the function of the trial court to determine from the evidence whether there was sufficient proof to warrant the assumption that Ritter had actual knowledge of respondent's situation. Such proof is found in the (1) testimony of respondent and of the witnesses Thone and McNaught. They testified that respondent had been for several minutes prior to the truck's actual backing into the driveway in the identical position that he was in when stricken. (2) Testimony of Ritter was that he clearly saw respondent near the mixer when respondent was in a perilous position. (3) The narrow driveway into which Ritter was backing

and the absence of a rear window in his truck were warnings of danger of which Ritter was aware. Not only did he testify that he saw respondent at the mixer a few seconds before he stopped his truck, but respondent and his three witnesses testified that respondent had been kneeling at the mixer at least four minutes prior to the truck's collision with the foot. From this it is patent that the trial judge reasonably drew the deduction that Ritter had seen respondent in his position of peril. The last three cases above cited on behalf of appellants, Thompson, Smith, Dalley, are factually different.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.



97 Cal.App.2d 492

**BERRY v. RYAN.**

Civ. 17359.

District Court of Appeal, Second District,  
Division 2, California.

May 15, 1950.

Action by C. A. Berry against Owne K. Ryan to recover money allegedly due under contract, wherein defendant filed a cross-complaint for money paid plaintiff under a contract. The Superior Court of Los Angeles County, Thurmond Clarke, J., entered judgment in favor of plaintiff and an order denying motion for new trial and defendant appealed. The District Court of Appeal, McComb, J., held that since respondent filed no brief, court would assume that respondent had abandoned any attempt to support the judgment and that the ground urged by appellant for reversal was meritorious.

Judgment reversed and appeal from order denying motion for new trial dismissed.

#### 1. Appeal and error ⇨773(5)

Where respondent filed no brief, District Court of Appeal would assume that

the facts as stated in appellant's brief were true, that the evidence was insufficient to support the findings of fact of trial court as contended by appellant and that respondent had abandoned any attempt to support judgment and that ground urged by appellant for reversal was meritorious.

#### 2. Appeal and error ⇨1010(1)

Where material findings of fact of trial court were not supported by the evidence, judgment should be reversed.

#### 3. Appeal and error ⇨110

Order denying motion for new trial was not an appealable order.

Francis C. Whelan, Los Angeles, for appellant.

No appearance for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff in an action to recover for money allegedly due under a contract, and against defendant on his cross-complaint seeking to recover money he had paid to plaintiff under a contract, defendant appeals. There is also a purported appeal from the order denying the motion for a new trial.

[1] Respondent (plaintiff) has not favored this court with a brief. Appellant (defendant) seeks reversal of the judgment on the ground, among others, that the evidence does not sustain material findings of fact of the trial court. Since respondent has not filed a brief we assume that (1) the facts as stated in appellant's brief are true, (2) the evidence is insufficient to support material findings of fact of the trial court, and (3) respondent has abandoned any attempt to support the judgment, and that the ground urged by appellant for reversing the judgment is meritorious. (Postin v. Griggs, 66 Cal.App.2d 147, 148, 151 P.2d 887; Zeigler v. Bonnell, 52 Cal.App.2d 217, 218, 126 P.2d 118; Bendlage v. Kohlsaat, 54 Cal.App.2d 136, 139 et seq., 128 P.2d 691. Cf. Lawrence v. Johnson, 131 Cal. 175, 177, 63 P. 176.)

[2] Applying the foregoing rule it is evident that if material findings of the trial



court are not supported by the evidence the judgment should be reversed.

[3] The judgment is reversed and the purported appeal from the order denying the motion for a new trial which is a non-appellable order is dismissed.

MOORE, P. J., and WILSON, J., concur.



97 Cal.App.2d 502

**GILLAN v. STANSBURY et al.**

Civ. 17148.

District Court of Appeal, Second District,  
Division 3, California.

May 15, 1950.

Silas L. Gillan, also known as S. L. Gillan, brought suit against Benjamin M. Stansbury, Hugh Gordon, and another, for a judgment declaring plaintiff to be the owner of an undivided one-fourth interest in and to a renewal lease from the United States government by reason of prospecting permit, and to recover a share of earned profit under government oil lease. The Superior Court of Los Angeles County, Fred Aberle, J. pro tem., rendered a judgment in favor of the plaintiff, and the named defendants appealed. The District Court of Appeal, Shinn, P. J., held that plaintiff had no interest in renewal lease and was not entitled to share in any bonus paid or agreed to be paid for the lease, but that plaintiff was entitled to royalty payments.

Judgment reversed.

#### 1. Mines and minerals ⚡64

Any assignee of mineral lease with notice would take lease subject to obligation to pay reserve royalties during full term of original lease and any extension or renewal thereof.

#### 2. Mines and minerals ⚡64

Interest of lessee in mineral lease was entirely distinct and separate from royalty

interests of joint adventurers and would remain so in hands of a transferee of the lease.

#### 3. Mines and minerals ⚡79(1)

Where prospecting permit was assigned to oil company under agreement whereby company was to drill oil wells and joint adventurers were to be paid royalty payments by company, rights to receive royalties were incorporeal interests in realty.

#### 4. Mines and minerals ⚡101

Where prospecting permit was assigned to oil company under agreement whereby company was to drill oil wells and joint adventurers were to be paid royalty payments by company, and company declined to file an application with the United States for renewal of lease, and one of the joint adventurers did nothing about seeking a new operator but merely "sat tight", and another joint adventurer succeeded in procuring a new operator who secured a renewal lease, the royalty interest of that joint adventurer who did nothing to seek a new operator, was not affected by the purchase of the lease by the new operator.

#### 5. Mines and minerals ⚡101

Where prospecting permit was assigned to oil company under agreement whereby company was to drill oil wells and joint adventurers were to be paid royalty payments by company, and company declined to file an application with the United States for renewal of lease, and one of the joint adventurers did nothing about seeking a new operator but merely "sat tight," and another joint adventurer succeeded in procuring a new operator who secured a renewal lease, joint adventurer who did nothing to seek a new operator, had no legal or equitable interest in renewal lease nor any right to share in any bonus for the lease.

#### 6. Joint adventures ⚡4(1)

A relationship of joint adventurers or co-owners among several owners solely as lessors of property, does not, by operation of law, or without special agreement, entitle all of them to share in the leasehold estate acquired by one or more of them by purchase from the lessee.

**7. Mines and minerals** ⇨101

Where prospecting permit was assigned to oil company under agreement whereby company was to drill oil wells and joint adventurers were to be paid royalty payments by company, and company declined to file an application with the United States for renewal of lease, and one of the joint adventurers did nothing about seeking a new operator but merely "sat tight," and another joint adventurer succeeded in procuring a new operator who secured a renewal lease, joint adventurer who secured new operator was not entitled to any allowance for services as an off-set against royalties payable to that joint adventurer who did nothing to seek a new operator, and the latter was not entitled to share in profits of operation of property.

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O'Melveny & Myers, William W. Clary, Sidney H. Wall, Ernest M. Clark, Jr., Los Angeles, for appellants.

W. P. Smith, Los Angeles, for respondent.

SHINN, Presiding Justice.

This case is before us on an appeal by Benjamin M. Stansbury and Hugh Gordon, defendants, from a judgment declaring plaintiff, Silas L. Gillan, to be the owner of an undivided one-fourth interest "in and to any renewal lease from the United States Government by reason of prospecting permit No. Los Angeles 033569, or any rights arising therefrom and/or lease and/or prospecting permit covering the following described land to wit: Northwest quarter of Section 28, Township 11 North, Range 20

West, S.B.M. in Kern County, California," a like interest in certain personal property, and awarding plaintiff \$2,418.66 from Stansbury as his share of earned profit under a government oil lease.

The prospecting permit was issued by the Department of the Interior to Henning E. Olund, on March 16, 1921, and was assigned by him, as legal owner thereof, to General Petroleum Corporation in 1923. Under this permit an oil and gas lease was issued to General Petroleum by the government on January 10, 1924, which, by its terms, was due to expire January 10, 1944. The lease carried with it a preferential right of renewal. Shortly before its expiration date the lease was purchased from General Petroleum by Stansbury and Gordon. The assignment was taken in the name of Olund and he, as assignee, applied for a renewal. This application was pending at the time of trial. A renewal lease was issued to Olund before final judgment was entered following an accounting. The judgment awards Gillan a one-fourth interest in this lease and in the profits from oil produced.

Plaintiff's claim of title is asserted to have a basis in the following written instruments: (1) An agreement between Olund, Gillan and Stansbury, as parties of the first part, and Alexander P. Anderson and Lydia Anderson, as parties of the second part, dated July 21, 1922, by the terms of which the Andersons agreed to advance up to \$10,000 for the development of the property for a one-fourth interest in the prospecting permit and its benefits and profits, the remaining interests to be held one-fourth each by Olund, Gillan and Stansbury;<sup>1</sup> (2) An

1. The agreement recited that the prospecting permit was owned by Olund, Gillan and Stansbury; that the \$10,000 to be advanced by the Andersons would be used to grade roads, bring in water, and drill a 500-foot well; that the first parties assigned to the Andersons a one-fourth interest in the prospecting permit and all benefits and profits to be derived therefrom; that if necessary, in order to further comply with the terms of the permit, all parties would sell a half interest for that purpose or convey a half interest to others in order to drill a

2000-foot well, each of the parties to contribute ratably to the share to be sold. The agreement read, in part, as follows: "5. In event the parties hereto hereafter make a contract with others to drill said land upon a bonus and royalty or upon a royalty basis, or in case said permit, or any lease hereafter acquired by virtue thereof, be sold outright—then, in either such event, from the proceeds thereof there shall first be deducted all amounts paid by any of the parties hereto for costs or expenses incurred in connection with said permit, including the

agreement dated March 13, 1923, between the four men and their wives, as assignors, and General Petroleum, as assignee, by the terms of which the assignors agreed to assign the prospecting permit to the assignee for a consideration of \$320,000 bonus and \$2,905.19 for improvements on the land, of which \$162,905.19 was to be paid in cash, the balance of \$160,000 bonus out of oil, and in addition certain overriding royalties. The bonus and all royalty payments were to be paid one-fourth to Olund, one-fourth to Gillan, one-fourth to Stansbury, one-eighth to Mr. Anderson, and one-eighth to Mrs. Anderson. General Petroleum agreed to drill wells and operate the property, and that its agreement should extend "for the full term of and be concurrent with any prospecting permit or lease to the assignee covering said land, and all extensions and renewals thereof," but retained the right to at any time transfer to the assignors all or portions of the land of not less than 10 acres each, and thereby reduce its drilling obligations. The agreement could be terminated for default of the assignee, and in the event of termination the assignee was to forthwith reassign the permit to Olund and request the consent of the Secretary of the Interior thereto. General Petroleum agreed that after the completion of the first well producing oil in paying quantities, it would file and prosecute an application for a government lease, but did not by that agreement, or otherwise, agree to apply for a renewal of any lease.

General Petroleum, upon the execution of the assignment and operating agreement,

entered into possession of the property, drilled four wells thereon, and complied with the terms of the permit and the agreement until it received a government lease on January 10, 1924, at which time only two of the wells were producing. Shortly before November 26, 1943, General Petroleum advised the assignors of its intention not to apply for a renewal of its lease. On November 26, 1943, Gillan, Stansbury and Olund met and discussed the decision of General Petroleum and the necessity of filing an application for a renewal of the lease prior to January 10, 1944. General Petroleum was not required to make the application and declined to do so. Less than sixty days remained for securing an assignment of the lease to a corporation or individual who would make the application. No one except General Petroleum's assignee would be qualified to apply for a renewal. General Petroleum would assign the lease only on condition that it be paid a sum, estimated to be \$2,500, for its equipment on the property. The parties hoped to find a new operator who would pay this sum, take an assignment of the lease, assume General Petroleum's obligations and apply for a renewal. It was manifest that if they failed in this effort the lease would have to be acquired by other means or all rights in the property would be lost. During the November 26th meeting Gillan announced his refusal to make any effort to find a new operator except upon condition that he receive any bonus paid by an operator he might secure. Stansbury flatly rejected these terms, and the meeting broke

amount which shall have been paid or advanced by second parties in accordance with this agreement, and such amounts repaid to the respective parties who have so advanced or paid the same; and the balance shall be divided in the proportion of twenty-five (25) per cent to Olund; twenty-five (25) per cent to Gillan; twenty-five (25) per cent to Stansbury, twelve-and-one-half (12.5) per cent to Alexander P. Anderson, and twelve-and-one-half (12.5) per cent to Lydia Anderson.

"6. While said prospecting permit now stands in the name of H. E. Olund individually, and it is the intention of the parties to apply to the secretary of the

Interior for approval of the assignments herein mentioned, nevertheless, in event such approval for any reason be not granted by the Secretary of the Interior, it is agreed that the proceeds eventually derived from said permit shall, notwithstanding, be divided in the proportions as hereinbefore set forth.

"7. It is agreed that first parties shall attend to the business of prosecuting the work of complying with the requirements of said permit and obtaining a lessee or purchaser for the same, and shall make no charge for their time or services heretofore or hereafter to be rendered in connection therewith."



up. The Andersons were in Minnesota; Olund had little interest in the project; and since Gillan refused to cooperate in seeking a new operator except on terms that Stansbury rejected, Stansbury undertook to save the project by acquiring in some manner the General Petroleum lease. Gillan did nothing. With respect to his conduct after the November meeting he testified: "I was not attempting to make any deal, I was just sitting tight to see what Stansbury could do in the way of getting a new operator." This continued to be his attitude while Stansbury was putting forth diligent efforts. Through those efforts Gordon was brought into the enterprise and financed the purchase of the General Petroleum lease and property for the sum of \$3,357. After the lease was assigned to Olund, Stansbury, acting as his attorney in fact, caused to be filed and prosecuted an application for a renewal lease and entered into an agreement with the Secretary of the Interior to fulfill the terms of the lease, pending a decision on the application. Although Gillan knew that Stansbury had taken over operation of the property it was not until June of 1944 that he contracted Stansbury. At that time he asserted that he still retained an interest in the enterprise when he met with Gordon, Stansbury and Olund in Gordon's office. Gordon had understood from Olund and Stansbury that Gillan had given up whatever interest he had and made his investment with that understanding. Stansbury asserted at the meeting that Gillan no longer had any interest. Gillan made an effort through the Department of the Interior to assert a right in Olund's pending application for a renewal lease, but this effort was fruitless, since he was unable to furnish evidence of such an interest. He later tendered to Olund two checks for \$40 each, as one-fourth of the annual cash rental due to the government, and thereafter endeavored to pay to the land office an entire year's rental of \$160 after the same had been paid by Stansbury. It was not until the trial of the present action in May of 1947 that he offered to bear any of the expense of his former associates in acquiring the lease and operating the property. In the meantime a performance bond of \$5,000

had been furnished, as required by the government, and the surety had been indemnified in the amount of \$1,000. Stansbury had complied with the lessee's obligations for more than three years. The production from the wells was only 16 barrels per day. The property was located about 100 miles from Los Angeles where Stansbury had his office. The operation was burdensome, entailing much detailed supervision and the advancement of money for maintenance, repairs and improvements. Nevertheless, the operation was successful in a small way and by the time the case came on for trial, one-fourth of the profits which Gillan was claiming would have exceeded the share of expense and outlay which he offered to pay.

A lease was issued to Olund in September, 1947; it was assigned to Gordon who entered into an operating agreement with Richfield Oil Corporation in June, 1948, under terms and conditions somewhat similar to those of the General Petroleum agreement. Stansbury and Gordon had previously acquired the royalty interests of Olund and the Andersons, but Gordon made his investment and acquired the lease and Richfield took its agreement with notice of the Gillan royalty interest. Gordon admittedly had knowledge of the joint venture relationship at the time he acquired his interest. By the terms of the agreement with Richfield, and because of Gillan's claims, one-fourth of the consideration for the lease and one-fourth of the royalties were to be impounded pending the determination of the present action. Richfield is not a party to the action, and the judgment does not purport to adjudicate any rights as between Gillan and Richfield. It may be mentioned, however, that under the Richfield agreement one of its obligations will be to recognize the rights of Gillan as they are finally declared in the present action.

In reviewing the findings and judgment it is necessary to define the relations and reciprocal rights of the parties under their agreements as they existed at the time of the November, 1943 meeting. Three separate interests in the property existed, (1) the government's ownership of the land and the rights of a lessor, (2) the leasehold in-

terest owned by General Petroleum, and (3) the overriding royalty interests owned by the joint adventurers.

[1,2] The royalty owners, individually or collectively, had no claim upon, or any right to acquire, any interest in the leasehold estate of General Petroleum. Although the scope of the joint venture originally encompassed physical operations on the property sufficient to meet the requirements of the permit, the associates were relieved of this obligation by their agreement with General Petroleum. The scope of the joint venture was thereby narrowed to the mere ownership of royalties. Acquisition by the royalty holders of their lessee's interest in the property and operations of their own for the production of oil were not within the contemplation or engagements of the parties as expressed in the original agreement or the agreement with General Petroleum. The terms of the latter agreement covered the lease that was issued in January, 1924, "and all extensions and renewals thereof." The leasehold estate of General Petroleum could be acquired only by purchase and the associates had no preferred right of purchase. Any assignee of the lease with notice would take it subject to the obligation to pay the reserved royalties during the full term of the original lease and any extension or renewal thereof. *Schiffman v. Richfield Oil Co. of California*, 8 Cal.2d 211, 225-227, 64 P.2d 1081. *Recovery Oil Co. v. Van Acker*, 79 Cal.App.2d 639, 180 P.2d 436. The royalty interests were several, absolute and unconditional. The lessee's interest owned by General Petroleum was entirely distinct and separate from the royalty interests of the joint adventurers, and would remain so in the hands of a transferee of the lease.

The present controversy between Gillan on the one hand, and Stansbury, Gordon and Olund on the other, arises out of the purchase of the General Petroleum lease. It is Gillan's contention that by reason of a fiduciary relationship existing between all the parties to the joint venture agreement, the purchase of the lease by Stansbury, Olund and Gordon would, as a matter of law, inure to the benefit of all the parties.

Stansbury and Gordon, who are the only appellants, contend that the purchase of the leasehold was not within the scope of the joint venture, but was in fact a new enterprise in which Gillan did not participate, and had no right to participate.

Before we consider these respective contentions further, it should be mentioned that the controversy has been over Gillan's claim to an interest in the lease, and not over his royalty interest. The evidence does not disclose that the royalty interest was discussed by the parties in any of their conferences. It is assumed in the briefs that Gillan has no interest unless it is an interest in the lease. The facts of the case demonstrate that this assumption is not warranted.

[3-5] The several rights to receive royalties were incorporeal interests in real property. See *La Laguna Ranch Co. v. Dodge*, 18 Cal.2d 132, 114 P.2d 351, 135 A.L.R. 546. In the absence of some new agreement the Gillan royalty interest was not affected by the purchase of the General Petroleum lease. It is clear that unless Gillan's interest has been sold, or otherwise disposed of, or abandoned, Gillan has the same right to receive royalties from appellants or their assignee as he would have had from any other purchaser of the lease who took with notice. It is not contended that Gillan ever transferred this interest. The only theory advanced by appellants is that he in some manner abandoned the entire project. If it be true that he had a right to participate with the others in the purchase of the General Petroleum lease, and could not be excluded legally, it would result that the judgment awarding him a one-fourth interest in the lease represents a correct decision. If, however, appellants were not fiduciaries with respect to the purchase of the lease, that is to say, if that was a new undertaking not within the scope of the joint venture, the judgment is erroneous. But even if Gillan is not accorded the status of a co-adventurer with respect to the ownership of the General Petroleum lease he is nevertheless the owner of his original royalty interest. (On April 15, 1931, the royalty obligations of General Petroleum were reduced by agreement with the joint ad-



venturers. Our references to royalty obligations are to such obligations, as modified by agreement of all the co-adventurers.) If it be true, as appellants contend, that Gillan failed in his duty to cooperate in finding a new operator for the property and other efforts to avoid loss of the lease, it does not follow that he abandoned or forfeited his royalty interest. This aspect of the case as we say was never discussed by any of the parties in their conferences. Gillan never demanded royalty payments and appellants never offered to make them. Appellants rely upon their claim that Gillan abandoned all interest in the enterprise and that they are not accountable to him as a co-owner of the lease. The evidence does not substantiate the claim that Gillan abandoned any of his rights. The fact that he claimed an interest in the lease and did not demand the payment of royalties indicates that if he had been allowed to participate in the operation of the property he would not have expected to be paid royalty. There would have been no reason for the operators to pay royalties to themselves. It may be conceded that if Gillan has an interest in the lease he cannot also claim royalties as a sublessor, but it is clear that if he has no interest in the lease he still retains his royalty interest. We have concluded that he has no legal or equitable interest in the renewal lease.

There could be but two theories evolved from the admitted facts under which Gillan would be the owner of even an equitable interest in the lease itself. One would be that he had such an interest by virtue of the original joint venture agreement, notwithstanding the assignment of the prospecting permit to General Petroleum and the operating agreement with that company. This theory is clearly unsound. Granting that Olund's associates originally had equitable interests in the permit and any lease that might be issued thereunder, they all exchanged these interests in their entirety for royalty interests in production. No one of them retained any other interest whatsoever except the right to have the lease reassigned to Olund in case General Petroleum should default under its agreement. This event did not occur.

[6] We do not agree with the contention of appellants that the joint venture was wholly terminated when the prospecting permit was assigned to General Petroleum in return for the royalties agreed to be paid. The scope of the joint venture, however, was greatly diminished. As long as General Petroleum performed under the operating agreement the joint adventurers had no present rights other than their royalty rights. Nevertheless there was a possibility that General Petroleum might become in default and forfeit the lease to Olund, or might relinquish all or certain 10-acre parcels of the land. If either of these events had occurred the associates would have been restored in certain respects to their original position. They would have found it necessary for the prosecution of the original undertaking to find a new operator for the property, and they would have been required to pay the government the annual cash rental. But they would have been under no obligation to each other to operate the property for themselves, or to contribute any labor or expense necessary in such operation. Their only obligation toward development as expressed in the June, 1922 agreement was to meet the requirements of the permit, namely, within a specified time to drill a 500-foot well and within an additional time a 2,000-foot well. Even though there was no more than a possibility that General Petroleum would abandon the property before the expiration date of the lease, the joint venture relationship was kept alive by that possibility, but only as to what remained to be done within the scope of the agreement. From the time the agreement was made with General Petroleum the relation of the royalty holders to the property was comparable to that of sublessors. As long as General Petroleum held the lease the associates had not the slightest interest in the leasehold estate. As we say, if the lease had been forfeited or surrendered, development and production operations would have been at a standstill, and could have been undertaken as a joint venture only through a new agreement. When Olund and Stansbury found it necessary to purchase the lease and equipment they had no duty to invite Gillan to join with them.



He had the same opportunity as they had to acquire the lease, and to devise ways and means for undertaking the operation of the property. No general fiduciary relationship exists between parties to a joint venture. The fiduciary duties are no broader than the business and activities encompassed by the joint venture agreement. A relationship of joint adventurers or co-owners among several parties solely as lessors of property does not, by operation of law, or without special agreement, entitle all of them to share in the leasehold estate acquired by one or more of them by purchase from the lessee. See *London Extension Mining Co. v. Ellis*, 10 Cir., 134 F.2d 405, 411-412; *Fleming v. Casady*, 202 Iowa 1094, 211 N.W. 488, 494; *Ramberg v. Wahlstrom*, 140 Ill. 182, 29 N.E. 727, 33 Am.St.Rep. 227. This is substantially what Gillan has been endeavoring to do, and it is what he has seemingly accomplished by the judgment. Even if he had offered in the beginning to join Stansbury and Olund in acquiring the lease they would have been under no duty to accept him as a partner. Each of them had, at least, an implied duty to endeavor to find a new operator for the property. If they had succeeded all would have shared equally in their success. Gillan, as we say, did nothing, and is in no position to complain that Stansbury and Olund failed to find a new operator. There was no secrecy about the matter. One who has had a fair and equal opportunity with his associates to act with them and who refuses to do so, but "sits tight" waiting for the others to pull the chestnuts out of the fire, has no grounds for complaint if the efforts put forth by his associates fail, and he is left out of a new undertaking which they are obliged to launch. The purchase of the lease and undertaking to operate the property was a distinctly new enterprise and not a mere continuation of the original one. In the absence of a new agreement Gillan was under no obligation to contribute any portion of the cost of the lease or the expense of operation, nor would he have been under any liability to share in the losses if the undertaking had proved unprofitable. See *Fuller v. Laws*, 219 Mo. App. 342, 271 S.W. 836.

The second theory would be that the acquisition of the lease from General Petroleum by Olund was pursuant to a new joint venture agreement between Gillan, Stansbury and Olund. It is not contended by Gillan that any such agreement was entered into. The evidence, including that of Gillan, conclusively shows there was no such new agreement.

Our conclusion that Gillan is not the owner of an interest in the lease as a co-adventurer necessarily results from the fact that Stansbury and Olund were not guilty of any breach of fiduciary duty in acquiring the lease for themselves, and therefore were under no duty to take Gillan in with them in acquiring the lease.

One of Stansbury's contentions is that if Gillan was part owner of the renewal lease he, Stansbury, should have been awarded substantial compensation for his services in securing the lease and negotiating with Richfield. Under our holding that Gillan was not part owner of the lease it would follow that Stansbury's services were not rendered in Gillan's behalf but on behalf of himself and Gordon. Gillan's royalty interest is not chargeable with any part of their expenses.

By his complaint Gillan sought declaratory relief. Although he has not contended that he still retains a royalty interest in production by virtue of the several agreements with his associates his claims have had a broader base. The evidence in the case was comprehensive and permits of a full declaration of the rights of the parties. Only limited issues remain for determination.

[7] Plaintiff is entitled to a judgment against Benjamin M. Stansbury in an amount equal to one-fourth of the royalty from production from January 8, 1944 until the operation of the property was taken over by Richfield, as evidenced by its agreement dated June 10, 1948. The total royalty for this period will be computed in accordance with agreements in force at the time General Petroleum assigned its lease to Olund. If Gordon does not consent that judgment for this amount be entered against him, as well as against Stansbury,

the court should determine the matter of his liability. Stansbury is not entitled to any allowance for services as an offset against royalties payable by him, and Gillan is not entitled to share in the profits of the operation of the property between January 8, 1944 and June 10, 1948. As between Gillan and appellants the judgment should also declare that Gillan has no interest in the renewal lease heretofore issued to Olund and assigned to Gordon, or the personal property in question, but has a right to receive as royalty, now accrued, and any that may accrue under the Richfield agreement, and from any production under the Gordon lease or any other lease founded upon the Gordon lease, the proportion or value of production equal to one-fourth of the royalty payable by General Petroleum under agreements in force at the time its lease was assigned to Olund. The judgment should

also declare that Gillan is not entitled to share in any bonus paid or agreed to be paid by Richfield for the lease. The bonus belongs to the owners of the lease. It represents consideration given for the agreement entirely separate from royalty obligations, and from Gillan's reserved interest in royalty, which is based solely on production.

The judgment is reversed and the trial court is instructed to determine the amounts and percentages necessary to render judgment in accordance with the views herein expressed and to enter judgment therefor. No costs on appeal.

WOOD, J., concur.

VALLÉE, J., being disqualified, did not participate.















# CALIFORNIA REPORTER

## 218 PACIFIC REPORTER

### SECOND SERIES

35 Cal.2d 404

**BELL-BROOK DAIRIES, Inc. v. BRYANT.**  
S. F. 17893.

Supreme Court of California, in Bank.  
May 11, 1950.

The Bell-Brook Dairies, Inc., sued James G. Bryant, Director of Employment, to recover unemployment insurance contributions paid by plaintiff. From a judgment of the Superior Court, San Francisco County, Edward P. Murphy, J., for plaintiff, defendant appealed. The Supreme Court, Gibson, C. J., held that the evidence supported the trial court's finding that notices of filing of applications by former employees of plaintiff for unemployment benefits were not sent to plaintiff, so that its reserve account was erroneously charged with payments to such applicants.

Judgment affirmed.

#### 1. Taxation ☞543(1)

A corporate employer, suing state employment director for overpayments of unemployment insurance contributions after defendant denied plaintiff's protest of charges against its reserve account for unemployment benefit payments to former employees of plaintiff, followed procedure provided by Unemployment Insurance Act, which does not restrict actions thereunder to correction of mathematical errors in reserve accounts. Gen.Laws, Act 8780d, § 41.1, St.1941, p. 2535.

#### 2. Appeal and error ☞931(1), 989

All inferences from evidence must be drawn in support of judgment appealed from, and evidence which might have justified trial court in reaching contrary result need not be considered by Supreme Court.

#### 3. Taxation ☞543(7)

Evidence supported trial court's finding that required notices of applications for

unemployment benefits were not sent to applicants' former employer, suing state employment director for unemployment insurance contributions paid by plaintiff on ground that its reserve account was erroneously charged with benefit payments made to such applicants. Gen.Laws, Act 8780d, §§ 66, 67, St.1937, p. 2059.

#### 4. Courts ☞90(1)

The Superior Court's finding, supported by sufficient proof, that employer was not given notice of filing of applications by former employees thereof for unemployment benefits, cannot be held erroneous on appeal, merely because Superior Court, in another case, reached contrary conclusion on substantially same evidence, where evidence in each case was conflicting and other case is not before Supreme Court, as required to present question whether judgments in two cases can or should be made to conform with each other. Gen. Laws, Act 8780d, §§ 66, 67, St.1937, p. 2059.

#### 5. Taxation ☞347.1, 537

An employer was prejudiced by state employment director's failure to give employer required notices of applications by former employees thereof for unemployment benefits, so as to entitle employer to recover unemployment insurance contributions paid thereby as result of its reserve account being erroneously charged with payments to such applicants. Gen.Laws, Act 8780d, §§ 55, 56, 66, 67, St.1937, pp. 2064, 2068, 2059.

#### 6. Taxation ☞347.1, 543(2)

A corporate employer, not given required notices by state employment director that former employees of corporation had applied for unemployment benefits, could recover unemployment insurance con-

tributions paid by it as result of its reserve account being erroneously charged with payments to such applicants, without showing that they were paid benefits to which they were not entitled. Gen.Laws, Act 8780d, §§ 55, 56, 66, 67, St.1937, pp. 2064, 2068, 2059.

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Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

GIBSON, Chief Justice.

Plaintiff brought this action to recover contributions paid under the Unemployment Insurance Act, Stats. 1935, p. 1226, Deering's Gen.Laws 1937, Act 8780d, claiming that it was not given notice of the filing of applications for unemployment benefits and that as a result its reserve account was erroneously charged with payments made to certain applicants. Judgment was rendered for plaintiff, and defendant has appealed.

[1] A preliminary question has arisen as to whether plaintiff has chosen the proper remedy. Under section 41.1 of the act an employer may protest any charge made against his reserve account, and if the protest is denied, an action may be brought to recover any overpayment. Stats.1941, p. 2535. This action was brought in conformity with that section as it read in 1944 when the suit was filed, but defendant claims that actions thereunder were restricted to the correction of mathematical errors in the reserve account. Not only is there no such restriction in the section, but it specifically provides that an employer can bring an action "in the event that the determination in any protest proceeding is rendered against the employer." The case of *Matson Terminals, Inc., v. California Emp. Comm.*, 24 Cal.2d 695, 151 P.2d 202, relied on by defendant, does not support the claim that plaintiff has not followed the proper procedure. There mandate was sought to prevent enforcement of an order awarding benefits to claimants, and, in con-

sidering the remedies available to petitioners, it was pointed out that, although section 41.1 affords a means for contesting charges against an employer's account and recovering overpayments, it is distinct from the remedy provided by section 67 of the act for testing the propriety of benefit payments. 24 Cal.2d at pages 700-702, 151 P.2d at pages 205-206. Plaintiff here, in seeking to recover overpayments of contributions and have charges removed from its account, has followed the procedure provided by statute.

[2, 3] It is not disputed that plaintiff was entitled to notice that its former employees had applied for unemployment benefits. Unemployment Insurance Act, §§ 66, 67, as the sections existed from 1937 to 1939, Stats.1937, p. 2059; Calif. Unemployment Com. Rule 66.1, as it read from 1938 to 1940. Defendant contends, however, that the evidence is insufficient to support the finding of the trial court that such notice was not given.

It was stipulated that the testimony of Cyrel O'Connor, an employee of the commission, given in the case of *General Machinery & Supply Co. v. California Emp. Stab. Comm.*, 80 Cal.App.2d 742, 182 P.2d 249, should be received as evidence in this case and that "the testimony of various witnesses in each of the cases involved here, if called as a witness, would be the same as that given by Mr. Clark in the General Machinery case." O'Connor testified that in 1938 a few notices were mailed out but that "it got to the point where they didn't mail them out, because they didn't have the office help." He said that he traveled throughout California examining "every claim in practically all the local offices around here," and that "it was the custom to retain them [the notices] in the office rather than to mail them out." Clark, an employee of General Machinery, testified that it was his duty to open his employer's mail and pass upon all documents from the commission, and that no notices of the applications for benefits were received.

In addition to the transcript of the testimony given in the General Machinery



case, plaintiff presented one witness, George L. Hillenbrand, a supervisor in defendant's compensation division, who testified that it was the practice during some portion of the time involved here not to send out notices to employers.

All inferences must, of course, be drawn in support of the judgment, and it is unnecessary to consider evidence which might have justified the trial court in reaching a contrary result. In our opinion the evidence, while not entirely satisfactory, is sufficient to support the finding that the required notices were not sent to plaintiff.

[4] In the General Machinery case the trial court gave judgment for the defendant and impliedly found that the notice had been given. This judgment was affirmed on appeal, and defendant claims that, because the evidence was substantially the same in both cases, it must be held here as a matter of law that plaintiff has failed to establish a right to recover. In each case, however, the finding of the trial court was based on conflicting evidence, and since the determination in this case is supported by sufficient proof, it cannot be held to be erroneous merely because the court in the other case reached a contrary conclusion on substantially the same evidence. Both cases are not before us, and therefore no question is presented as to whether the judgments can or should be made to conform with each other. See *Dillard v. McKnight*, 34 Cal. 2d 209, 209 P.2d 387; *Morris v. Fortier*, 59 Cal.App.2d 132, 137-138, 138 P.2d 368.

[5] It is clear that plaintiff was prejudiced by the failure of defendant to give the required notice. Although it eventually received statements of charges to its account which showed that claims for bene-

fits had been made and allowed, lack of proper notice deprived plaintiff of the opportunity to defeat the claims by offering the claimants suitable employment. Further, because of the lapse of time before learning of the charges against its account, it may have been deprived of the means of showing that the claimants were ineligible for benefits on other grounds. See *Deering's Gen.Laws* 1937, Act 8780d, §§ 55, 56; *Stats.*1937, pp. 2064, 2068.

[6] There is no merit in defendant's position that plaintiff cannot recover contributions unless it shows that the claimants were in fact paid benefits they were not entitled to receive. It is, of course, the settled rule that a taxpayer may not obtain a refund of taxes unless it appears that more taxes were exacted than in equity and good conscience should have been paid, and recovery is limited to the difference between the tax actually paid and that which properly should have been collected. *Simms v. County of Los Angeles*, Cal.Sup., 217 P.2d 936; see *Northrop Aircraft, Inc., v. California Emp. Stab. Comm.*, 32 Cal.2d 872, 879-880, 198 P.2d 898. This rule, however, being based on equitable principles, cannot aid the taxing authority where, as here, it failed to give the notice required by its rules and the relevant statutes, which notice would have afforded plaintiff an opportunity to prevent the creation of the conditions giving rise to the tax or to show facts which might have established that the claimants were not entitled to benefits, thereby relieving plaintiff of liability for the tax.

The judgment is affirmed.

SHENK, EDMONDS, CARTER,  
TRAYNOR, SCHAUER and SPENCE,  
JJ., concur.

35 Cal.2d 897

1

**BELSHAW WAREHOUSE CO., Inc., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17894.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

## PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.



35 Cal.2d 897

2

**JOHN BREUNER CO., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17895.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

## PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.

3

35 Cal.2d 898

**CARLEY & HAMILTON, Inc., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17896.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

## PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.



4

35 Cal.2d 898

**J. A. CLARK DRAYING CO., Ltd., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17897.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

## PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.

35 Cal.2d 899

1

**CLINTON CAFETERIA CO., Inc., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17898.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.



35 Cal.2d 899

2

**GENE COMPTON'S CORPORATION, Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17899.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.

3

35 Cal.2d 900

**DEL MONTE ICE CO., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17900.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.



4

35 Cal.2d 900

**FOSTERS LUNCH SYSTEM, Ltd., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17901.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.



35 Cal.2d 901

1

**GANTNER & MATTERN CO., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17902.

Supreme Court of California, in Bank.  
May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.



35 Cal.2d 901

2

**HAGSTROM'S FOOD STORES, Inc., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17903.

Supreme Court of California, in Bank.  
May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.

3

35 Cal.2d 902

**HASLETT WAREHOUSE CO., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17904.

Supreme Court of California, in Bank.  
May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.



4

35 Cal.2d 902

**HIGHWAY TRANSPORT, Inc., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17905.

Supreme Court of California, in Bank.  
May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.

35 Cal.2d 903

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35 Cal.2d 904

JENKEL, et al., Plaintiffs and Respondents, v. James G. BRYANT, Director of Employment, Defendant and Appellant.

S. F. 17906.

McCANN-ERICKSON, Inc., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.

S. F. 17908.

Supreme Court of California, in Bank.

May 11, 1950.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondents.

PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.



35 Cal.2d 903

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35 Cal.2d 904

MANNING'S, Inc., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.

S. F. 17907.

MERCHANTS EXPRESS CORPORATION, Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.

S. F. 17909.

Supreme Court of California, in Bank.

May 11, 1950.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.



35 Cal.2d 905

1

**OVERLAND FREIGHT TRANSFER, Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17910.

Supreme Court of California, in Bank

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

## PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.



35 Cal.2d 905

2

**OWL DRUG CO., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17911.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

## PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.

3

35 Cal.2d 906

**PENINSULA ICE CO., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17912.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

## PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.



4

35 Cal.2d 906

**ROBERTSON DRAYAGE CO., Inc., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17913.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

## PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.



35 Cal.2d 907

1

**SOUTHERN CALIFORNIA ICE CO., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17914.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

## PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.



35 Cal.2d 907

2

**TIEDEMANN & HARRIS, Inc., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17915.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

## PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.

218 P.2d—1½

3

35 Cal.2d 908

**G. L. TILDEN & CO., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17916.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

## PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.



4

35 Cal.2d 908

**UNION ICE CO., Plaintiff and Respondent, v. James G. BRYANT, Director of Employment, Defendant and Appellant.**

S. F. 17917.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

## PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.

35 Cal.2d 909

1

**UNION ICE & STORAGE CO.,** Plaintiff and Respondent, v. **James G. BRYANT,** Director of Employment, Defendant and Appellant.

S. F. 17918.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

## PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.



35 Cal.2d 909

2

**WALKUP DRAYAGE & WAREHOUSE CO.,** Plaintiff and Respondent, v. **James G. BRYANT,** Director of Employment, Defendant and Appellant.

S. F. 17919.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

## PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.

3

35 Cal.2d 910

**WILLIAMS,** Plaintiff and Respondent, v. **James G. BRYANT,** Director of Employment, Defendant and Appellant.

S. F. 17920.

Supreme Court of California, in Bank.

May 11, 1950.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Fred N. Howser, Attorney General, and Chas. W. Johnson, Deputy Attorney General, for appellant.

Fabian D. Brown, San Francisco, for respondent.

## PER CURIAM.

This appeal presents the same problems as those disposed of in Bell-Brook Dairies, Inc., v. Bryant, 218 P.2d 1, decided this day, and that decision is controlling herein.

The judgment is affirmed.



4

35 Cal.2d 379

**ROBINSON et al. v. SUPERIOR COURT**  
**IN AND FOR LOS ANGELES**  
**COUNTY.**

L. A. 21188.

Supreme Court of California, in Bank.

May 9, 1950.

Edward G. Robinson and others, filed a petition against the Superior Court of the state of California, in and for the county of Los Angeles, to require such court to take jurisdiction of a motion for an order confirming award of Labor Commissioner awarding petitioners, as executors of the estate of F. W. Vincent, deceased, an employment agent, commissions allegedly due under a written agency contract with Michel Kralke. The Supreme Court, Gibson, C. J., held, inter alia, that mandate would not be refused although petitioners had an adequate remedy at law by appeal, and that petitioners could obtain judicial confirmation of the award in Superior Court under statute providing for a judicial confirmation of awards of arbitrators.

Writ issued.

**1. Appeal and error ☞83**

Application of statutory provision that an appeal may be taken from a final judgment entered in a special proceeding is restricted by statute providing that an appeal may be taken from an order confirming, modifying, correcting or vacating an arbitration award, or from a judgment entered upon an award, as from an order or judgment in an action. Code Civ.Proc., §§ 963, 1293.

**2. Appeal and error ☞83**

Order of Superior Court denying motion for an order confirming award of Labor Commissioner awarding commissions allegedly due to petitioner's decedent, an employment agent, under a written agency contract, was appealable under statute as being equivalent to an order vacating award. Code Civ.Proc. § 1293.

**3. Mandamus ☞4(3)**

Where order of Superior Court denying motion for an order confirming award of Labor Commissioner awarding commissions allegedly due to petitioner's decedent, an employment agent, under a written agency contract, was held by Supreme Court to be appealable under statute but uncertainty had previously existed with respect to appealability of such order, writ of mandate to require Superior Court to take jurisdiction of motion for order confirming award would not be refused on ground that petitioners had adequate remedy at law by appeal. Code Civ.Proc., §§ 1086, 1293.

**4. Courts ☞26**

Trial courts must hear and determine merits of all matters properly before them which are within their jurisdiction.

**5. Mandamus ☞31**

Mandate may be used to compel trial courts to hear and determine merits of matters properly before trial court which are within jurisdiction of trial court, even where refusal of trial court to pass on merits is based on considered but erroneous belief that it has no jurisdiction as a matter of law to grant the relief requested.

**6. Judgment ☞570(5)**

A dismissal of a proceeding or a denial of relief on the sole ground of lack of jurisdiction is not a decision on the merits.

**7. Judgment ☞193**

If trial court has jurisdiction of a case the parties are entitled to a decision on the merits and not merely to a hearing on the merits.

**8. Mandamus ☞31**

An ancient office of writ of mandate was to compel a court to hear and decide the merits of a matter within its jurisdiction.

**9. Mandamus ☞4(1)**

Statements that a writ of mandate is not a writ of error, and that mandate cannot be employed as a corrective of error, are too broad and are inaccurate and misleading.

**10. Mandamus ☞1**

If error involves a breach of a clear legal duty, and there is no other adequate remedy, mandate will lie.

**11. Master and servant ☞15(1)**

In the settlement of disputes submitted to him, the Labor Commissioner acts as an arbitrator, and the powers he exercises are similar to those which may be conferred on private arbitrators under statute. Labor Code, §§ 1280-1293, 1626, 1647, 1647.5.

**12. Arbitration and award ☞3**

A contract between an artist and an employment agency is not a contract pertaining to "labor" within statute prohibiting arbitration agreement from applying to disputes arising out of contracts pertaining to labor. Code Civ.Proc., § 1280.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Labor".

**13. Master and servant ☞14½**

The fact that labor code provides that a party aggrieved by decision of Labor Commissioner in controversy arising under chapter of code relating to employment agencies, may obtain a complete new hearing in Superior Court, did not preclude



petitioners who obtained an award from Labor Commissioner for commissions due petitioners' decedent, an employment agent, under agency contract, from obtaining judicial confirmation of award under statute providing for judicial confirmation of awards of arbitrators, where other party did not take advantage of the de novo procedure. Labor Code, §§ 1287, 1647.

#### 14. Master and servant ☞14½

The fact that petitioners who obtained an award from Labor Commissioner for commissions due petitioners' decedent, an employment agent, under an agency contract, could bring an independent action at law to enforce the award, did not preclude petitioners from obtaining judicial confirmation of award in Superior Court under statute providing for judicial confirmation of awards of arbitrators. Labor Code, §§ 1280-1293, 1287, 1626, 1647, 1647.5.

#### 15. Master and servant ☞14½

Petitioners who obtained an award from Labor Commissioner for commissions due petitioners' decedent, an employment agent, under an agency contract, could obtain judicial confirmation of the award in Superior Court under statute providing for judicial confirmation of awards of arbitrators, where the other party sought no hearing de novo as permitted by statute. Labor Code, §§ 1280-1293, 1287, 1626, 1647, 1647.5.

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Simon, Fox & Fraider and Stanley E. Fox, Beverly Hills, for petitioners.

1. "§ 1647. In all cases of controversy arising under this chapter the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, *subject to appeal within ten days after determination, to the superior court* where the same shall be heard de novo. To stay any award for money, the party aggrieved shall execute a bond approved by the superior court in a sum not exceeding twice the amount of the judgment. In all other cases the bond shall be in a sum of not less than one thousand dollars and approved by the superior court." (Italics added.)

2. "§ 1287. At any time within three

Pauline Nightingale, Edward M. Belasco and Leon H. Berger, Los Angeles, as amicus curiae on behalf of petitioners.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Julian C. Sorin, Beverly Hills, for real party in interest.

#### GIBSON, Chief Justice.

A dispute arose between Michel Kraike, an artist, and petitioners, who are executors of the Estate of F. W. Vincent, deceased, an employment agent, over commissions claimed to be due under a written agency contract. The dispute was submitted to the Labor Commissioner for settlement, and after a hearing the petitioners were awarded the sum of \$500. Kraike did not seek a hearing de novo in the superior court, as allowed by section 1647 of the Labor Code,<sup>1</sup> and after the ten days in which he could have sought such a hearing had passed, petitioners moved the superior court under section 1287 of the Code of Civil Procedure<sup>2</sup> for an order confirming the commissioner's award. The court denied the motion on the ground that the provisions of section 1287 of the Code of Civil Procedure authorizing judicial confirmation of the awards of arbitrators cannot be applied to an award of the Labor Commissioner and that the only remedy available to petitioners was an independent action on the award as an obligation created by law. This proceeding in mandate was then brought to compel

months after the award is made, unless the parties shall extend said time in writing, which award must be in writing and acknowledged or proved in like manner as a deed for the conveyance of real estate, and delivered to one of the parties or his attorney, any party to the arbitration may apply to the superior court of the county or city and county in which said arbitration was had for an order confirming the award; and thereupon said court must grant such an order unless the award is vacated, modified or corrected, as prescribed in the next two sections. Notice in writing of the motion must be served upon the adverse party or his attorney five days before the hearing thereof."

the trial court "to take jurisdiction of the motion for an order confirming the commissioner's award and to render a judgment thereon either confirming, modifying, correcting or vacating the award."

[1] In considering the availability of the writ the first question to be determined is whether petitioners had another plain, speedy, and adequate remedy at law. Code Civ.Proc., § 1086. The appealability of an order denying a motion for confirmation of an award is not clearly established by the relevant statutes or by the decisions construing them. Section 963 of the Code of Civil Procedure provides that an appeal may be taken from a final judgment entered in a special proceeding, but it has been held that the application of this section is restricted by section 1293 of the Code of Civil Procedure which provides that "an appeal may be taken from an order confirming, modifying, correcting or vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action." *Jardine, Matheson & Co. v. Pacific Orient Co.*, 100 Cal. App. 572, 576-577, 280 P. 697.

Although an order denying a motion for confirmation is not expressly enumerated therein, section 1293 has been liberally construed to allow an appeal from an order made after completion of arbitration which in effect dismisses the proceeding before the court. See *Pleaters & Stitches Ass'n v. Superior Court*, 114 Cal.App. 35, 36, 299 P. 555, order dismissing application for confirmation with prejudice held equivalent to order vacating award; *Glesby v. Balfour, Guthrie & Co.*, 63 Cal.App.2d 414, 417, 147 P.2d 60, order denying motion to vacate an award held equivalent to order confirming award. An order directing parties to proceed to arbitration was held nonappealable in *Jardine, Matheson & Co. v. Pacific Orient Co.*, 100 Cal.App. 572, 280 P. 697, but that case is distinguishable from the cases cited above and from the situation presented here. In holding the order nonappealable in the *Jardine* case, the court stated that the purpose of section 1293 was to permit appeals only after arbitration has been completed and an award made, and that to permit an appeal

at an earlier stage of the proceedings would result in undue delay and defeat the purpose of the arbitration statutes.

[2, 3] In the present case the order was made after completion of the proceedings before the Commissioner, and in effect constituted a dismissal of the application for confirmation of the award. Under the liberal construction which has been given section 1293, the order denying the motion to confirm the award, while not a decision on the merits, may be treated, for purposes of appeal, as being equivalent to an order vacating the award, and it is therefore appealable. However, in view of the uncertainty which has existed heretofore with respect to appealability of orders of this type, we should not refuse to allow the writ to be used to test the issue before us solely because we have now resolved that uncertainty by holding that petitioners had an adequate remedy by appeal from the order in question.

[4, 5] The next question to be considered is whether the trial court has failed or refused to perform a duty which may be enforced by mandate. It is clear from the record that the motion for an order confirming the award was denied on the sole ground of lack of jurisdiction and that the trial court did not determine the merits of the application. The law is well settled that a trial court is under a duty to hear and determine the merits of all matters properly before it which are within its jurisdiction and that mandate may be used to compel the performance of this duty. This is so even where the trial court's refusal to pass on the merits is based on the considered but erroneous belief that it has no jurisdiction as a matter of law to grant the relief requested. As stated in *Temple v. Superior Court*, 70 Cal. 211, 212, 11 P. 699, "the court cannot, by holding without reason that it has no jurisdiction of the proceeding, divest itself of jurisdiction, and evade the duty of hearing and determining it." Mandate will issue to compel a hearing and determination of the merits where the court has merely sustained an objection on jurisdictional grounds and left the proceeding pending. *Lissner v. Superior Court*, 23



Cal.2d 711, 146 P.2d 232; *Miller v. Municipal Court*, 22 Cal.2d 818, 142 P.2d 297; *Conklin v. Superior Court*, 1 Cal.2d 601, 36 P.2d 386. The writ is also available where the trial court has disposed of a matter by an order dismissing it or denying relief on the sole ground of lack of jurisdiction. *Sampsell v. Superior Court*, 32 Cal.2d 763, 197 P.2d 739; *Stewart v. Superior Court*, 29 Cal.2d 63, 172 P.2d 683; *Katenkamp v. Superior Court*, 16 Cal.2d 696, 108 P.2d 1; *Hennessey v. Superior Court*, 194 Cal. 368, 228 P. 862; *Golden Gate Tile Co. v. Superior Court*, 159 Cal. 474, 114 P. 978; *Cahill v. Superior Court*, 145 Cal. 42, 78 P. 467; *Temple v. Superior Court*, 70 Cal. 211, 11 P. 699. Thus, there is no distinction, insofar as the availability of the writ is concerned, between cases where the court merely refuses to proceed because of its erroneous belief that it has no jurisdiction, and those in which the court makes a ruling disposing of the matter on the sole ground it has no jurisdiction. In either case if the effect is to preclude a hearing and judgment on the merits of a matter properly before the court, and there is no other adequate remedy, mandate will lie to test the question of jurisdiction.

The case of *Brock v. Superior Court*, 119 Cal.App 5, 5 P.2d 659, is in conflict with the cases cited above. An action was brought by Mrs. Brock against her former husband for the support of their minor child, and the trial court made an order denying the requested relief "on account of this Court not having jurisdiction to award temporary attorney fees, costs, or support on two grounds; that the child is not within the jurisdiction of this Court, also that provisions in Section 137, Civ. Code, in re Attorney's fees, costs and support money do not apply in this case." A petition for a writ of mandate to compel the trial court to hear and determine the matter was denied with a short opinion which was filed four days after the application for the writ was made, and which cited no authority in support of its holding that the writ was not available to test the question of jurisdiction. The petition might have been denied upon the

ground that there was another adequate remedy at law by appeal from the order, but this was not the basis of the decision. Instead, it was held that the trial court "did not deny its jurisdiction to pass upon the application. It did pass upon and determine said application, but refused the requested allowance, because the court was of the opinion that it did not have the authority to make such allowance to a child not residing in this state and not present in this state, in an action to compel a father to support his child. If the court erred in this conclusion (which we do not decide), it was only an error made by the court in the exercise of its jurisdiction. It was not a refusal to act upon the merits of the matter presented."

[6] If, by the statement that there was no "refusal to act upon the merits," the *Brock* case means that the trial court did not refuse to pass upon and determine its own jurisdiction, then the opinion incorrectly uses the term "merits." It is well settled that a dismissal of a proceeding or a denial of relief on the sole ground of lack of jurisdiction is not a decision on the merits. See *Hogeberg v. Industrial Accident Commission*, 201 Cal. 169, 182-183, 256 P. 413; *Slaker v. McCormick-Saeltzer Co.*, 179 Cal. 387, 389, 177 P. 155; *Helvey v. Castles*, 73 Cal.App.2d 667, 672, 167 P.2d 492. If the opinion means that the trial court did not refuse to pass upon and exercise its discretion with respect to other questions presented, such as the necessity and reasonableness of the allowances, then the appellate court did not carefully examine the record before it. The record shows that the only evidence heard or considered by the trial court was the stipulated fact "that the child was not then a resident of or physically present in the state of California." It is clear that the trial court passed only on the question of its jurisdiction and that it disposed of the request for allowances for support, etc., on the sole ground that it was without jurisdiction to hear and determine the merits of the application.

[7,8] In *Sampsell v. Superior Court*, 32 Cal.2d 763, 770, 197 P.2d 739, we errone-



ously assumed because of statements in the Brock opinion that the trial court in that case had given the petitioner a hearing on the merits, and there is language in the Sampsell opinion which suggests that if such a hearing has been had, mandate will not lie to compel a *decision* on the merits. This is not a correct statement of the rule. If the court has jurisdiction of a case the parties are entitled to something more than a hearing on the merits—they are entitled to a decision thereon. See *Cahill v. Superior Court*, 145 Cal. 42, 78 P. 467. One of the fundamental aims of the law is to secure to a litigant a judgment on the merits of a matter properly brought before the court, and one of the ancient offices of the writ of mandate was to compel a court to hear and decide the merits of a matter within its jurisdiction. (See 35 Am.Jur. 25.)

In refusing to permit mandate to be used to test the jurisdictional question, the Brock case is in conflict with the long line of decisions beginning with *Temple v. Superior Court*, 70 Cal. 211, 11 P. 699, cited above, and with the weight of authority in this country, holding that the writ will lie to review orders dismissing a proceeding or denying relief on the sole ground of lack of jurisdiction, if there is no other adequate remedy. See cases in other jurisdictions collected in 4 A.L.R. 582; 82 A.L.R. 1163.

[9,10] The Brock case was followed in *Hayward v. Superior Court*, 130 Cal. App. 607, 609, 612, 20 P.2d 348; and *Thomas v. Superior Court*, 4 Cal.App.2d 356, 359-360, 41 P.2d 220; which refused to permit the use of mandate to review orders of trial courts dismissing proceedings on the sole ground of lack of jurisdiction. The opinions in those cases contain such statements as "It is elementary that a writ of mandate is not a writ of error", *Thomas v. Superior Court*, supra, 4 Cal.App.2d at page 359, 41 P.2d at page 222, and "mandate cannot be employed as a corrective of error." *Hayward v. Superior Court*, supra, 130 Cal.App. at page 610, 20 P.2d at page 350. Such statements are too broad and were long ago characterized as inaccurate and misleading. See *Wood v.*

*Strother*, 76 Cal. 545, 548-554, 18 P. 766, 9 Am.St.Rep. 249; *Ex parte Ford*, 160 Cal. 334, 116 P. 757, 35 L.R.A.,N.S., 882, Ann.Cas.1912D, 1267; *MacPherson v. Superior Court*, 22 Cal.App.2d 425, 432-434, 71 P.2d 91. It is obvious that if the error involves a breach of what has been deemed a "clear legal duty" and there is no other adequate remedy, mandate will lie. See *Brown v. Superior Court*, 34 Cal.2d 559, 212 P.2d 878; *Betty v. Superior Court*, 18 Cal.2d 619, 622, 116 P.2d 947. As we have seen, there is a clear duty on a court to hear and determine the merits of all matters within its jurisdiction and properly before it, and performance of this duty is compellable by mandate. Any other rule would be unjust where the order disposing of the proceeding is nonappealable, because the aggrieved party would have no way of correcting the trial court's error—and obtaining a decision on the merits. See *Katenkamp v. Superior Court*, 16 Cal.2d 696, 698, 108 P.2d 1; *Cahill v. Superior Court*, 145 Cal. 42, 44, 78 P. 467.

The case of *Lincoln v. Superior Court*, 22 Cal.2d 304, 139 P.2d 13, does not conflict with the position we have taken here. The order of dismissal there involved was not based expressly on the ground of lack of jurisdiction, and it appeared that the trial court had heard and determined the matter before it on its merits. Moreover, the opinion notes that petitioner was not entitled to mandate because he had an adequate remedy by appeal. There is language in the opinion, however, which would appear to suggest that mandate will not lie to compel a court to hear and determine the merits of a matter if it has made an order within its jurisdiction which disposes of the proceeding. See 22 Cal.2d 304, 309-310, 314-315, 139 P.2d 13.

The cases of *Brock v. Superior Court*, 119 Cal.App. 5, 5 P.2d 659; *Hayward v. Superior Court*, 130 Cal.App. 607, 20 P.2d 348, and *Thomas v. Superior Court*, 4 Cal. App.2d 356, 41 P.2d 220, are disapproved, and any language in *Lincoln v. Superior Court*, supra, and *Sampsell v. Superior Court*, supra, which is not in accord with the views expressed herein is likewise disapproved.

As before stated, the motion for an order confirming the award of the Labor Commissioner was denied on the sole ground of lack of jurisdiction, and petitioners are, therefore, entitled to mandate if respondent court had jurisdiction to entertain and determine their motion.

[11] It is contended that section 1287 of the Code of Civil Procedure providing for judicial confirmation of the awards of arbitrators has no application to awards of the Labor Commissioner and accordingly that the trial court was without jurisdiction to entertain the motion for an order confirming the award here involved. Although the Labor Commissioner is not expressly mentioned in sections 1280 to 1293 of the Code of Civil Procedure relating to arbitration, the provisions therein apply to written agreements to submit controversies to arbitrators for settlement, and there appears to be no good reason why the method of obtaining judicial confirmation of awards provided for in section 1287 should not apply to awards made by the Labor Commissioner. Under the Labor Code, a contract between an employment agency and an applicant for employment may provide for reference of controversies arising thereunder either to the Labor Commissioner, Labor Code §§ 1626, 1647, or to private arbitration, Labor Code § 1647.5. In the settlement of disputes submitted to him, the Labor Commissioner acts as an arbitrator, and the powers he exercises are similar to those which may be conferred on private arbitrators pursuant to section 1647.5. See *Garson v. Division of Labor Law Enforcement*, 33 Cal.2d 861, 864-866, 206 P.2d 368.

[12] Under the Code of Civil Procedure parties may agree to name a single arbitrator, and there is no restriction as to what persons may act in that capacity. Code Civ.Proc. §§ 1283, 1286. The sole requirement for a valid and enforceable arbitration agreement is that it must be in writing and must not apply to disputes arising out of contracts "pertaining to labor." Code Civ.Proc. § 1280. A contract between an artist and an employment agency is not a contract pertaining to labor within the inhibition of section

1280. See *Kerr v. Nelson*, 7 Cal.2d 85, 88, 59 P.2d 821; *Universal Pictures Corp. v. Superior Court*, 9 Cal.App.2d 490, 492-495, 50 P.2d 500. The agency contract in the present case is in writing, it provides that all disputes arising thereunder shall be submitted to the Labor Commissioner for settlement, and it therefore meets the requirements of section 1280.

[13, 14] The fact that the Labor Code provides that a party aggrieved by the Commissioner's decision may obtain a complete new hearing in the superior court, Labor Code § 1647, affords no reason why the party prevailing before the Commissioner should not be able to get judicial confirmation of the award under section 1287 of the Code of Civil Procedure, if the other party does not take advantage of the de novo procedure. Nor should the fact that the successful party may bring an independent action at law to enforce the award deprive him of the more expeditious procedure provided by statute. There appears to be no justification for saying that the awards of the Labor Commissioner are not entitled to as speedy and summary a method of enforcement as those of private arbitrators if no de novo hearing has been sought. Moreover, such a speedy method of enforcement of awards might assist the Labor Commissioner in curtailing undesirable activities of employment agencies under his supervision.

We find nothing in the statutes which shows that the Legislature intended that the Labor Commissioner's awards should not be enforceable under Code of Civil Procedure section 1287, in the same manner as awards of private arbitrators. It is true that the arbitration sections of the Code of Civil Procedure are expressly made applicable by Labor Code section 1647.5 if the parties agree to private arbitration, and no similar provision is made where the dispute is referred to the Labor Commissioner. However, Labor Code section 1647.5 was added in 1939, two years after the decision in *Collier & Wallis v. Astor*, 9 Cal.2d 202, 70 P.2d 171, where it was held that no suit could be brought on employment agency contracts until disputes arising thereunder had been

referred to the Labor Commissioner. Thus it appears that section 1647.5 was added to relieve the burden on the Labor Commissioner, and to give the parties more freedom in the choice of persons to whom disputes could be referred.

[15] Accordingly section 1287 of the Code of Civil Procedure may properly be applied to awards of the Labor Commissioner if no hearing de novo has been sought, and respondent court had jurisdiction to hear and determine petitioners' motion for an order confirming the award.

Let the writ issue as prayed.

SHENK, EDMONDS, CARTER,  
TRAYNOR and SPENCE, JJ., concur.

SCHAUER, J., concurs in the judgment.



35 Cal.2d 409

FINNEGAN v. ROYAL REALTY CO.

MERCHUT v. ROYAL REALTY CO.

L. A. 21048, 21049.

Supreme Court of California, in Bank.

May 12, 1950.

Rehearing Denied June 8, 1950.

Action by Dorothy Finnegan against Royal Realty Company and another, consolidated with an action by Sophie Merchut against the same defendants for injuries resulting from a fire. The Superior Court for Los Angeles County, Roy V. Rhodes, J., entered judgments for plaintiffs, and the named defendant appealed in each case. The Supreme Court, Carter, J., held that the evidence supported the judgments.

Judgments affirmed.

Edmonds, Traynor and Spence, JJ., dissented.

Prior opinion, 204 P.2d 661.

# **I. Municipal corporations ☞603**

Ordinance of city of Los Angeles requiring that doors serving as exits from aggregate floor area of more than 1,000 square feet open only in direction of exit

applies to buildings in existence at effective date of ordinance.

## **2. Landlord and tenant ☞165(1)**

Where floor area of workroom including area of stairwell and either portion of floor covered by balustrade or ledge along inner surface of exterior wall exceeded 1,000 square feet, landlord owed duty to employees of tenants to provide exit doors opening in direction of exit under city ordinance requiring such doors from an aggregate floor area of more than 1,000 square feet.

## **3. Landlord and tenant ☞169(6)**

In actions by employees of tenants against landlord for injuries sustained in fire in room which had exit doors that opened inwardly in alleged violation of city ordinance wherein landlord claimed that condition of doors was not a proximate cause of injuries, evidence supported judgments for employees.

Lasher B. Gallagher, Gibson, Dunn & Crutcher, Norman S. Sterry, Gerold C. Dunn and Frederic H. Sturdy, Los Angeles, for appellant.

Walker, Meyers, Ingram & Moser, Parker, Stanbury & Reese and Raymond G. Stanbury, Los Angeles, for respondents.

CARTER, Justice.

These appeals are taken by the defendant, Royal Realty Company, a corporation, from judgments for plaintiffs entered upon verdicts of a jury in two actions for damages for personal injuries. The complaints named as defendants the appellant and Herman Helbush, its president. The verdicts were in favor of plaintiffs against the appellant corporation, and in favor of the defendant Helbush. The actions were consolidated for trial and tried together. The two appeals have been submitted on one set of briefs and involve identical questions.

The cases arose out of a fire which occurred on January 20, 1944, in a workroom in a building located at the corner of Wilshire Boulevard and Alvarado Street in



Los Angeles. Appellant corporation was the lessor of the second floor of the building. Norman Noll, doing business as Noll & Company, was the lessee. The lease was executed on June 22, 1937, for a term which was to expire July 22, 1942, and provided that the premises were to be used for "the business of manufacturers of and dealers in club furniture and equipment, and for no other purpose" and "That the lessee will not use, or permit to be used, the said premises, or any part thereof, for any purpose or purposes other than the purpose or purposes for which the said premises are leased, demised and let unto the lessee, as hereinbefore specified." After the expiration of the lease, Noll held over as tenant from month to month under the terms of the lease and was in possession on the day of the fire. At the time of the fire, seven of Noll's employees were in the building. Of these seven, three met their death, and these two respondents were horribly burned. Respondent Merchut, who was once a pretty girl, is now a hideous caricature of her former self. Plastic surgeons have been unable to replace her eyelids, and there is the possibility that her eyesight will be permanently impaired. Respondent Finnegan's hands and arms were so badly burned that they are now useless and she is thus permanently disabled.

Noll, the lessee, was principally engaged in the manufacture of dice from celluloid. Cellulose tetranitrate is blended with camphor to produce celluloid which is a highly inflammable material. When celluloid burns, it does so rapidly and as it burns it emits the gases of nitrogen, carbon and hydrogen, and various combinations of these gases, all of which are hot and toxic in that they burn the mucous membrane. Celluloid shavings and dust burn faster and with more violence than celluloid in the solid form and will ignite instantly upon contact with flame. Celluloid is explosive at its ignition temperature, 350 degrees Fahrenheit, without contact with flame.

The upper floor of the premises occupied by Noll was divided into two rooms, the "showroom" and the "workroom". Between these two rooms were double doors which

opened *into* the workroom rather than *outward* from it. Against one of these doors on the workroom side, Noll had placed a heavy table on which was placed a cash register thus effectively blocking one-half of this exit which on the day of the fire was the only way out of the room.

In the manufacture of dice, small particles of celluloid were drilled or shaved from the cubes and these particles had collected on the machines and on the floor. Dust and shavings were blown off the machines with electric blowers and had settled on shelves, curtains, walls, floor and the clothing, hair and persons of the workers. There was no suction equipment of any kind with which to remove the dust in the room. At the close of each day, the refuse, shavings and dust, were swept up by the employees and put into sacks which were then stacked against the wall until Noll found it convenient to take them away. At the time of the fire there were four such sacks of shavings and dust stacked against the north wall immediately east of the double doors, and a half full sack under Mrs. Finnegan's machine. Beside the sacks there was an open trashbox full of shavings and dust. In addition, there were over 150 pounds of cellulose nitrate stored in the room. The doors and windows offered the only ventilation in the room. It is conceded by the parties that Noll conducted his business in a grossly negligent manner.

The fire started about five o'clock in the afternoon when the workers were preparing to leave for the day. Mrs. Finnegan was standing about six or seven feet from the double doors leading into the showroom and had just asked Miss Merchut, who was in the southwest corner of the room, if she could help her. Mr. Reuter, another employee, was standing close to where the sacks were stacked, and made some remark to Mrs. Finnegan. As she turned toward him she saw some object, which she could not identify, fly through the air and land in the cardboard trash box. Flames immediately shot forth and hit the sacks causing an explosion. A sheet of fire then spread over the entire room. The smoke was intense.

The following points are raised on this appeal:

(1) The Ordinance: Appellant contends that certain sections of Ordinance No. 8700 were improperly received in evidence as they created no duty on its part to these respondents; that there is no proof that the violation of any section thereof contributed in any way to respondents' injuries; that the trial court erred in giving and refusing certain instructions with reference thereto.

(2) Negligence: Appellant contends that it owed no duty to these respondents under the common law.

(3) Contributory Negligence and Assumed Risk: Appellant contends that as a matter of law, these respondents were guilty of contributory negligence and that they assumed the risks involved in their employment.

(4) Damages: Appellant contends that there was no evidence from which the jury could find, without indulging in conjecture and speculation, what part of respondents' injuries was attributable solely to its acts or omissions.

(5) Special Damages: Appellant contends that the trial court erred in admitting proof of respondents' special damages and in instructing the jury thereon.

(6) The Neuber case as a precedent: (Neuber v. Royal Realty Co., 86 Cal.App. 2d 596, 195 P.2d 501). Appellant contends that the Neuber decision (an action arising out of the same fire) was correct in holding that the various provisions of the ordinance (with the exception of the "door" section) had no application to a "building as a building" but were concerned with the use and occupancy of such buildings and placed the defendant corporation under no legal duty to prevent the violations of ordinances by either the tenant, Noll, or his employee. Appellant does not concede that the "door" section is applicable.

(7) The Instructions.

#### The Ordinance

Ordinance No. 87000 of the City of Los Angeles became effective January 1, 1943 and constituted a new building code which

expressly amended the "old" building code "in its entirety" and repealed everything that was in the old ordinance and not contained in the new one.

Section 91.0101(b): "Purpose. The purpose of this Article is to safeguard life or limb, health, property and public welfare by regulating and controlling the design, construction, quality of materials, use and occupancy, location and maintenance of all buildings and structures *erected or to be erected* within the city."

Section 91.0102 provides in part that: "No person shall construct, alter, repair, demolish, remove, move, *use, occupy or maintain*, within the city, any building or structure, or any portion thereof, except as provided by this Code." Also that "All of the provisions of this Code shall be limitations for safeguarding life or limb, health, property and public welfare."

Section 91.0502(e): "Group E. Occupancies: Sub-Group E-1: Every room in which explosive materials in lots of more than eight pounds weight or flammable liquids are manufactured or used in any process or kept in unsealed containers; also film laboratories, film cutting rooms, and cellulose-nitrate processing rooms."

Section 91.0505(b): "Groups A and E: Every Group A Occupancy and every Group E Occupancy shall be housed in a Type I building."

Section 91.0642 (Special Requirements for Sub-Group E-1 Occupancies):

"(b) Exits. Every part of every building shall have two separate exits and shall be within seventy-five feet (75') of a doorway opening into an exit.

"(c) Film and Explosive Material Storage. Every room appropriated to the storage of explosive materials, film or cellulose nitrate in excess of 100 pounds shall conform to the requirements of Division 42 of this Code (Film and Explosive Vaults), unless stored in film cabinets as specified in Article 7 of Chapter 5 of the Los Angeles Municipal Code.

"(i) Fire-Extinguishing Apparatus. Every room housing a Sub-Group E-1 Occupancy shall be sprinklered."

Section 91.3303. "(a) Scope. Every door serving as an exit from an aggregate floor area of more than one thousand square feet (1,000 sq. ft.) shall be constructed and installed in conformity with the requirements of this Section. \* \* \* (c) Location. Every door shall open on a landing at least equal in width and length to the width of the door. Doors when in any position shall not reduce the width of an exitway to less than thirty inches (30"). (d) Details. Every door to an exit enclosure shall be self-closing. *Doors serving as exits shall open only in the direction of exit* and shall be openable from the inside without the use of a key. Sliding doors and rolling shutters shall not be used on exit doors." [Emphasis added.] [Note: This section applies to all buildings having the requisite amount of floor space regardless of the use made thereof.]

Section 91.0103 (entitled Application To Existing Buildings) provides "(a) Maintenance. Any portion of any building or structure which, *from any cause*, has become a menace to life or limb, health, property, or public welfare shall be restored to its original condition of stability and safety, *or shall be made to conform to the regulations* of this Code, or shall be demolished.

[Emphasis added.] A building or portion thereof shall be presumed to be a menace to life or limb, health, property or public welfare if either of the following conditions exists: \* \* \* 2. When any exit, fire-protective construction or safety device does not provide the required degree of security to life or limb, health, property or public welfare. \* \* \* (c) Change of Occupancy. The use or occupancy of any existing building may be changed to any use or occupancy permitted by this Code for a building of the same Type of Construction, area, location and occupancy requirements. If a portion of any building does not conform to the requirements of this Code for a proposed occupancy, that portion shall be made to conform."

Section 91.0315 "(a) Certificate Required. In order to safeguard life, limb, health, property and public welfare, every building or structure shall conform to the

construction requirements for the Sub-Group Occupancy to be housed therein, or for the use to which the structure is to be put. \* \* \* No building or structure or portion thereof shall be used or occupied until a Certificate of Occupancy has been issued therefor.

"Exceptions: 1. No existing building or portion thereof shall require a Certificate of Occupancy unless the occupancy housed therein is different from that for which the original permit was issued. \* \* \* (b) Change of Occupancy. Each change of occupancy to one classified in a different subgroup shall require a new Certificate of Occupancy whether or not any alterations to the building are required by this code. When application is made for such Certificate of Occupancy, the Superintendent (of the Department of Building and Safety) shall cause an inspection to be made. The inspector shall advise the applicant of those alterations necessary, or if none is necessary, shall make a Report of Compliance to the Superintendent. (c) Issuance Of Certificates. When required by Sub-section (a) of this Section, and after the receipt and approval of Reports of Compliance, the Superintendent of Building shall *issue a Certificate of Occupancy, without charge, to the owner of the building*. Upon the payment of \$1.00 each, duplicates of the Certificate may be secured by the owner, architect, engineer, contractor, permittee or tenant."

The sections of the Ordinance which respondents claim were violated by appellant will, for convenience, be called the "door" section, the "double exit" section, the "sprinkler" section, and the "change of occupancy" section.

Appellant claims generally that these sections are not applicable because the Ordinance applied only to buildings to be erected in the future and was not intended to apply to existing buildings. It is also contended that the "door" section did not apply because the floor space in question did not total 1,000 square feet, and that, assuming it did apply, there is no showing that the fact that the door opened inward contributed to respondents' injuries. It is contended that the "sprinkler" section is ap-



plicable only when a particular use is made of the premises and that it, as owner and lessor, is not liable for the use a tenant makes of premises.

[1] It would seem that appellant's contention that the Building Code was to apply only to buildings to be erected after its effective date cannot be sustained. By the express terms of the ordinance in question, the old building code is amended in its entirety and everything therein contained which is not contained in the new code is repealed. To sustain appellant's contention would have the effect of removing from the operation of the ordinance every building erected in the city of Los Angeles before 1943 without reference to its condition. It clearly appears from the very terms of the ordinance that this could not have been the intention of its framers who declared its purpose to be that of safeguarding life, property and public welfare by regulating and controlling the design, construction, use and occupancy of all buildings and structures *erected or to be erected* within the city. (Section 91.0101.) We find also that Section 91.0103 is entitled "Application to Existing Buildings".

[2] Section 91.0403 (f) of the ordinance defines floor area as the area in square feet within the exterior walls of a building but not including the area of inner courts, shaft enclosures, or exterior walls. It was stipulated that the floor area of the workroom exceeds 1,000 square feet if (1) the area of the stairwell and (2) either the portion of the floor covered by the balustrade or the ledge along the inner surface of the exterior wall are included, but if the stairwell opening and either the portion occupied by the balustrade or the square footage of the ledge is excluded, the floor area was less than 1,000 square feet. By the terms of the section neither the area of the stairwell nor the portion of the floor covered by the balustrade nor the ledge along the inner surface of the exterior wall is excluded, and thus it appears obvious that the square footage of the workroom exceeds 1,000 square feet. As the floor area exceeded 1,000 square feet, the door serving as exit was required to open *outward* without ref-

erence to the use to which the premises were put.

A municipality, under the power delegated to it by the state, may enact ordinances creating duties for the protection of persons and property, and it is very generally held that those who violate such ordinances are liable for resulting injury to others. The standard of conduct of a reasonable man may be established by a statute or ordinance. The violation of such a legislative enactment may be negligence in itself if the plaintiff is one of a class of persons whom the statute was intended to protect and the harm which has occurred is of the type which it was intended to prevent. *Harris v. Joffe*, 28 Cal.2d 418, 170 P.2d 454; *Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, 177 P.2d 279; *Muir v. Cheney Bros.*, 64 Cal.App.2d 55, 148 P.2d 138; 45 C.J. secs. 100; 105, pp. 717, 723; 1 C.J.S., Actions § 12, page 996; *Prosser on Torts*, Sec. 39, p. 264. Appellant's duty to these respondents to provide a proper exit from the premises is thus established by the provisions of the Building Code.

The "door" section:

[3] Appellant's contention that there is no showing of any causal connection between respondents' injuries and the inward-opening door cannot be upheld in light of the following testimony of Mrs. Finnegan (whose face and hands and arms were burned):

"Q. And was the door leading from the workroom to the showroom and the one we have been talking about here, open or closed at the time the fire occurred? A. It was closed, sir.

"Q. Whereabouts in these premises did you get these burns to your hands? A. I got the worst part of my burns right directly at the door. \* \* \* He (Reuter) was hollering for me to help him from the flames on him, and thereafter the girls and all started running in a panic and hollering, and I crawled over to the door. It was all a mass of flames there, and I got—when I got to the door, I felt this pressure of these people up on top of me, and I reached up and grabbed the knob in my hand, and it slid right on down as I pulled

it again; but I grabbed around and pulled up again, and reached down, and when I finally got the door open Miss Merchut had her arms around my waist. I tried to throw her arms off me when I felt the dead weight, but could not. I finally got the door open. The first time I tried to open it outward. In the excitement and panic I forgot which way the door would open, but finally I got it open and got out and pulled Miss Merchut after me.

"Q. All right. Let me ask you, which way did that door open. A. It opened toward me. I had to pull it inward to get out.

"Q. That is, it swung inward into the workroom? A. That is correct, sir.

"Q. Was it a two-way door? Did it also open out? A. No, sir.

"Q. I assume it goes without saying you were highly excited while you were there at the door? A. Yes, sir, I was.

"Q. And did you recall, when you got there, which way the door did open? A. No, sir.

"Q. You attempted to open it first which way? A. I tried to push it from me, you know, to get out \* \* \*. There was quite a bit of panic there at the door. I felt these people shove me from every which direction and pull me down. \* \* \* I was concerned in trying to find the little knob there so I could get out myself. I knew—I was aware of Miss Merchut because she kept hollering, 'I am burning', and she had her hands around my waist, and I tried to tear them loose, and of course when I got out she still had her hands around my waist \* \* \*.

"Q. By Mr. Stanbury (Counsel for plaintiffs): Were you, yourself, doing anything at the door except trying to get out? A. No, sir; that is all I was trying to do.

"Q. And in attempting to get out, were you using your hands? A. Yes, sir.

"Q. What were you doing with your hands? A. Part of the time I was using this one to protect my eyes, and the other one groping around for the little small knob.

"Q. All right. Did you use your hand when you got hold of the knob? A. Yes, sir, I pulled it in and got out.

"Q. Now, was it hot around that door? A. Yes, sir, it was all in flames.

"Q. Were there flames around you at the time you got there? A. Yes, sir.

"Q. Did you get your hands burned? A. Yes, sir. I got my hands all burned, and at the time I got out, why, my hands were bleeding, they were all cut, and the flesh was falling off them. My face was swollen, and I could feel a bursting and cracking sensation to my skin.

"Q. Was there anything wrong with your hands before the fire? A. No, sir.

"Q. Have you any way of telling us how long you were at that door before you got out? A. It seemed like an eternity to me when I was there at the door. \* \* \*

"Q. Before the fire what substance was in that central panel of those doors? A. Wood. \* \* \*

"Q. And at the time this fire started, was there any obstacle or obstruction of any kind between you and this doorway? A. No, sir. \* \* \*

"Q. By Mr. Gallagher (Counsel for defendant): Now, it was just a matter of a second after the explosion occurred before you caught on fire, wasn't it? A. That is correct. I was right close to the door and in line with the fire, and I threw myself out.

"Q. In other words, you were on fire before you could hardly move at all? A. Yes, I was right in line with the explosion.

"Q. Now, the smoke was so thick and dense over in the vicinity of the door as you were crawling toward it, that you could not see the door, isn't that true? \* \* \* A. That is right.

"Q. By Mr. Gallagher: And in your progress while crawling along the floor, you bumped against the table on which the cash register sat? A. Yes, because it was right next to the door.

"Q. You could not see the table or the cash register there on account of the smoke, isn't that right? A. That is right.

"Q. Now, when you got to the door, you stood up, isn't that right? A. That is correct.

"Q. And you could not see the door or the doorknob on account of the flames and smoke there, isn't that right? A. The flames and smoke, yes.

"Q. You got over to a point where you thought you were close to the door, and did you start feeling for the knob? A. Well—

"Q. Or did you first try to push the door open? A. When I first got there, you see, it was just a matter of seconds from the time I threw myself to the floor until I hit the door, because I was very near it, and then I got up and tried to push my way out.

"Q. Then after you tried to push the door open, you remembered, or at least it came into your mind that the door opened inward, isn't that right? A. At the moment of panic, like that, I was concerned in trying to push and it would not work, so I felt around and had hold of the knob several times, but my hands slipped off from it, and the only time I really grabbed the knob I got the door opened."

Miss Merchut testified as follows:

"Q. (By Mr. Stanbury): What did you do when the fire broke out? A. I ran to the door.

"Q. When you say you ran to the door, you mean to the door to what? A. The exit door right near the elevator there.  
\* \* \*

"Q. Now, whereabouts did you get into the flames? A. When I was on my way to the door.

"Q. How close to the door were you? A. Oh, just a matter of a few steps, about six or seven feet away from the door.

"Q. And when you got to the door were you conscious of anyone else being there? A. Mrs. Finnegan was there.

"Q. And could you see what Mrs. Finnegan was doing? A. Trying to get out, struggling there trying to get out.

"Q. What did you do, if anything? A. I tried to open the door.

"Q. What did you do? A. I was pushing it.

"Q. Which way did that door open? A. It opened inward.

"Q. During the time you had been working there hadn't you found out which way the door opened? A. I knew it opened inward.

"Q. Why were you trying to open it outward? A. When I came to the door and Mrs. Finnegan was there struggling with it, suddenly I became panicky realizing I was trapped, and I started pushing, I guess, at the door, and trying to shield my face from the flames, and Mrs. Finnegan opened the door and got out. \* \* \*

"Q. (By Mr. Stanbury): Now, why didn't you try to pull the door inward, yourself? \* \* \*

"The Witness: Well, sir, when I did get to the door, Mrs. Finnegan was struggling with it, and then, you know, I forgot, I became panicky and realized I was trapped and started pushing against it.

"Q. (By Mr. Stanbury): You just forgot what you were doing? A. Yes, sir.

"Q. You were excited? A. Yes, I was.

"Q. When you were there at the door, what was it like so far as whether it was in flame or not around there? A. Well, there was flame and I felt hot, and my face was burning, my arms.

"Q. How long were you there? A. It seemed like hours to me.

"Q. It seemed like hours to you? A. Yes, sir. \* \* \*

"Mr. Gallagher: Miss Merchut, so far as you know, you and Mrs. Finnegan were the first two people who actually got out of that workroom, isn't that right? A. Yes, sir.

"Q. And did you, according to your best recollection, and I realize it might not be possible for you to remember exactly, go out first, or did Mrs. Finnegan go out first? A. That is hard to say, sir.

"Q. You cannot tell that? A. I know Mrs. Finnegan opened the door and I went out."

Whether or not there was a causal connection between the violation of the "door" section of the ordinance and the respondents' injuries is a question of fact for the jury whose determination will not be dis-



turbed on appeal when there is substantial evidence in support thereof. *McEvoy v. American Pool Corp.*, 32 Cal.2d 295, 195 P.2d 783; *Smith v. Schwartz*, 14 Cal.App.2d 160, 164, 57 P.2d 1386; *Dougherty v. Ellingson*, 97 Cal.App. 87, 275 P. 456; *Fishman v. Silva*, 116 Cal.App. 1, 2 P.2d 473; *Hill v. Peres*, 136 Cal.App. 132, 28 P.2d 946; 8 Cal.Jur. Ten-year Supp., note 4, sec. 139, p. 394. From the testimony just set forth the jury could reasonably infer that Mrs. Finnegan and Miss Merchut may have been retarded in their progress from the room by reason of the fact that the doors opened inward. It cannot be said, as a matter of law, that the doors, as constructed, did not impede their exit.

It is not necessary that appellant's negligence be the sole proximate cause of respondents' injuries, but it is sufficient that it be one of the contributing causes thereof. *McEvoy v. American Pool Corp.*, supra; *Sawdey v. Producers' Milk Co.*, 107 Cal. App. 467, 480, 290 P. 684. Where an injury results from two separate and distinct acts of negligence by different persons operating simultaneously and concurrently, both are proximate causes and recovery may be had against either or both of the responsible persons. *Sawdey v. Producers' Milk Co.*, supra; *Hunt v. Los Angeles Ry. Corp.*, 110 Cal.App. 456, 294 P. 745; *Holahan v. McGrew*, 111 Cal.App. 443, 295 P. 1059; *Corvello v. Baumsteiger*, 115 Cal. App. 194, 1 P.2d 484; *McEvoy v. American Pool Corp.*, supra; *Westover v. City of Los Angeles*, 20 Cal.2d 635, 128 P.2d 350; *Satterberg v. Pacific Gas & Elec. Co.*, 58 Cal.App.2d 296, 136 P.2d 43.

Appellant complains that at a previous trial of another case which arose out of the same fire (*Neuber v. Royal Realty Co.*, 86 Cal.App.2d 596, 195 P.2d 501), Mrs. Finnegan testified that the first time she got hold of the doorknob of the door she pulled it open and that it must, of necessity, follow from this that the manner in which the door opened did not contribute to respondents' injuries. It seems apparent that no such result is necessary. Furthermore, if the previous testimony created a conflict in the evidence, the resolution of that conflict was for the trier of the fact whose de-

termination will not be disturbed on appeal where substantial evidence exists to support it. *Weintraub v. Soronow*, 115 Cal. App. 145, 1 P.2d 28; *Farmers' Bank of Camarillo v. Goodrich*, 90 Cal.App. 717, 266 P. 550; *Dowd v. Joyce*, 85 Cal.App. 377, 259 P. 368; *Morton v. Manhattan Lunch Co.*, 41 Cal.App.2d 70, 106 P.2d 212; *Rivera v. Goodenough*, 71 Cal.App.2d 223, 162 P.2d 498; *Alward v. Paola*, 79 Cal.App.2d 1, 179 P.2d 5.

#### The "double exit" section:

At the time the lease to the tenant was made there was a second exit in the room. This exit led to a flight of steps which went down into the storeroom and from there down another flight of steps to a door in the basement which opened onto an alley. At some time during the period of the lease, Noll, the tenant, had placed heavy planking over the stairwell leading from the storeroom into the basement, and he had nailed a heavy prop against the door leading into the alley—thus effectively blocking the second exit from the room.

Section 91.3301(a) provides that "The purpose of the limitations of this Division is to provide safe and continuous means of egress from every portion of every building." The evidence shows that the door had been nailed shut for nearly four years and that the stairwell had been planked over for longer than that. The only time that the planking and door prop were not present was when supplies were brought through the alley door. Appellant contends that these obstructions were not structural changes but merely temporary ones created by Noll for which it is not liable.

With respect to these obstructions, the court gave an instruction based on Section 660 of the Civil Code which reads, in pertinent part, as follows: "I instruct you that a letting, if any, of the premises by an owner thereof with knowledge that the same do not conform structurally to the foregoing requirements, if they did not so conform, would constitute a violation of the said 'Ordinance'." And "The second (question) is regarding exits—If blocking of exits is temporary then it is not a structural change. Please define "temporary" and "structural". Would "to fix by nailing" be permanent?

Or, "to prevent the use of under ordinary circumstances" be permanent?" (The Court): "We can suggest that Section 660 of the Civil Code provides that anything that is nailed to a building is deemed to be a permanent attachment thereto, or words to that effect. *The question of what is temporary and structural is something for you to say, with regard to the facts in this case.*" And Instruction #11: "You are instructed that in order to be held liable for the proximate results of unlawful structural features, if any, of a building, it is not necessary that the owner should itself have created the condition which caused the violation of law. The obligation of the owner with respect to the leasing of buildings which are structurally defective in violation of ordinances may arise when to its knowledge the tenant has changed the structure of said building, or is putting the same to uses for which the same are in violation of ordinances \* \* \*."

The following instruction (#38) was given by the court at appellant's request: "If, from the evidence, you believe that at the time of the execution of the lease and at all times thereafter the workroom was equipped with the requisite number of exists required by the ordinances of the City of Los Angeles, but that one or more of such exists were blocked and rendered incapable of easy or ready use, and that such blocking of the exists was done by Norman Noll or his employees, and that the blocking or obstruction of any exit was of a temporary character and one which did not affect the building in any structural way, then the court charges you the defendants would not, nor would either of them, be responsible therefor, and the blocking of such exit would not constitute a basis for a verdict in favor of either plaintiff against the defendants, or either of them." The jury was also instructed (#46) that " \* \* \* the defendants did not owe any duty to the plaintiffs, or either of them, to inspect the premises leased to Noll to ascertain if they were being either legally or carefully used by the said Noll or any of his employees and, therefore, before the defendants can be charged with knowledge of any unlawful

act of Noll, they must have had knowledge and notice thereof." This instruction was given as requested by appellant with the omission of the word "actual" before the word "knowledge". The court then gave an instruction defining actual and/or constructive notice or knowledge.

The jury impliedly found that the tenant had made structural changes in the building which violated the ordinance when he blocked the other exit from the room, and that this change was known to the defendant and raised a duty on its part to terminate the tenancy or force the tenant to remove the obstructions to comply with the mandate of the safety measure enacted by the city. *Roxas v. Gogna*, 41 Cal.App.2d 234, 106 P.2d 227; *Harmon v. M. H. Sherman Co.*, 29 Cal.App.2d 580, 85 P.2d 205; *Goetz v. Duffy*, 215 N.Y. 53, 109 N.E. 113; *Tvedt v. Wheeler*, 70 Minn. 161, 72 N.W. 1062; *Tralle v. Hartman Furniture & Carpet Co.*, 116 Neb. 418, 217 N.W. 952; *Moore v. Dresden Inv. Co.*, 162 Wash. 289, 298 P. 465, 77 A.L.R. 1258. Taking into consideration the physical aspects of the means used to block the one exit it can not be said as a matter of law that the change was not a structural or permanent one.

The record shows that respondent Merchut was standing close to the blocked exit when the fire started, and that she was burned while running toward the only available door. The record also shows that the part of the room in which she had been standing when the fire started did not burn. No citation of authority is necessary nor is any argument needed to show that an exit which is impassible is no exit at all.

The "sprinkler" section:

Appellant contends that the section of the ordinance which required every room housing this type of an occupancy to be sprinklered applies only when a particular use is made of the premises and that it was solely the tenant's duty to comply with this section. Respondents, on the other hand, contend that appellant, knowing the use to which the premises were being put and that the building did not comply with the safety regulations prescribed by the ordinance, is liable to them for the violation thereof.



An ordinance which requires certain buildings to be equipped with automatic fire sprinklers is a proper exercise of the police power of the state or municipality to provide regulations for the protection of life and property. *City of Chicago v. Washington Home of Chicago*, 289 Ill. 206, 124 N.E. 416, 6 A.L.R. 1584; *Commonwealth v. Badger*, 243 Mass. 137, 137 N.E. 261; *City of Chicago v. Washingtonian Home*, 289 Ill. 206, 124 N.E. 416, 6 A.L.R. 1591, and cases there cited. The situation here is analogous to the one presented in the case of *Roxas v. Gogna*, 41 Cal.App.2d 234, 106 P.2d 227; where an ordinance provided that if a certain building were used as a lodging house it must be equipped with a fire escape. The building was leased to one who, by his use of the premises, brought it within the provisions of the ordinance. It was there held that the plaintiff, one of the lodgers, was entitled to recover against the owners of the building for injuries sustained by him when he was forced to jump from a second story window during a fire. The court said that while the ordinance did not name the person upon whom the duty to provide the fire escape rested, where the owner leased the premises knowing for what purpose it was to be used, the duty to comply with the ordinance should be upon him. In such a case, the obligation of the owner as to third persons is not under the contract with the lessee, but rather under the law, violation of which constitutes negligence. *Hurtel v. Albert Cohn, Inc.*, 5 Cal. 2d 145, 52 P.2d 922; *Wright v. Los Angeles Ry. Corp.*, 14 Cal.2d 168, 93 P.2d 135; 19 Cal.Jur., *Negligence*, Sec. 65, p. 632; *Harper, Law of Torts*, p. 187, S. 78; 14 So. Cal.L.Rev. 194; *Moore v. Dresden Inv. Co.*, 162 Wash. 289, 298 P. 465, 469, 77 A.L.R. 1258. Statutes and ordinances prescribing the safety features of buildings impose a duty of compliance upon the property owner. Where such a statute or ordinance fails to designate the person charged with the duty of compliance, the initial responsibility is that of the owner. *Roxas v. Gogna*, 41 Cal.App.2d 234, 106 P. 2d 227; *Harmon v. M. H. Sherman Co.*, 29 Cal.App.2d 580, 85 P.2d 205; *Goetz v. Duffy*, 215 N.Y. 53, 109 N.E. 113; *Tralle v.*

*Hartman Furniture & Carpet Co.*, 116 Neb. 418, 217 N.W. 952, 955; *Burt v. Nichols*, 264 Mo. 1, 173 S.W. 681, 684, L.R.A.1917E, 250; *Moore v. Dresden Inv. Co.*, 162 Wash. 289, 298 P. 465, 468-473, 77 A.L.R. 1258.

There is evidence in the record to show that the president of appellant corporation was in the workroom and saw the celluloid from which the dice were being manufactured, and that the manufacturing operations were explained to him by Noll's staff. Actual knowledge of a property owner, where necessary as a basis of liability, may be inferred from his knowledge of other facts placing him on inquiry. *Turner v. Lischner*, 52 Cal.App.2d 273, 277, 126 P.2d 156. The record shows that appellant corporation's president called at the establishment approximately every six weeks during the tenancy.

It is contended by appellant that, assuming it was under a duty to comply with the section requiring an automatic sprinkler system, respondents have shown no causal connection between the violation of that duty and their injuries. The question of proximate cause is one for the jury, and before an appellate court will reverse a judgment upon the ground of insufficiency of the evidence to support a finding of causal connection it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party from recovering a judgment. The evidence must be construed most strongly against the losing party. Every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. *Lindsey v. De Vaux*, 50 Cal. App.2d 445, 448, 123 P.2d 144, hearing denied. Just what would have happened in the present case had a sprinkler system been in operation is not capable of direct proof and must, of necessity, be largely a matter of speculation or of inference. And, even so, it has been held that the question is one for the jury, and not for the court.



Rovegno v. San Jose K. of C. Hall Association, 108 Cal.App. 591-595, 291 P. 848; hearing denied; Lindsey v. De Vaux, supra; 19 Cal.Jur. 732; 38 Am.Jur. 1056; Stockwell v. Board of Trustees, 64 Cal. App.2d 197, 204, 205, 148 P.2d 405, hearing denied; Dennis v. Gonzales, 91 Cal.App.2d 203, 205 P.2d 55. Respondents' expert witness testified that the automatic sprinklers would have gone into operation when the temperature at the ceiling reached 165 degrees Fahrenheit, which would have been within two or three seconds after the outbreak of the fire.

"Change of Occupancy" section:

The original permit issued to appellant corporation was one allowing it to house "stores and offices" in the building. Appellant maintains that this section does not apply to it, that the duty, if there was one so far as an existing building is concerned, to obtain a Certificate of Change of Occupancy rested upon the tenant, Noll. It contends that it was not the leasing by it which might be said to be unlawful, but the occupancy of the premises. It is further contended that, even if the duty were upon it to secure such a certificate, plaintiffs have shown no causal connection between the failure to procure the certificate and their injuries. Respondents, on the other hand, maintain that these sections of the ordinance were admitted in evidence *only* to show that appellant knew that it had leased premises for an occupancy which was unlawful under the original permit and that the required application would, by the terms of the section, have necessitated an inspection and a report of any necessary alterations and that appellant should be charged with knowledge of what the inspection would have revealed. It clearly appears from the record that appellant had knowledge that the lessee was engaged in manufacturing dice. The lease itself provided that the premises were to be used for the business of "manufacturers of and dealers in club furniture and equipment \* \* \*." It would seem that since the original permit had been applied for and issued to the owner of the building the responsibility of procuring a change of occupancy certificate was upon it. After the

expiration of the original lease, there was a month to month tenancy in effect and the appellant-lessor had the right of re-entry. At the expiration of the lease the section requiring a change of occupancy certificate was in effect and appellant corporation must be charged with knowledge of that requirement. From the following testimony of appellant's president, Mr. Helbush, it would appear that the company considered that it was its duty to apply for the necessary permits, of whatever character, from the city. Mr. Helbush's statement that at the time of making the lease he did not know the extent of the tenant's manufacturing operations would not excuse him subsequently. Prior to the time of the fire, he knew that Noll was manufacturing dice, and he must be charged with knowledge of the sections of the ordinance providing for safety devices necessary in a building where such a business was being carried on. Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 P. 1063, 16 Ann.Cas. 1061; Andreen v. Escondido Citrus Union, 93 Cal.App. 182, 269 P. 556. The testimony of Mr. Helbush (president):

"Q. Those (Exhibits 55, 56, 34, 35) are the applications of the Royal Realty Company to make alterations requested by Mr. Noll, are they not? A. Yes.

"Q. And I notice that they recite that the purpose of the building after the alteration or moving is stores and offices? A. That is correct.

"Q. Now, the lease that you signed at the same time with Noll gives as its purpose what we have already read here, and I won't read it again. You stated that you did not understand that was his actual purpose, so I am going to ask you, sir, to look at your testimony of January, 1946, page 61, line 24, to page 62, line 9, where I have marked it in red (handing to witness). \* \* \* A. Yes, I testified to that the same as I have testified now, too.

"Q. Now, when you signed this lease—you did sign this lease yourself, did you not? A. I did.

"Q. Well, at that time you read it, did you not? A. It was my understanding it was just like I say now, my understanding

was all the place was going to be used for was the manufacturers or dealers in club furniture, manufacture as dealers.

"Q. When you filed this document with the city, you said the use was stores and offices. When you signed the lease, you said manufacturers or dealers in this equipment. \* \* \*

"Q. Then this is the situation, is it not: that when you signed the lease with Noll, it provided what I have already read as to manufacturing, but when you made your application for repairs in connection with the same lease to the city, you recited only that the purposes are offices, is that correct? A. That is all I thought it was at any time.

"Q. All right, but in the document you filed with the city, you stated offices, and in the leases you said what I have already read. That is a fair statement, is it not? A. I know, but that is not the way the understanding was.

"Q. Mr. Helbush, that is a question of fact. A. O.K.

"Q. So I am confining myself to what is written, and not what you or I think \* \* \*.

"Q. Please answer the question, if I have accurately read what you had written down when you were dealing with Noll.

"Mr. Gallagher: That is objected to as asked and answered. The document speaks for itself.

"Mr. Stanbury: It has been asked, but not answered.

"The Court: The question has been asked, but he has not answered it.

"The Witness: Yes, it is written down like this in the lease.

"Mr. Stanbury: And I have also accurately read what is written down in the representation to the Safety Board of the City, have I not? A. Yes, you did. (Objected to, and question reframed.)

"Mr. Stanbury: I have also correctly read what was written down by your company when it informed the Department of Building and Safety of this City what the purpose of the alterations for Noll was, have I not?" (Mr. Helbush then admitted that these applications to the city were

signed by Mr. Livingston, Secretary of the Royal Realty Company, and the architect of the company, a Mr. W. L. Schmolle.)

Respondents did not endeavor to show any causal connection between the failure to obtain the certificate and their injuries, and it would seem that there is none. If appellant corporation had the duty to obtain the certificate, as contended by respondents, and failed to do so, the requirement together with the original applications to the city at the time the lease was entered into would be sufficient to show that appellant knew it had leased premises for a purpose not in the contemplation of the city authorities at the time the original permit was granted. Appellant's subsequent knowledge of the extent of the manufacturing operations being carried on by Noll would seem to raise a duty on its part to terminate the tenancy at the expiration of the lease in July, 1942, or at any period thereafter during the time the tenancy was continued on a month to month basis and *particularly* because from 1943 until the date of the fire appellant would be charged with knowledge of the various sections of the ordinance which had been enacted for the avowed purpose of safeguarding life, limb and property, and with the knowledge that the building leased by it was not structurally safe for the purpose for which it was being used.

The jury was instructed (#28) as follows: "You are hereby instructed that on July 15, 1942, when the original five year period of the lease expired, the defendant, Royal Realty Company, was not required by the terms of the lease to permit the tenancy of Noll and Company to continue. Thereafter, up to and including the time of the fire here involved, the said defendant was entitled, on one month's notice, to terminate said tenancy. I instruct you that if the owner of premises knowingly permits the same to be continually used for purposes for which they are structurally in violation of the building ordinances read to you in these instructions, while having the power to terminate such use and occupancy by giving notice of termination or by refusing to permit the extension thereof, he violates such ordinances. You are to de-

terminate the facts." And (#30): "You are instructed that the knowledge of an agent is imputed to his principal. Therefore, if you should find that any of the officers of the Royal Realty Company had knowledge of a fact, you must also find that the defendant, Royal Realty Company, was possessed of the same knowledge."

#### Common Law Liability

Subject to certain exceptions, a lessor is not subject to common law liability for harm caused to the lessee, or to others upon the land or outside of it, by the condition of the premises or the activities of the lessee. (Prosser on Torts, Sec. 81, p. 648; Harper on Torts, Sec. 103, p. 234.) Respondents do not claim that appellant owed them any common law duty of care.

#### Contributory Negligence

It is claimed by appellant corporation that plaintiffs were guilty of contributory negligence as a matter of law in that they violated certain sections of the Los Angeles Municipal Code, and Section 13001 of the Health and Safety Code. The just mentioned section of the Health and Safety Code prohibits any person from throwing or placing any substance or thing which may cause a fire in any place where it may directly or indirectly cause a fire. The Los Angeles Municipal Code, Section 57.21, prohibits any person from storing, manufacturing, polishing, finishing, perforating or handling any cellulose nitrate products except as provided therein. One of the requirements is that all such products when not in actual use or being worked upon shall be kept in approved manila envelopes or other approved containers. Section 57.24 prohibits any person from failing to entirely remove or safely dispose of combustible waste material or litter at the close of each working day. Such combustible material is to be stored in approved incombustible receptacles or in rooms or vaults approved by the Building Department. Section 57.27 prohibits any person from permitting the accumulation of any explosive or inflammable dust in quantities sufficient to create a fire or explosion hazard on electric motors, walls, ledges, or other

interior surfaces on which dust may settle. Section 57.04 prohibits any person from storing, manufacturing, polishing, finishing, perforating, transporting, or handling of any cellulose nitrate products without a permit. Section 11.01 provides that "person" shall mean a natural person, a business organization of any type or the manager, lessee, agent, servant, or officer or employee of any of them.

A complete answer to appellant's contention that respondents were among the "persons" contemplated by these provisions is that Section 11.01(a) provides that "The following words and phrases whenever used in this Code shall be construed as defined in this Section *unless from the context a different meaning is intended*, or unless a different meaning is specifically defined and more particularly directed to the use of such words or phrases." [Emphasis added.] Section 57.04(a) provides that "No person shall, *without a written permit* then in effect from the Board (of Fire Commissioners) so to do, (1) Manufacture \* \* \* (8) Store, manufacture, print, develop, wash, dry, polish, finish, assemble, perforate, fix, repair, transport or handle any cellulose nitrate products \* \* \*." [Emphasis added.] Thus, it clearly appears from the context that the framers of the section intended that someone with authority and control should obtain the permit—not persons in the position of plaintiffs who were paid a wage of \$30 per week and whose duties were more or less mechanical in that they involved only one small part in the manufacture or making of the dice, and whose duties involved no discretion and no power to change the method of doing the work.

Section 57.24 provides (a) that "No person making, using, storing *or having charge or control of any* \* \* \* other combustible waste material or litter, or having charge or control of any building, structure or premises where the same may be located, shall fail, neglect or refuse to entirely remove or safely dispose of same at the close of each working day \* \* \*." [Emphasis added.] Section 57.27 provides for the *installation* of specified types of machinery and equipment to prevent the ac-



cumulation of any explosive or inflammable dust in quantities sufficient to create a fire or explosion hazard. Again, it appears from the context that all of these sections were intended to apply to someone having the control of the business and the authority to comply with the provisions.

With respect to Section 13001 of the Health and Safety Code there is no evidence in the record to show that there was any causal connection between these respondents and the origin of the fire.

#### Common Law Contributory Negligence:

It is contended by appellant that respondents were guilty of contributory negligence in that they were engaged in the manufacture of dice from cellulose nitrate. Whether or not respondents were guilty of contributory negligence was a question of fact for the jury. *Scholey v. Steele*, 59 Cal.App.2d 402, 138 P.2d 733; *Anthony v. Hobbie*, 25 Cal.2d 814, 155 P.2d 826; *Stockwell v. Board of Trustees*, 64 Cal.App.2d 197, 148 P.2d 405. Where contributory negligence is set up as a defense, it seldom happens that the question is so clear from doubt that the court can undertake to say as a matter of law how the jury should find upon the issue. *McWane v. Hether-ton*, 51 Cal.App.2d 508, 125 P.2d 85; *Zehnder v. Spaulding*, 53 Cal.App.2d 268, 127 P.2d 620; *Pewitt v. Riley*, 27 Cal.2d 310, 163 P.2d 873.

The jury was repeatedly instructed that respondents could not recover if they were guilty of contributory negligence which was comprehensively defined in the instructions. The jury impliedly found that respondents were not guilty of contributory negligence and it cannot now be said as a matter of law that they did not exercise ordinary care for their own safety.

#### Imputed Negligence:

Appellant contends that respondents may not recover since their employer's negligence is imputed to them. In *Scholey v. Steele*, 59 Cal.App.2d 402, 405, 406, 138 P.2d 733, 735, (wherein the court affirmed a judgment for an invitee of a negligent tenant), it was said:

"It is further argued, because of the language used in some of our decisions that an invitee to the premises 'stands in the shoes of the tenant, and therefore may [not] recover if the tenant cannot' (*Runyon v. City of Los Angeles*, supra, 40 Cal.App. 383, 180 P. (837), 841), that plaintiff is barred from recovery by Mrs. Enos' negligence.

"It may be doubted whether the statement that the invitee stands in the shoes of the tenant is intended to be so sweeping as to impute the tenant's negligence to his invitee. Rather it would seem to be a *catch phrase* to indicate that the duty owed to the invitee by the landlord is identical with the duty owed by him to the tenant."

In *Singer v. Eastern Columbia, Inc.*, 72 Cal.App.2d 402, 412, 164 P.2d 531, 536 (hearing denied), it was said: "We are aware of neither authority nor sound reason for applying the doctrine of imputed negligence to a case of injury to the tenant's invitee which has resulted from the landlord's breach of duty to make repairs. The rule applicable in such case is that if the landlord has agreed to repair a specific condition which is known to be dangerous, he is liable \* \* \* if the duty to repair rested upon him and he had knowledge of the condition. In either case the invitee of the tenant is chargeable with knowledge only of what he actually knows or, in the exercise of ordinary care, should know of the dangerous condition."

#### Assumed Risk

Where an ordinance is a police regulation, made for the protection of human life, it is an obligation imposed upon the defendant by a salutary police regulation and the doctrine of assumption of the risk does not apply. Public policy forbids that the duty which the defendant owes to the plaintiffs should be waived by plaintiffs' mere passive quiescence, even though with knowledge of the infraction of the ordinance. *Martello v. Beletich*, 59 Cal.App. 533, 211 P. 20—Judge Finlayson's concurring opinion. In *Friedman v. Pacific Outdoor Adv. Co.*, 74 Cal.App.2d 946, 952-953, 170 P.2d 67, it was said that the doctrine of *volenti non fit injuria* is not applicable where the injury

arises from a violation of an ordinance. Neither does it apply to the maintenance of a nuisance unless the aggrieved party contributed to such maintenance. Even though a person may waive the benefit of a law enacted for his own benefit an ordinance enacted for the public good cannot be contravened by private agreement. Public policy requires that duties imposed by statute be discharged and that those who are affected cannot suspend the operation of the law either by waiver or by express contract. *Adams v. Cumberland Inn Co.*, 117 Tenn. 470, 101 S.W. 428; *Martello v. Beletich*, supra; *Rauch v. Southern California Gas Co.*, 96 Cal.App. 250, 273 P. 1111; *Moore v. Dresden Inv. Co.*, 162 Wash. 289, 298 P. 465, 77 A.L.R. 1258; *Landgraf v. Kuh*, 188 Ill. 484, 59 N.E. 501; *Goetz v. Duffy*, 215 N.Y. 53, 109 N.E. 113.

There are certain statutes which clearly are intended to protect the plaintiff against his inability to protect himself. Such are the child labor acts, and various safety statutes for the benefit of employees as to which the courts have recognized, in this respect at least, the economic inequality in bargaining power which has induced the passage of the legislation. Since the fundamental purpose of such statutes would be defeated if the plaintiff were permitted to assume the risk, it is generally held that he cannot do so, either expressly or by implication. The workman has no alternative but the loss of his livelihood, it is his "poverty and not his will" which consents, and economically he is no more free to leave his employment than a soldier or a sailor. *Prosser*, Sec. 51, p. 392; *Suess v. Arrowhead Steel Products Co.*, 180 Minn. 21, 230 N.W. 125; *Osborne v. Salvation Army*, 2 Cir., 107 F.2d 929; *Welch v. Waterbury Co.*, 206 N.Y. 522, 100 N.E. 426; *Depre v. Pacific Coast Forge Co.*, 151 Wash. 430, 276 P. 89.

#### Provisions of the Lease

Appellant complains, in general, with regard to the pertinent sections of the ordinance that the lease provided as follows: "Seventh: That the lessee will, at the sole cost and expense of lessee, comply with all the requirements pertaining to the said

premises, and to the business to be carried on by the lessee in the said premises, of all Municipal, State, County and Federal authorities."

Statutes frequently require fire escapes to be maintained on certain buildings, elevators and their shafts to be guarded, and other floor openings to be made safe. In connection with these statutes there is a preliminary question as to whether the duty of making the required improvements rests upon the landlord or upon the tenant. The better view is that the duty of making these improvements rests upon the landlord because they are of a permanent nature and substantially benefit his reversionary interest. The courts that adhere to this view hold that the landlord is liable for damages to any one rightfully upon or about the premises caused by the landlord's failure to make the improvements required by these statutes. *Harkrider*, Tort Liability of a Landlord, 26 Mich.Law Rev. 383, 391; *Cowen v. Story & Clark Piano Co.*, 170 Ill.App. 92; *Steiart v. Coulter*, 54 Ind.App. 643, 102 N.E. 113, 103 N.E. 117; *Fowler Packing Co. v. Enzenperger*, 77 Kan. 406, 94 P. 995, 15 L.R.A., N.S., 784; *Barfoot v. White Star Line*, 170 Mich. 349, 136 N.W. 437; *Pauley v. Steam-Gauge & Lantern Co.*, 131 N.Y. 90, 29 N.E. 999, 15 L.R.A. 194.

The authorities hold that the landlord's duty to make safe those portions of premises which he furnishes for common use, on premises leased to various tenants, is one that can not be delegated. In line with the principle stated, where a hotel owner was required by municipal ordinance to provide adequate fire escape equipment on premises leased for that use, the owner was not relieved of his obligation thereto by the fact that he had leased the premises and that the tenant had assumed as between them the obligation to provide the equipment. In such case the duty imposed on the landlord is mandatory and can not be delegated to the tenant, nor to any other entity or person. *Bennett*, Landlord & Tenant, Sec. 349, p. 496; *Moore v. Dresden Invest. Co.*, 162 Wash. 289, 298 P. 465, 77 A.L.R. 1258; *Tralle v. Hartman Furniture & Carpet Co.*, 116 Neb. 418, 217 N.W. 952. It would seem that this principle is sound



in reason. If a landlord may delegate his duty of compliance with safety ordinances and statutes designed for the protection of members of the public rightfully on the premises to persons who may be financially irresponsible, all salutary legislation would soon become a nullity. The situation is somewhat analogous to that of one who employs an independent contractor. Where the law imposes a definite, affirmative duty upon one by reason of his relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such person can not escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor. Restatement of the Law of Torts, 286. And it is immaterial whether the duty thus regarded as "non-delegable" be imposed by statute, charter or by common law. 79 U. of Pa. L.Rev. 90, citing cases; *Wilson v. Thayer County Agricultural Soc.*, 115 Neb. 579, 213 N.W. 966, 52 A.L.R. 1393; 37 *Yale Law Journal* 113.

#### Damages

Appellant contends that there was no evidence from which the jury could find, without indulging in conjecture and speculation, what portion of the respondents' injuries was attributable solely to the acts or omissions of appellant.

In *City of Oakland v. Pacific Gas & Electric Co.*, 47 Cal.App.2d 444, page 450, 118 P.2d 328, page 331, the court said: "One who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured. (Cases cited.) It is incumbent upon the party alleging injury to prove the amount of damages. Respondents sustained that burden in this case. If the damages proven could be reduced proportionately, that burden rested upon appellant. (Cases cited.) The record does not show that appellant sustained that burden." In *Cummings v. Kendall*, 41 Cal.App.2d 549, 107 P.2d 282, the court imposed the burden of differential proof upon the defendant. In *Slater v. Pacific American Oil Co.*, 212 Cal. 648, 654, 300 P. 31, 34, it was held that as far as ascertainable from the rec-

ord, there was evidence that appellant contributed substantially to the damage, or at least to the aggravation thereof, and that the amount of compensation awarded was "an approximation to accuracy".

Where several persons act in concert and damages result from their joint tort, each person is held for the entire damages unless segregation as to causation can be established. Even though persons are not acting in concert, if the result produced by their acts are indivisible, each person is held liable for the whole. Death, burning of a building or the sinking of a boat are such indivisible results. The reason for imposing liability on each for the entire consequence is that there exists no basis for dividing damages and the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant. This liability is imposed where each cause is sufficient in itself as well as where each cause is required to produce the result. 15 So. Cal.L.Rev. 439.

In *Summers v. Tice*, 33 Cal.2d 80, 199 P. 2d 1, 5 A.L.R.2d 91, this court said: "In addition to that, however, it should be pointed out that the same reasons of policy and justice shift the burden to each of defendants to absolve himself if he can—relieving the wronged person of the duty of apportioning the injury to a particular defendant, apply here where we are concerned with whether plaintiff is required to supply evidence for the apportionment of damages. If defendants are independent tortfeasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. The wrongdoers should be left to work out between themselves an apportionment. See, *Colonial Ins. Co., v. Industrial Acc. Comm.*, 29 Cal.2d 79, 172 P.2d 884. Some of the cited cases refer to the difficulty of apportioning the burden of damages between the independent tortfeasors, and say that where factually a correct division cannot be made, the trier of fact may make it the best it can, which would be more or less a guess, stressing the



factor that the wrongdoers are not in a position to complain of uncertainty. *California Orange Co. v. Riverside Portland Cement Co.*, supra, (50 Cal.App. 522, 195 P. 694.)"

The jury was clearly instructed (#64, #42) that the appellant was not liable for the starting of the fire, and from the above cited authorities it clearly appears that appellant's contention is without merit.

#### Special Damages

It is appellant's contention that where an employer or his insurance carrier pays to an employee the compensation required under the Workmen's Compensation statutes, the carrier or employer then has an independent right to recover for such items from a third party whose negligence injured the employee. It is argued that Noll's insurance carrier stands in Noll's shoes and that Noll's gross negligence is imputed to it as the recipient of any special damages and that the judgment should be reduced accordingly. Precisely the same contention was made in the case of *Pacific Indemnity Co. v. California, etc., Ltd.*, 29 Cal.App.2d 260, 84 P.2d 313, and answered adversely to appellant. It was there held that when an employee brings an action against a negligent third party for damages for personal injuries, the contributory negligence of his employer does not bar the employer or its insurance carrier from asserting a lien on the employee's judgment for the amount of workmen's compensation and medical expenses paid to or on behalf of the employee as a result of the injuries. Although this decision was based on section 26 of the Workmen's Compensation Act as it read in 1931, sections 3854 and 3855 of the Labor Code contain substantially the same language.

Section 3856 (Labor Code) reads as follows: "The court shall first apply, out of the entire amount of any judgment for any damage recovered by the employee, a sufficient amount to reimburse the employer for the amount of his expenditures for compensation. *If the employer has not joined in the action or has not brought action, or if his action has not been consolidated*, the court, on his application shall

allow, as a first lien against the entire amount of any judgment for any damages recovered by the employee, the amount of the employer's expenditures for compensation." (Emphasis added.)

The italicized portion of the section would appear to answer appellant's contention that the employer's right is a separate and independent one and not a right derived by virtue of subrogation to such rights as his employees may have against a third party. He, or his insurance carrier, Section 3850(b), is entitled to a lien *if he has not joined in the action, or has not brought action, or if his action has not been consolidated*. The section provides that the court shall allow, *on his application*, a first lien against the entire amount for any expenditures made for compensation. The chapter wherein the foregoing sections are found is entitled "Subrogation of Employer", and no mention is made in any part thereof that the contributory negligence of the employer shall defeat his right to such a lien.

The trial court did not err in admitting proof of special damages and in instructing the jury thereon.

#### The Neuber Case

A sufficient answer to appellant's contention in this respect is that the two cases were not similarly presented, nor were the plaintiffs in the two cases, other than being victims of the same tragedy, similarly situated factually. In *Morris v. Fortier*, 59 Cal.App.2d 132, 136-138, 138 P.2d 368, it was held that the same results need not follow, even on the same evidence, when two appeals from decisions of trial courts reaching opposite conclusions are not before an upper court at the same time. In *Southern Pacific Co. v. City of Los Angeles*, 5 Cal. 2d 545, 548, 55 P.2d 847, this court stated that in order that victims of the same misfortune share the same fate, their cases must be before an appellate court at the same time, that the facts be the same, and also that the cases be similarly presented. That the two cases were not tried and presented under the same theories is admitted by appellant (in its Op.Brief, page 37): "That case was tried and presented under

theories somewhat different from those in the present case, and the evidence there somewhat differed from the evidence of the present cases." The Neuber case was apparently tried in the main on the theory that the Royal Realty Company owed a common law duty of care to the employees of Noll, the tenant.

#### The Instructions

Appellant contends that the trial court committed prejudicial error in instructing the jury:

(1) With respect to any of the ordinances offered by the plaintiffs;

(2) With respect to the "building as a building";

(3) With respect to the "use and occupancy" of the building;

(4) With respect to damages, general and special; and

(5) With respect to the zoning ordinance.

Because of the views expressed herein, appellant's contention that the trial court committed prejudicial error in giving instructions on the first four subdivisions as set forth above can not be sustained.

It is contended that the trial court erroneously admitted in evidence Section C-3 of Section 12.01 of Ordinance No. 87,000 and instructed the jury thereon. The section, in substance, provides that not more than ten per cent of the rentable floor area in a C-3 Zone may be used for light manufacturing, provided that where all articles are sold at retail then up to fifteen per cent of the floor space may be so used. It is conceded that Noll used more than fifteen per cent of the floor space rented to him, and that the provisions of the section were violated. It is contended, however, that this section applied only to the use made of the building, and not to the "building as a building"; and that the zoning ordinance was intended for the protection of the values of properties within the zone and not to afford a right of action to a person not within the class designed to be protected. In this respect, appellant's contention is meritorious. The court instructed the jury that the violation of the zoning ordi-

nance "*did not afford a basis for recovering by either plaintiff against the defendants, or either of them, and it is not claimed by plaintiffs that they are entitled to recover on those grounds.*" Assuming that the section of the ordinance pertaining to zoning was improperly admitted in evidence, the portion of the instruction just quoted was sufficient to cure the error.

The judgments are, and each of them is, affirmed.

GIBSON, C. J., and SHENK, J., concur.

SCHAUER, Justice.

[1-3] I concur in the judgments of affirmance upon the ground that in the light of the entire record it appears, either without any dispute or overwhelmingly, that the defendant owed and breached a duty imposed by city ordinance (§§ 91.0102 and 91.3303(d)) to provide exit doors opening "in the direction of exit," and that the failure to provide such doors was a proximate contributing cause of plaintiffs' injuries.

The fact that plaintiffs cannot prove what portion of their injuries is due to the burning they endured while they were held in the flaming room by the illegal door, as distinguished from the portion which may have ensued from the first flash of flame and during the few seconds which elapsed while they were making their way to the door which should have, but did not, swing out, is immaterial. Under the circumstances of this case plaintiffs are not called upon to trace and allocate partial responsibilities (Summers v. Tice (1948), 33 Cal.2d 80, 87-88, 199 P.2d 1, 5 A.L.R.2d 91; see Peaslee, Multiple Causation and Damage (1934), 47 Harv.L.Rev. 1127) and, in the very nature of the case, the evidence upon which any attempted apportionment of responsibility would have to be based is so uncertain and unsatisfactory to that end as to make it impossible to say that defendant is not liable for all the injuries sustained. The defendant owner should have foreseen that there might be a fire (whether of innocent or wrongful origin) and that his failure to supply legal exits would cause appreciable, though not apportionable, damage which would not have resulted from

the fire alone. Under these circumstances the giving of the other instructions complained of (as to blocking of doors and installing of sprinklers), if erroneous, was not prejudicial.

EDMONDS, Justice (dissenting).

The affirmance of the judgment in this case allows the plaintiffs to recover against a property owner upon a verdict rendered by a jury which, the record clearly shows, was misled by incorrect and confusing instructions. The owner was liable for any injuries occasioned by the failure to provide an outswinging door. But the jurors were also told that damages might be awarded because of conditions for which the property owner was not responsible.

It is a fundamental principle that the defendant is entitled to a reversal of the judgment because of prejudicial error when the record shows irreconcilably conflicting instructions and it cannot be ascertained upon what theory the verdict was returned. *People v. Cornett*, 33 Cal.2d 33, 198 P.2d 877; *People v. Dail*, 22 Cal.2d 642, 140 P.2d 828; *Wells v. Lloyd*, 21 Cal.2d 452, 132 P.2d 471; *Westberg v. Wilde*, 14 Cal.2d 360, 94 P.2d 590; *Wright v. Sniffin*, 80 Cal.App.2d 358, 181 P.2d 675; *Jolley v. Clemens*, 28 Cal.App.2d 55, 82 P.2d 51. As Chief Justice Gibson stated in *People v. Dail*, *supra*, 22 Cal.2d at page 653, 140 P.2d at page 834, "Inconsistent instructions have frequently been held to constitute reversible error where it was impossible to tell which of the conflicting rules was followed by the jury."

In general, and subject to certain exceptions not here applicable, a lessor is not liable for injuries to the person or property of a lessee or his invitees or employees caused by defects in the leased premises. *Newber v. Royal Realty Co.*, 86 Cal.App.2d 596, 195 P.2d 501, and cases cited therein. Accordingly, apart from any duty imposed by ordinance, the lessor in this case owed

no duty to the plaintiffs, who were the employees of the lessee.

A municipal ordinance<sup>1</sup> placed upon the lessor, as the owner of the property where the fire occurred, the duty of maintaining a door opening in the direction of exit. The evidence would support a determination that this duty was breached, and that the breach proximately caused injuries to the plaintiffs. But I cannot agree that the City of Los Angeles placed any legal duty upon the lessor to provide two exits and sprinklers. The requirements in this regard are upon the one using the building rather than the building owner.

Section 91.0502 (e) of the ordinance, requires sprinklers in every room where certain materials are handled. It is entitled: "Group E-1 Occupancies:", a term which connotes the use of property. The title does not describe a type of building nor does it define a class of building owners; rather, it designates a type of occupant. The section reads: "Every room in which explosive materials *in lots of more than eight pounds weight* or flammable liquids are *manufactured or used* in any process \* \* \* [is a Group E. occupancy]." (Italics added.) The section specifies a room having a certain type of use, as being within the terms of the ordinance.

The use is narrowly defined in terms of specified weights of materials. The factors which bring the room within the requirements laid down by the city normally are within the cognizance of the user alone; only he can know whether the "occupancy" is one involving explosives to the extent which brings it within the class defined by the law.

Section 91.0642 of the ordinance provides "Special Requirements for Sub-Group E-1 Occupancies". Here also the title of the section strongly indicates a duty cast upon the occupants of premises and not the owner of them. Part (b) of this section de-

1. Section 91.3303, Ordinance No. 87,000, City of Los Angeles: "Doors serving as exits shall open only in the direction of exit. \* \* \*"

Section 91.0642, Ordinance No. 87,000, City of Los Angeles: [Giving requirements for rooms in which explosive

materials in specified quantities are manufactured or used in any process] "(b) Every part of every building shall have two separate exits \* \* \*"; "(i) Every room housing [explosives] shall be sprinklered."



clares that there must be two separate exits. Part (i) requires that "Every room housing a sub-group E-1 Occupancy shall be sprinklered." (Italics added.) However, under Section 91.0642, *supra*, the room is not one classified as having a Sub-group E-1 Occupancy unless the explosives exceed eight pounds in weight, a condition which is within the direct knowledge and control of the lessee rather than the owner of the property.

The language of these sections is quite different from that used in imposing conditions concerning the general plan of a building. For example, Section 91.3303 provides that, "Every door serving as an exit \* \* \* [in areas of specified floor area] \* \* \* shall be *constructed and installed* in conformity with the requirements of this Section \* \* \* [that the door open in the direction of exit]." (Italics added.) The reference to the word "constructed" shows an intent to make the owner of property responsible for compliance with the standard of safety set by the city. In imposing a duty upon the owner of property, the city has not prescribed any particular use of the premises. As stated in the majority opinion, "The section applies to all buildings having the requisite amount of floor space regardless of the use made thereof." Under these circumstances, Royal Realty Co. is liable for all damages occasioned by its failure to provide a door opening in the direction of exit. On the other hand, it was under no legal duty to provide two exits and sprinklers, and if the jury based its verdict upon the failure to provide them, the judgment should be reversed.

However, even if the lessor owed to the plaintiffs the duty of providing two exits, the record shows the uncontradicted fact that, at the time the lease to the tenant was made, the room where the fire occurred had two doors. The tenant subsequently blocked the rear exit and placed planks over the top of the stair well leading to it. These were acts of the tenant rather than those of the lessor. But the rear door was not permanently closed. The evidence shows that both it and the stairway were used from time to time when supplies were

brought in through the alley. One witness stated that "We often used that stairway in bringing lumber up. \* \* \*" This testimony was uncontradicted. The record therefore presents the factual situation of a property owner's compliance with the legal requirement laid down by the city with intermittent restriction by the tenant upon the use of one exit. Under these circumstances, there is no basis for a conclusion that the property owner either failed to provide the two exits, or breached any duty concerning them for which he may be held liable.

If an ordinance or statute required that, for the purposes of light and ventilation, there be in every room of given dimensions a specified number of windows, and a room of the stated area were leased, clearly the lessor would not be liable to the tenant's employees for suffocation resulting from a closing of the windows by the tenant. This is particularly true where the windows were not permanently closed and were used from time to time. "\* \* \* [W]hen a lessee rents premises that are safe as leased, but are rendered unsafe by his use of them, neither the lessee nor his employees can recover from the lessor for injuries resulting from that condition." *Neuber v. Royal Realty Co.*, 86 Cal.App.2d 596, 616, 195 P.2d 501, 514 citing *Donahoo v. Kress House Moving Corp.*, 25 Cal.2d 237, 153 P.2d 349; *Scholey v. Steele*, 59 Cal.App.2d 402, 138 P.2d 733; *Singer v. Eastern Columbia, Inc.*, 72 Cal.App.2d 402, 164 P.2d 531, and *Runyon v. City of Los Angeles*, 40 Cal.App. 383, 180 P. 837.

It is suggested that because the lease had expired and the tenant was holding over upon a month to month basis, the lessor is not in the position of having leased the premises with two exits. The contention is that a new lease of the premises was created at the time of the expiration of the lease. The first answer to this argument is that, for the reasons which have been stated, the lessor owed no duty to provide two exits. Further, even assuming that such a duty existed, where a tenant holds over in accordance with the terms of a lease, his possession is a continuation of the tenancy under the lease. *Howell v. City of*

Hamburg Co., 165 Cal. 172, 131 P. 130; Robertson v. Drew, 34 Cal.App. 143, 166 P. 838; see also, Dean v. Brower, 119 Cal.App. 412, 6 P.2d 580.

The evidence relating to the burns and disfigurement suffered by the plaintiffs fully justifies the amounts awarded to them by the jury. However, seriousness of injury does not do away with the necessity for a clear basis of liability for damages which have been sustained. And one cannot read the transcript of the proceedings and not come to the certain conclusion that the jurors were confused and misled by the 81 instructions which were given by the trial judge. Indeed, there can be no certainty as to whether the verdicts were based upon the lessor's failure to provide doors opening in the direction of exit, or by reason of any lack of two separate exits, or because of the lack of sprinklers.

All of the sections of the municipal ordinances which have been mentioned were read to the jury by the trial judge. He then told them that if the lessor knowingly let the premises without sprinkler equipment, the ordinance was violated by him. The court also gave the following instruction: "In reading to you certain ordinances relating to buildings, I have told you what conduct would constitute a violation thereof. I instruct you that the violation, if any, of any of these ordinances by the defendant owner, if such violation proximately caused injury as a result thereof, would constitute negligence unless there is evidence to excuse \* \* \* [his conduct]". (No. 25)

By another instruction the trial judge told the jurors that he had read to them "the provisions of certain ordinances and in each instance \* \* \* stated what would constitute a violation thereof insofar as such ordinances may, under the facts stated, have been applicable to the defendants. \* \* \* Where a statute or an ordinance prescribes a certain conduct, that is to say, requires the doing of a certain act or forbids the doing of a certain act, the violation of such ordinance or statute amounts to negligence as a matter of law. \* \* \*" (No. 33) He also charged the jurors " \* \* \* that neither the violation of the zoning ordinance, if any, as

shown by the evidence nor the letting, if any, of a \* \* \* building for housing a Sub-group E-1 Occupancy can afford a basis for recovering by either plaintiff against the defendants. \* \* \*" (No. 35) Concisely stated, having declared to the jurors that, under certain circumstances, the letting of a building for Sub-group E-1 Occupancy "in which explosive materials in lots of more than eight pounds weight or flammable liquids are manufactured or used in any process" would constitute negligence, they were told that such negligence could not be considered in determining the question as to the liability of the lessor. This and other conflicts in the instructions most certainly were confusing and presented to the jurors no certain basis for determining the lessors' liability.

That the jurors were in doubt about the rules of law governing liability is clearly indicated by the questions of some of them when, during their deliberations, they returned to the court room. They asked for a clarification of the "Law regarding sprinkling system", and stated, "We are confused about a landlord being responsible for results of acts of a tenant". They also said, "Please again give illustration of hypothetical case of landlord and tenant" although no such case had been mentioned in the instructions. Several more instructions were then read to the jury. The effect of the new instructions was to tell the finders of fact that if they found the lessor was negligent in not providing two exits, or was negligent in not installing sprinklers, and either breach of duty was a proximate cause of the injuries suffered by the plaintiffs, their verdicts should be against the property owner. In Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 195 P.2d 501, an action for damages sustained in the same fire in which the plaintiffs in this case were injured, essentially the same instructions were held to be erroneous.

I agree that the plaintiffs cannot be held to have been guilty of contributory negligence as a matter of law under the applicable ordinances. It is true that section 11.01 of the ordinance defines "person" as " \* \* \* agent, servant, or \* \* \* employee. \* \* \*" By section 57.27 of

the ordinance, any *person* is prohibited from permitting the accumulation of an explosive or inflammable material in quantities sufficient to create a fire or explosion hazard. If these provisions were narrowly construed, the plaintiffs' failure to compel their employer to store the explosive refuse safely, or in the event of his refusal to do so, to leave their jobs, would constitute contributory negligence as a matter of law. But implicit in such a statute is the condition that the employee have some real control over the forbidden conduct. Any other construction of the ordinance would defeat an important purpose of the legislation, which is to protect the employee lacking discretion or some authority from the danger imposed upon him by his employer.

However, as the jury may have based its verdict upon one or both of the two asserted grounds of liability which would not justify a recovery by the plaintiffs, rather than upon the duty to provide out-swinging exits, the errors in the instructions clearly prejudiced the rights of the lessor and may well have caused a miscarriage of justice. *Wells v. Lloyd*, 21 Cal.2d 452, 458, 132 P.2d 471; *Westberg v. Wilde*, 14 Cal.2d 360, 369, 371, 94 P.2d 590. Under these circumstances, the judgment should be reversed.

TRAYNOR and SPENCE, JJ., concur.

Rehearing denied; TRAYNOR and SPENCE, JJ., dissenting.



# MELLO et ux. v. WEAVER.

Civ. 4045.

District Court of Appeal, Fourth District,  
California.

May 16, 1950.

Rehearing Denied June 5, 1950.

Hearing Granted July 14, 1950.\*

Action by Joe L. Mello and Virginia C. Mello, his wife, against Charles L. Weaver to quiet title to a strip of realty. Defendant denied ownership in plaintiffs and alleged

\* Subsequent opinion 224 P.2d 691.

ownership in himself. The Superior Court of Tulare County, W. L. Braeshaw, J., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Shepard, J. pro tem., held that where defendant had paid out taxes on disputed realty, and no agreement was made which fixed fence as boundary, and there was no uncertainty as to boundary in plaintiffs' deed, acquiescence alone by defendant in permitting plaintiffs to remain in possession of realty up to fence on alleged boundary was insufficient to establish title in plaintiffs' favor.

Judgment reversed.

## 1. Boundaries ⇨48(7)

Where there is an acquiescence in a wrong boundary, and true boundary may be ascertained by the deed, acquiescence is treated, both in law and equity, as a mistake, and neither party is estopped from claiming to true line, and boundary is considered definite and certain.

## 2. Boundaries ⇨48(7)

Where plaintiffs purchased realty from defendant, and assumed boundary to be fence to rear of realty, and remained in possession of realty up to fence for 18 years until they were dispossessed by defendant, who had land surveyed and true boundary located, but defendant had paid all taxes on disputed realty, and no agreement was made which fixed fence as boundary, and there was no uncertainty as to boundary in plaintiffs' deed, acquiescence by defendant in permitting plaintiffs to use realty up to fence was by itself insufficient to establish title in plaintiffs. Code Civ. Proc. § 325.

George A. Moran, Fred J. Heid, Jr.,  
Tulare, for appellants.

Louis J. Coelho, Fresno, for respondents.

SHEPARD, Justice pro tem.

Action to quiet title. Boundary dispute.

Plaintiffs sued to quiet title to a strip of land about 1321 feet long, 102 feet wide on the north end and 98 feet wide on the south end, lying along the west boundary of plaintiff's land and the east boundary



of defendant's land and for damages for dispossession. Defendant denied ownership in plaintiffs and alleged ownership in himself. Trial was had before the court without a jury. Judgment was rendered for plaintiffs and defendant appeals.

The material facts are substantially without conflict. Plaintiff Joe L. Mello and Charles L. Weaver did practically all negotiating so that references hereinafter to plaintiff and defendant in the singular are to them, unless otherwise specified.

Defendant, in 1930, owned the southeast quarter of the southwest quarter and the east three acres of the southwest quarter of the southwest quarter of section six, township twenty south, range 24 east, M. D. B. & M., in Tulare County. Plaintiff, in that year, asked defendant if his land was for sale. Defendant replied it was and directed plaintiff to go see it and that the tenant Tony Molles, on the place would show it. Plaintiff went to the place. Tony Molles showed it. The record does not indicate that said tenant ever pointed or referred to any boundaries or that plaintiff and defendant ever directly discussed this boundary at all until 1946. However, there was in place in 1930, a barbed wire fence along the line which plaintiff claims to be the true boundary. The record does not show how or why the fence came into existence except that defendant's father, at a time when he owned the entire quarter section, built it without reference to property lines. The land under dispute lies immediately east of said fence. Defendant sold said southeast quarter of the southwest quarter and the east three acres of the southwest quarter of the southwest quarter of said section to plaintiffs in 1930. Since that date plaintiffs were in peaceable possession of the land under dispute until April of 1948, and farmed, cultivated and grew surface crops on the land in dispute until he was dispossessed by defendant in 1948. In 1939, defendant acquired the land in the southwest quarter of the southwest quarter lying adjacent to plaintiffs. The first direct suggestion that the line was in the wrong place was made in the year 1946, by defendant to plaintiff. Shortly before the commencement of

this action defendant had the land surveyed and the true line was located. This was the first time either the plaintiff or the defendant knew that the fence was not on the true boundary line.

The evidence unequivocally shows that the taxes paid on the strip in dispute were paid by defendant. Plaintiffs paid their taxes for all of the years related according to the description set forth in their deed and there is no indication that any assessment was ever made of any valuable buildings or other improvements on the land in controversy nor that plaintiffs ever paid any such taxes or any taxes at all on the land in dispute.

There is no word of testimony that the plaintiffs or the defendant believed or declared this boundary line to be uncertain until after the acquisition by defendant of the property to the west and the urging of defendant for a survey. There is no testimony about any agreement fixing the fence as the accepted boundary line because of such uncertainty. On the contrary, the evidence affirmatively shows that no such agreement was ever made.

The whole case of the plaintiffs resolves itself down to this, that plaintiffs did not know where the boundary line called for by their deed was but supposed it to be the fence here under dispute. There was no uncertainty even upon the face of the deed. The fence, as the boundary line, was a mere assumption upon their part. Plaintiffs exercised certain acts of dominion and control over the disputed strip. From the acquiescence by his silence of the coterminous owner to the west it is argued that this acquiescence having continued for a period beyond that required by the statute of limitations gives rise to the conclusive presumption of previous agreement or if not to the conclusive presumption, at least to a presumption which has not been rebutted by any evidence.

As was said in *Clapp v. Churchill*, 164 Cal. 741, at page 745, 130 P. 1061, at page 1062: "But the doctrine of an agreed boundary line and its binding effects upon the coterminous owners rests fundamentally upon the fact that there is, or is believed

by all parties to be, an uncertainty as to the location of the true line. When that uncertainty exists, or is believed by them to exist, they may amongst themselves by agreement fix the boundary line, and that agreement will bind all the consenting parties. Acquiescence is merely evidence of the agreement and can properly be considered as evidence of an agreement only when a formal agreement would itself have made a binding contract. But a formal agreement to fix a boundary line is not valid, indeed is void, if the parties know or one of them knows, that the agreed line is not the true line, or, in other words, if there be not an actual or believed uncertainty as to the true line."

[1] On the subject of certainty, the general rule which controls a case involving the circumstances here at bar is contained in *Janke v. McMahon*, 21 Cal. App. 781, 788, 133 P. 21, 24, citing from *Hartung v. Witte*, 59 Wis. 285, 18 N.W. 175: "Where there is an acquiescence in a wrong boundary, when the true boundary may be ascertained by the deed, it is treated, both in law and equity, as a *mistake*, and neither party is estopped from claiming to the true line. The boundary is considered definite and certain when by survey it can be made certain from the deed."

In *Pedersen v. Reynolds*, 31 Cal.App.2d 18, 25, 87 P.2d 51, 55, the court said: "When a fence is built along an arbitrarily accepted line as a mere accommodation or convenience to the builder thereof without any mutual purpose or understanding to thereby locate an uncertain boundary line between coterminous owners of land, the fence may not be said to establish the line by acquiescence and the owner is not estopped from thereafter claiming title to the true line."

One of the elements missing in plaintiffs' assertion of title is the compliance with the requirement of section 325 of the Code of Civil Procedure that he shall have shown that he paid all taxes on the land under dispute for the minimum period of five years.

As is said in *Sorensen v. Costa*, 32 Cal.2d 453, 466, 196 P.2d 900, 908, "There is no question that a person claiming title by adverse possession must show that he and his predecessors actually paid the taxes assessed on the particular land occupied, and he cannot show compliance with section 325 of the Code of Civil Procedure by merely proving that he and his predecessors 'thought or supposed they were paying taxes' on the land occupied by them, when the lands were assessed under a correct description that applied to other land."

[2] In the case at bar the evidence is entirely devoid of any agreement that the fence should be the true line and there is no positive act of either party such as the building or rebuilding of a fence, monument, building or other marker along the line claimed, from which an agreement or intention of both parties might be implied. Acquiescence alone is insufficient. *Copley v. Eade*, 81 Cal.App.2d 592, 184 P.2d 698; *Phelan v. Drescher*, 92 Cal.App. 393, 397, 268 P. 465.

Further, if we assume respondents to be proceeding under the theory of adverse possession there is no proof to show payment of taxes by plaintiffs in accordance with the provisions of section 325 of the Code of Civil Procedure.

The motion for a new trial should have been granted. Judgment reversed.

GRIFFIN, Acting P. J., and MUSSELL, J., concur.

97 Cal.App.2d 623

**SEVEN UP BOTTLING CO. OF LOS ANGELES, Inc., v. GROCERY DRIVERS LOCAL UNION NO. 848 et al.**

Civ. 17610.

District Court of Appeal, Second District,  
Division 1, California.

May 18, 1950.

Seven Up Bottling Company of Los Angeles, Inc., brought action against Grocery Drivers Union Local No. 840, a labor organization and an unincorporated association chartered by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, affiliated with the Federation of Labor, Thomas L. Pitts, individually and as Secretary thereof, and others, for injunction, damages, preliminary injunction and a temporary restraining order. A judgment denying relief but continuing preliminary injunction theretofore issued during pendency of the appeal was entered by the Superior Court of Los Angeles County, Archie E. Mitchell, J., and the plaintiff appealed and the defendants moved for dismissal of the appeal. The District Court of Appeal, Drapeau, J., held that plaintiff's notice of appeal could be fairly interpreted to refer to the judgment, and not to the two unappealable orders.

Motion to dismiss appeal denied.

White, P. J., dissented.

### 1. Appeal and error ⇨105

An appeal does not lie from order sustaining objection to taking of any testimony in a cause of action on ground that complaint does not state a cause of action, since order is not one mentioned among the interlocutory orders which statute makes the subject of appeal, but it may be reviewed upon appeal from the judgment as an intermediate order which necessarily affects the judgment. Code Civ.Proc. § 963.

### 2. Appeal and error ⇨419(1)

Notices of appeal are liberally construed to effect a hearing on the merits unless it appears that the respondent has been misled by the description, and the words "judgment" and "order" as used therein may be treated as interchangeable.

### 3. Appeal and error ⇨422

Where judgment was entered and thereafter an amendment to the judgment

nunc pro tunc was entered, plaintiff's notice of appeal from order sustaining objection to introduction of the evidence upon ground that complaint did not state facts sufficient to constitute a cause of action and from order increasing bond on the preliminary injunction previously issued would be interpreted as referring to the judgment, and appeal would not be dismissed on ground that it was from two unappealable orders, where there was no intimation that respondents were misled to their prejudice by misdescription contained in the notice. Code Civ.Proc. § 963.

Thomas P. Menzies, Harold L. Watt and Carl M. Gould, Los Angeles, for appellant.

John C. Stevenson, Los Angeles, and Clarence E. Todd, San Francisco, for respondents.

DRAPEAU, Justice.

The instant action for an injunction, damages, preliminary injunction and a temporary restraining order was filed by plaintiff on June 29, 1949. On September 29, 1949, the trial court sustained defendants' objection to the introduction of evidence on the ground that the complaint failed to state facts sufficient to constitute a cause of action. On September 30, plaintiff filed notice of appeal from the order sustaining such objection, and on October 10, it filed its amended notice of appeal from such order.

Thereafter, on October 13, 1949, judgment was entered that plaintiff take nothing and that the preliminary injunction theretofore issued be continued in effect during the pendency of "an appeal by the plaintiff from the judgment of this court"; and that the bond of \$3,000 be maintained in full force.

The next day, October 14th, an amendment to the judgment nunc pro tunc was entered ordering the temporary injunction of July 11, 1949 be continued in full force and effect "pending final disposition of the appeal from the order sustaining an objection to the introduction of evidence and pending the trial, if any, of this cause on



the merits"; and decreeing that the \$3,000 bond therefore filed and approved should be sufficient "on the continuance of the injunction pursuant to this judgment."

On October 26, 1949, plaintiff filed its second amended notice of appeal "from the order of the above entitled Court sustaining an objection to the introduction of the evidence upon the ground that the complaint did not state facts sufficient to state a cause of action, and from the order increasing the bond on the preliminary injunction." At the same time plaintiff also requested preparation of a Clerk's Transcript to include: "(13) Judgment of October 13, 1949; (14) Amendment to Judgment Nunc Pro Tunc of October 14, 1949."

The question of the sufficiency of the second amended notice of appeal is now before this court on rehearing of respondents' motion to dismiss the appeal, it being contended that the appeal is from two unappealable orders.

Appellant claims the appeal is from the judgment.

[1] At first blush, the case of *Dabney v. Wilhelm*, 190 Cal. 340, 341, 212 P. 203, appears to be decisive. There it was held that no appeal lies from an order sustaining an objection to the taking of any testimony in a cause of action on the ground that the complaint does not state a cause of action, since the order is not one mentioned among the interlocutory orders which section 963 of the Code of Civil Procedure makes the subject of appeal, but it may be reviewed upon appeal from the judgment as an intermediate order which necessarily affects the judgment.

However, in the cited case, no judgment was ever entered. In the case under review, not only was judgment entered, but it was also amended nunc pro tunc.

[2] The latest pronouncement of the supreme court on the question here propounded is *Adams v. Talbott*, 20 Cal.2d 415, 417, 126 P.2d 347, 349. In that case a judgment was entered in favor of defendant on June 19, 1939, containing certain conditions to be performed within 90 days, and on October 23, 1939, the court entered an order

based upon the conditional clause in the judgment of June 19th. On November 9, 1939, plaintiff filed her notice of appeal "from the judgment rendered in favor of the defendant." Defendant there contended that plaintiff's appeal filed November 9th was from the judgment of June 19th, and therefore was filed too late. However, the supreme court held that "The fact that the plaintiff's notice of appeal stated that it was taken 'from the judgment' does not compel a conclusion that it was intended as an appeal from the judgment of June 19, 1939, rather than from the order of October 23, 1939. *Notices of appeal are liberally construed to effect a hearing on the merits, and the words 'judgment' and 'order' have been treated as interchangeable.*" *Kellett v. Marvel*, 6 Cal.2d 464, 58 P.2d 649; *Estate of Smead*, 215 Cal. 439, 10 P.2d 462; *Title Guarantee & Trust Co. v. Lester*, 216 Cal. 372, 14 P.2d 297. There are no facts which would justify a conclusion that the defendant was misled. \* \* \* The trial court was therefore in error in terminating the proceedings on appeal on the ground that the appeal was filed too late." (Emphasis added.) See, also, *Balkins v. Norrby*, 61 Cal.App.2d 413, 416, 142 P.2d 958, 960, wherein it is stated: "It is established as the rule in this state that 'notices of appeal are liberally construed to preserve the right of review unless it appears that the respondent has been misled by the misdescription.'" *Kellett v. Marvel*, 1936, 6 Cal.2d 464, 471, 58 P.2d 649, 653."

[3] Viewed in the light of the foregoing, the notice of appeal herein may be fairly interpreted to refer to the judgment of October 13th, there being no intimation that respondents were misled thereby to their prejudice.

The motion to dismiss the appeal is denied.

DORAN, J., concurs.

WHITE, Presiding Justice.

I dissent. The case of *Adams v. Talbott*, 20 Cal.2d 415, 126 P.2d 347, relied upon in the majority opinion herein, is not, to my mind, helpful or determinative of the problem presented by the instant proceeding.

In the cited case, as the court points out, 20 Cal.2d at page 418, 126 P.2d at page 347, both the judgment of June 21, 1939, as well as the order of October 23, 1939, were appealable, and therefore the rule of liberality in the construction of notices of appeal was applicable.

In the case at bar, however, the order "sustaining an objection to the introduction of the evidence upon the ground that the complaint did not state facts sufficient to state a cause of action," and the order "increasing the bond on the preliminary injunction" were not appealable. Code Civ. Proc. sec. 963.

Therefore, no jurisdiction whatever was conferred upon this court by the attempted appeal from the foregoing nonappealable orders. Being without jurisdiction, we have no recourse other than to dismiss it. *Sherman v. Standard Mines Co.*, 166 Cal. 524, 525, 137 P. 249; 2 Cal.Jur. p. 131, sec. 15; 2 Cal.Jur. p. 752, 753; *Hughes v. De Mund*, 70 Cal.App. 265, 267, 233 P. 93.



97 Cal.App.2d 418

**WERKMAN v. HOWARD ZINK CORPORATION et al.**

Civ. 17181.

District Court of Appeal, Second District,  
Division 3, California.

May 9, 1950.

Rehearing Denied May 24, 1950.

Hearing Denied July 6, 1950.

Action by Ellie Werkman against the Howard Zink Corporation, Edith Jones, and others, for injuries sustained when an overhead garage door which was being closed descended on plaintiff, who was proceeding down alley on foot. The Superior Court of Los Angeles County, Otto J. Emme, J., entered judgment on a verdict in favor of the plaintiff in the amount of \$14,385.21, and the named defendants separately appealed. Edith Jones also appealed from an order

denying her motion for judgment notwithstanding the verdict. The District Court of Appeal, Vallée, J., held that the plaintiff was not contributorily negligent as a matter of law and that the verdict was not excessive.

Judgment and order affirmed.

**1. Negligence ⇨4**

A plaintiff is required to exercise only that amount of care which would be exercised by a person of ordinary prudence in the same circumstances.

**2. Negligence ⇨136(9, 26)**

The question of contributory negligence is ordinarily one of fact for trier of fact and is question of law only when court can draw but one inference from the evidence, and that an inference pointing unerringly to negligence of plaintiff proximately contributing to his injury.

**3. Appeal and error ⇨930(1)**

On appeal from judgment on verdict for plaintiff, the facts would be considered in light most favorable to plaintiff.

**4. Negligence ⇨136(27)**

A pedestrian who was proceeding down alley and who was struck by descending overhead garage door which was being closed was not contributorily negligent as a matter of law for not foreseeing that door would descend on her, whether she was walking and looking straight ahead or running and looking down.

**5. Damages ⇨127**

In absence of showing of passion or prejudice of jury in arriving at amount of verdict, amount is not excessive as a matter of law.

**6. Damages ⇨132(7)**

\$14,385.21 to 58 year old woman who was in excellent physical condition and who sustained scalp, ankle and leg injuries which required her to wear a cast for 10 weeks and to use crutches for 4 months and cane for 3½ months and who would permanently be unable to do work involving much walking or standing was not excessive.

**7. Negligence ⇨62(1)**

An "intervening force" is one which actively operates in producing harm to an-

other after actor's negligent act or omission has been committed and does not relieve actor from liability unless it is a superseding cause.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Intervening Force".

#### 8. Negligence ⚖62(1)

A "superseding cause" which relieves actor from liability is act of third person or other force which by its intervention prevents actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Superseding Cause".

#### 9. Negligence ⚖62(1)

An "independent intervening cause" is one which operates without respect to defendant's cause, and "dependent intervening cause" is one which is caused by the tort-feasor act.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Dependent Intervening Cause" and "Independent Intervening Cause".

#### 10. Negligence ⚖56(3)

In action against owner of building for injuries sustained when overhead garage door which was being closed by employee of tenant descended on plaintiff, who was proceeding through alley on foot, the question whether owner's negligence in constructing a door which in opening and closing would extend four feet into alley in violation of ordinance was proximate cause of accident depended on whether owner should have reasonably foreseen that injury was likely to occur and not on whether owner should have foreseen the identical consequences that occurred.

#### 11. Negligence ⚖35

The duty of owner installing overhead garage door opening from building into alley is measured by standard of foreseeability of injury to eyes of reasonably prudent man having regard for accompanying circumstances.

#### 12. Negligence ⚖59

"Foreseeability" in causation means foreseeability of intervening cause only and does not include foreseeability of consequences, and consequence which follows directly either from defendant's act or from a foreseeably caused intervening act is proximate.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Foreseeability".

#### 13. Negligence ⚖61(1)

A primary act of negligence may be so continuous in character that it conjoins with act of negligence committed by another at later time, and where original negligence continues and exists up to time of injury, the concurrent negligent act of third person causing injury is not superseding cause, but each of the two concurring acts of negligence is a proximate cause.

#### 14. Negligence ⚖56(3), 62(3)

In action against owner of building for injuries sustained when overhead garage door which was being closed by employee of tenant descended on plaintiff who was proceeding through alley on foot, owner's negligence in constructing door which in opening and closing would extend four feet into alley in violation of ordinance was the primary act of negligence, and continued and existed up to time of injury and conjoined with negligence of tenant in closing door, and tenant's act was to be anticipated and was foreseeable and was intervening force in chain of causation and was not superseding cause and did not break chain of causation where what occurred was reasonably foreseeable.

#### 15. Trial ⚖253(4)

The refusal to instruct on superseding cause was not error when negligent acts of defendants operated concurrently to produce the injury.

#### 16. Trial ⚖261

The trial court must refuse a requested instruction which incorrectly states the law.



Moss & Lyon, Henry F. Walker, Los Angeles, for appellant Edith Jones.

Spray, Gould & Bowers, Los Angeles, for appellant Howard Zink Corporation.

Russell H. Pray, and Eric A. Rose, Long Beach, for respondent.

VALLEE, Justice.

These are separate appeals by defendants The Howard Zink Corporation and Edith Jones from a judgment for plaintiff for \$14,385.21 entered on a verdict of a jury in an action for damages for personal injuries. Edith Jones also appeals from an order denying her motion for judgment notwithstanding the verdict.

Defendant Jones was the owner of a parcel of realty in Long Beach. In the rear the property abutted on a public alley. The alley ran east and west. It was about 20 feet wide. In 1947, Jones constructed a building on the property. The building extended to within inches of the north property line of the alley. An overhead garage-type door which opened from the building into the alley was installed. It was 12 feet wide and 10 feet high. It was so installed as to swing into the alley in the opening and closing operation. When open the door rested in a horizontal position above the doorway. Its lower end was then flush with the building and next to the top flight member of the doorway. The door was closed by pressing a spring which was located on the west wall, inside the garage, about "one foot back inside the west edge of the doorway." In the closing operation the lower edge of the door described an arc projecting into the alley a distance of 48 to 50 inches from the north property line at a height of about 6 feet from the concrete pavement of the alley.

At the time the building was constructed and at the time the accident occurred, the Long Beach Building Code provided: "Doors or swinging windows shall not project nor swing beyond the property line bordering a street or alley. \* \* \* No projection whatsoever shall be allowed in alleys except a curb or buffer block extending not more than nine (9) inches

from the face of the building and not more than nine (9) inches above the established alley grade."

The Howard Zink Corporation leased the building upon its completion and was in possession at the time of the accident.

April 23, 1948, plaintiff, 58 years of age, was employed by a candy company located west of the Jones Building. Her place of employment had a rear exit to the public alley. She left work about 4:00 p. m. by the rear door, went into the alley and proceeded east toward Pico Street to take a bus between 4:15 and 4:30, which was to take her home. She travelled about 4 feet south of the north property line. She was not in a hurry. She walked her usual pace, rather fast, not slow, looking straight ahead. She was not running. There was nothing in the alley to obstruct her path. The sun was shining; visibility was good; it was not windy; and the pavement was dry. An employee of The Howard Zink Corporation, about to quit work for the day, pressed the spring to close the door. As plaintiff reached about the center of the doorway of the Jones Building she was hit on the head by the descending door. The impact knocked her to the pavement and she was severely injured.

#### Appeal of The Howard Zink Corporation

Defendant The Howard Zink Corporation contends: 1. Plaintiff was guilty of contributory negligence as a matter of law. 2. The verdict was grossly excessive.

[1,2] A plaintiff is required to exercise only that amount of care which would be exercised by a person of ordinary prudence in the same circumstances. *Lay v. Pacific Perforating Co.*, 62 Cal.App.2d 233, 144 P.2d 395. The question of contributory negligence is ordinarily one of fact for the trier of fact. *Hubbell v. Clink*, 73 Cal.App.2d 295, 300, 166 P.2d 384. Contributory negligence is a question of law only when the court can draw but one inference from the evidence, and that an inference pointing unerringly to the negligence of the plaintiff proximately con-

tributing to his injury. *Anthony v. Hobbie*, 25 Cal.2d 814, 818, 155 P.2d 826.

[3,4] The facts related supra are stated in a light most favorable to plaintiff. The argument of defendant The Howard Zink Corporation is based on the assertion that "Plaintiff's version of the facts cannot be accepted without doing violence to reason and common sense." That was a question for the jury. It is said that because plaintiff made extra judicial statements to the effect that at the time of the accident she was running with her head down, and because the records of the weather bureau noted high winds at Long Beach on April 23, 1948, plaintiff's testimony was false. This and other evidence referred to by defendant did nothing more than create a conflict. Assuming that plaintiff was running with her head down, it does not follow that she was negligent. A person travelling on a public highway, whether walking and looking straight ahead or running and looking down, cannot be said to be negligent as a matter of law because she did not foresee that an overhead door would descend upon her. It cannot be said as a matter of law that plaintiff was guilty of contributory negligence. Cf. *Donahoo v. Kress House Mov. Corp.*, 25 Cal.2d 237, 247, 153 P.2d 349; *Jacoby v. Johnson*, 84 Cal.App.2d 271, 274, 190 P.2d 243; *Louie v. Hagstrom's Food Stores*, 81 Cal.App.2d 601, 610, 184 P.2d 708; *Tschumy v. Brook's Market*, 79 Cal.App.2d 556, 561, 180 P.2d 933; *Miller v. Pacific Constructors, Inc.*, 68 Cal.App.2d 529, 546, 157 P.2d 57; *Bush v. Los Angeles Ry. Corp.*, 63 Cal.App.2d 464, 467, 146 P.2d 491; *Thompson v. B. F. Goodrich Co.*, 48 Cal.App.2d 723, 727, 120 P.2d 693.

[5,6] Where there is no showing of passion or prejudice on the part of the jury in arriving at the amount of the verdict, it cannot be said that the amount is excessive as a matter of law. *Walker v. Adamson*, 9 Cal.2d 287, 290, 70 P.2d 914; *Moran v. Zenith Oil Co.*, 92 Cal.App.2d 236, 244, 206 P.2d 679. No such showing is made. The amount of the verdict was considered and approved by the trial judge on a motion for a new trial. At the time of the accident plaintiff was in excellent

physical condition. Her special damages were \$1885.36. She sustained multiple fractures of the left ankle. There were two complete independent fractures: 1. An oblique complete fracture of the lateral malleolus of the fibula (the calf or smaller of the two bones of the legs) with marked posterior displacement of the distal (end) fragment. The distal fragment of the lateral malleolus was displaced slightly lateralward and slightly posteriorly. The malleolus is the rounded lateral projection of each bone of the leg at the ankle. 2. A transverse complete fracture of the medial (middle) malleolus of the tibia (the shin or larger of the two bones of the leg) about 1½ or 2 inches above the ankle joint with posterior and downward displacement of the distal fragment. There was a wide separation or gap—about 1 or 1½ inches—of two fragments of bone between the medial malleolus. There was a posterior dislocation of the astragalus at the ankle joint. The astragalus was tilted inward. The astragalus is the proximal or central bone of the foot which receives the weight of the body. All of the ligaments between the ankle joint and the malleolus were torn. The function of the ligaments is to hold the bones in normal apposition, to maintain the foot stable. Plaintiff sustained a laceration in the center of the forehead just within the hairline and another about 1½ inches long at approximately the vortex of the skull. One laceration was completely through the scalp, the other partially through. She was in bed about a month with her foot elevated. She wore a cast for 10 weeks extending from the toe to the knee. She was compelled to walk on crutches for 4 months. Thereafter she used a cane for 3½ months. X-ray pictures taken in November, 1948, showed that one bone had not united. After the accident plaintiff developed a bursitis of her shoulder, i. e., "an inflammation or irritation of the small fluid-like sac \* \* \* which acts as a guide sac over which the muscles and tendons glide," resulting in a para-arthritis, which is a stiffening of the shoulder. She was under the care of a physician from the time of the accident until the trial on

January 10, 1949, and had not been able to work during that time. At the time of the trial she was unable to go downstairs normally; if inadvertently she started to go, she suffered severe pain. She had to go sideways because she could not bend her ankle. When she reached or tried to lift anything, she had a dull pain in her shoulder and arm. She had headaches occasionally. Some of her headaches felt as if there were a clamp on her head. At times she had ringing noises in her head. This had happened every few days from the time of the accident. She had a sore spot back of her hairline which was sensitive to the touch. She was required to wear an elastic stocking. There was evidence that she sustained these permanent injuries: Alteration of her normal ankle functions; enlargement of the ankle; some stiffness; some discomfort when she uses her ankle in walking considerably; for the rest of her life she will have some pain which will be worse in inclement weather; she will not be able to be on her feet more than 2 or 3 hours daily; she will be unable to do work which involves a good deal of walking or standing. The award of \$14,385.51 was not excessive. See *Kircher v. Atchison, T. & S. F. Ry. Co.*, 32 Cal.2d 176, 186, 195 P.2d 427; *Welch v. Sears, Roebuck & Co.*, 96 Cal. App.2d 553, 215 P.2d 796; *Pederson v. Carrier*, 91 Cal.App.2d 84, 204 P.2d 417; *Buswell v. City & County of San Francisco*, 89 Cal.App.2d 123, 200 P.2d 115.

#### Appeal of Edith Jones

Edith Jones adopts the points advanced by The Howard Zink Corporation. The only point she argues is that the court committed prejudicial error in refusing to give the following instruction: "As you have been instructed, one of the questions we must decide in finding whether or not one person is liable for injury to another, is whether or not the conduct in question was a proximate cause of the injury in question. This inquiry may involve the conduct of two or more persons acting independently and at different times. To explain the problem presented by such a situation, I shall refer to the person whose

conduct came first in point of time as the first actor and to the other person as the second actor. If the first actor foresaw, or by exercising ordinary care would have seen, that a second actor probably would conduct himself as the second actor actually did, and also that the combination of the first actor's conduct and the second actor's conduct probably would cause injury to a third person, and if the combined conduct did so result, then each actor's conduct was a concurring proximate cause of that injury—although, of course, neither would be liable unless his conduct was negligent. But if the first actor's conduct alone did not cause the injury, and if a combination of results such as I have mentioned was not foreseen by him as a probability, and was not so foreseeable in the exercise of ordinary care, then the first actor may not be held liable for any injury of which the second actor's conduct was a proximate cause or which now may appear to have resulted from the combined conduct of both." California Jury Instructions—Civil Alternate No. 104-C-1948 Pocket Parts, p. 43.

Jones says that she contended at the trial that the negligence of The Howard Zink Corporation "employee, in closing the door, was an intervening or superseding cause and that if there was any negligence on appellant's [Jones'] part it was not a proximate cause of the event." She argues that "whether the act of the employee operated as an intervening cause was a question of fact for determination by the jury under proper instructions," citing *Stockwell v. Board of Trustees*, 64 Cal. App.2d 197, 204-205, 148 P.2d 405, and "that the question, whether the negligent act of the corporation's employee was an independent proximate cause of the injury, was a question of fact." She says it was prejudicial error to refuse the instruction.

[7-9] Appellant Jones does not distinguish between an intervening force and a superseding cause. "An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." Rest., Torts, sec. 441. "A superseding



cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." Rest., Torts, sec. 440. A superseding cause relieves the actor from liability; an intervening force does not unless it is a superseding cause. Rest., Torts, secs. 442-453 and comments thereto. She also confuses an "independent intervening cause" and a "dependent intervening cause," as applied to the facts. "An independent intervening cause is one which operates without respect to defendant's cause. It would have been operating when and where it did if defendant's cause was wholly out of the picture. In other words it is a cause which is not caused by defendant's act. \* \* \* A dependent intervening cause is one which is caused by the tortfeasor act. If the intervening act is stimulated or incited by defendant's act it will be dependent, but it need not be stimulated or incited, it is sufficient if it were merely caused by defendant's act." Carpenter, Rules for Determining Proximate Cause, 20 Cal.L.Rev. 484; see also Rest., Torts, sec. 441, comment c.

[10,11] The instruction is not a correct statement of the law. It would have told the jury that negligence of Jones was not a proximate cause unless she did foresee, or by the exercise of ordinary care would have foreseen, the identical consequence that happened. There is no question but that Jones was negligent. She constructed the overhead door, knowing that in opening and closing it would extend at least 4 feet into the alley in violation of the ordinance. She leased the building. She knew that the lessee would open and close the door. She permitted the door to remain in that condition to the time of the accident in violation of the ordinance. The wrongdoing of Jones continued to be potentially active until the accident. The question to be decided by the jury was not whether she did foresee, or by the exercise of ordinary care would have foreseen, the identical consequence that happened, in order that her negligence be a proximate cause of the injury. The ques-

tion was whether it was reasonably foreseeable that injury was likely to occur. Her duty "is measured by the standard of foreseeability of injury to the eyes of a reasonably prudent man having regard for the accompanying circumstances. *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 216, 157 P.2d 372, 158 A.L.R. 872; 1 *Shearman & Redfield on Negligence*, sec. 24; Rest., Torts, secs. 284, 289, 290." *Gibson v. Garcia*, 96 Cal.App.2d 681, 216 P.2d 119, 120.

[12-14] The facts in the case at bar do not involve the conduct of two or more persons acting "at different times." as stated in the instruction. They involve the conduct of two persons acting at the same time. "If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby." Rest., Torts, sec. 449. Foreseeability in causation means foreseeability of intervening cause only; it does not include foreseeability of consequences. Carpenter, Proximate Cause, 16 So.Cal.L. Rev. 280. A consequence which follows directly either from the defendant's act or from a foreseeably caused intervening act is proximate. Carpenter, Proximate Cause, 16 So.Cal.L.Rev. 18. A primary act of negligence may be so continuous in its character that it conjoins with an act of negligence committed by another at a later time. *Cummings v. Kendall*, 34 Cal.App. 2d 379, 382, 93 P.2d 633. Where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as a superseding cause; but each of the two concurring acts of negligence will be held to be a proximate cause. *Lacy v. Pacific Gas & Electric Co.*, 220 Cal. 97, 98, 29 P.2d 781; *Taylor v. Oakland Scavenger Co.*, 17 Cal.2d 594, 602, 110 P.2d 1044; *Rae v. California Equipment Co.*, 12 Cal.2d 563, 570, 86 P.2d 352; *Northwestern Ins. Co. of Milwaukee, Wisconsin v. Rogers Pattern & Aluminum Foundry*, 73 Cal.App.2d 442,

444, 166 P.2d 401. The negligence of Jones was the primary act of negligence. It continued and existed up to the time of the injury. It conjoined with the negligence of The Howard Zink Corporation. The act of the latter was to be anticipated. It was foreseeable. It was an intervening force in the chain of causation. Such intervening force was not a superseding cause and did not break the chain of causation where what occurred was reasonably foreseeable. *Mosely v. Arden Farms Co.*, 26 Cal.2d 213, 218, 157 P.2d 372, 158 A.L.R. 872; *Katz v. Helving*, 215 Cal. 449, 451, 10 P.2d 1001.

In the recent case of *Gibson v. Garcia*, 96 Cal.App.2d 681, 216 P.2d 119, 121, we said: "It is well-settled that proximate causation is not always arrested by the intervention of an independent force. If the original negligence continues to the time of the injury and contributes substantially thereto in conjunction with the intervening act, each may be a proximate concurring cause for which full liability may be imposed. *Gerberich v. Southern Calif. Edison Co.*, 5 Cal.2d 46, 53 P.2d 948; *Lacy v. Pacific Gas & Electric Co.*, 220 Cal. 97, 29 P.2d 781; *De Corsey v. Purex Corp.*, 92 Cal.App.2d 669, 675, 207 P.2d 616. \* \* \* [I]n order to prevent an intervening act from being a superseding cause which will relieve the defendant of responsibility for his negligence, the law does not inevitably require that the precise act be foreseeable. Numerous cases have declared that if the defendant's conduct exposes persons in the class to which plaintiff belongs to a foreseeable risk of injury, and his act or omission contributes substantially to injury of that nature actually occurring, he may be held liable notwithstanding the fact that an unforeseeable independent intervening act is a concurring cause. *Prosser on Torts*, pp. 369-372, and cases cited; *Sandel v. State*, 115 S.C. 168, 104 S.E. 567, 569, 13 A.L.R. 1268. As the Supreme Court stated in *Taylor v. Oakland Scavenger Co.*, 17 Cal.2d 594, 602, 110 P.2d 1044, 1049, 'the fact that neither party could reasonably anticipate the occurrence of the other concurrent cause will not shield him from

liability so long as his own negligence was one of the causes of the injury. *Herron v. Smith Bros., Inc.*, 116 Cal.App. 518, 2 P.2d 1012; *Sawdey v. Producers' Milk Co.*, 107 Cal.App. 467, 290 P. 684.' See, also, *Rodriguez v. Savage Transportation Co.*, 77 Cal.App.2d 162, 168-169, 175 P.2d 37. The principle is recognized in section 435 of the Restatement of Torts: 'If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm *or the manner in which it occurred* does not prevent him from being liable.' (Emphasis added.)" See also *Carroll v. Central Counties Gas Co.*, 74 Cal.App. 303, 240 P. 53.

[15, 16] On the facts the negligence of Jones was a direct proximate cause of the injury. The acts of the defendants operated concurrently to produce the injury. The jury was fully and fairly instructed on negligence, proximate cause, and contributory negligence. It was told that plaintiff could not recover against Jones unless it found that Jones was negligent, that her negligence was a proximate cause of the injury, and that plaintiff was not guilty of contributory negligence. The jury was also told that "the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions, is regarded in law as a proximate cause." As the acts of Jones and The Howard Zink Corporation operated concurrently, there was no error in refusing to instruct the jury on the subject of superseding cause. *Traylen v. Citraro*, 112 Cal.App. 172, 176, 297 P. 649. It is the duty of a trial court to refuse a requested instruction which incorrectly states the law. 24 Cal.Jur. 802, sec. 77. The offered instruction was properly refused.

Judgment and order affirmed.

WOOD, J., concurs.

SHINN, Presiding Justice.

I concur. The manner in which the jury was instructed illustrates a practice that has

grown up in the matter of instructions which I believe calls for comment.

Many lawyers share the belief that instructions are given little consideration in the deliberations of jurors. While this may be true in some cases, I believe they follow them to the extent they understand them and give up only when they become bewildered. I also believe that juries are usually instructed at such length and with such a superfluity of legal words and phrases as to make it impossible for them to separate the wheat from the chaff. But lawyers hold to their prolixity and to their pompous definitions just as medical witnesses hold to their Latin, although they would discover, upon slight inquiry, that laymen have as little respect for the one as for the other, and not much more understanding. The legal profession has not only failed to progress in this branch of procedure, but in some respects has retrogressed. The time was when trial lawyers understood the importance of instructing juries in a manner that would aid them in applying principles of law to established facts. It was recognized that in reaching a decision upon a factual issue, as, for instance, negligence, the jury would have to determine first what was the conduct of the party charged with negligence. If the conduct consisted of driving a vehicle, the jury might have to decide whether it was driven in violation of statutory law or without the exercise of ordinary care. It was the practice in a case of this kind to state the facts hypothetically, and in the alternative; under certain facts the jury was to find negligence, under other facts that there was no negligence. Under this practice the party in whose favor a rule of law operated would receive the full benefit of it, if the facts were found in his favor. If this procedure had been followed in the present case, a proper instruction as to the alleged negligence of Howard Zink Corporation would have read as follows: "If you conclude from the evidence that the employee of Howard Zink Corporation, in closing the warehouse door, failed to exercise the care that would have been exercised under the circumstances by a person of ordinary prudence you should find de-

fendant Howard Zink Corporation guilty of negligence." As to the claimed negligence of plaintiff a proper instruction would have been: "If you find that plaintiff, in passing by the warehouse door, failed to exercise the care that would have been exercised under the circumstances by a person of ordinary prudence, you should find plaintiff guilty of negligence." Instead of simple instructions such as I have suggested, eleven instructions on negligence and contributory negligence were given. These were all stated in cold, abstract terms, and involved a considerable amount of repetition. Together, they constituted an abstruse treatise on negligence of such length as to fog the minds of the jurors. If we agree with Dr. Millikan that an educated person is one who can concentrate for more than two minutes on a given subject, and if we assume that the average juror is not possessed of super intelligence, it would seem to follow that a few brief, clear, instructions applying legal principles to specific facts would serve a better purpose than eleven which stated the same principles in broad general terms and at unnecessary length.

My next comment is upon the instructions on proximate cause. These were three in number, although the words "proximate cause" are found in numerous of the other instructions. One of the instructions read as follows: "The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies." The instruction on intervening agency that was refused is substantially in the form of one that is commonly used. But even if the errors in it had been corrected it would not have been a satisfactory instruction. While it is customary to give these abstruse instructions on proximate cause and intervening agency, I doubt that they have ever had an effect upon the mind of an average juror except



to confuse him. He is required to decide for himself whether certain conduct operated "in natural and continuance sequence," a phrase that is calculated to becloud his thinking. He must decide whether the conduct of a party "necessarily" set in operation the factors that accomplished the injury. Is he to distinguish between results reasonably to be anticipated and "necessary" results, and if so, how is he to draw a distinction? One cause is the "efficient cause," which "necessarily sets in operation the factors that accomplish the injury" and the other is the "efficient intervening cause that produces the injury." I doubt that jurors comprehend these confusing terms or even remember them. I believe they decide, as they should, that the negligence of the driver of a vehicle was a proximate cause of a collision if he was driving in a manner that was likely to cause a collision. The operation of the doctrine of proximate cause should be illustrated by application to the facts of the case, without attempt at definition. The definition of proximate cause that is commonly used was taken from *Sherman & Redfield on Negligence*, section 34, 1941 Revised Edition. It is a statement of theory addressed to students of law, and was not proposed by the authors as a definition to be incorporated in instructions.

Juries do not decide the question of proximate cause, as such. They determine what the conduct of the parties was, whether it was negligent, and whether the negligent conduct was a cause of the injury. The factual decision as to the conduct of a party always furnishes an answer to the question of negligence and almost always to the question of proximate cause. Just as the jury should be instructed that specific conduct would or would not constitute negligence, so it should be instructed that upon one hypothetical set of facts deducible from the evidence, certain negligent conduct would be a proximate cause of the injury, and upon an opposing set of facts it would not be a proximate cause. For illustration, in the present case, with reference to the conduct of the Howard Zink employee, it would have been proper to instruct to the effect that if it was found

he was negligent in closing the door and that his negligence was the cause or one of the causes of plaintiff's injury, such negligence would be a proximate cause of the injury. No other reasonable conclusion could have been reached. Likewise, it would have been proper to instruct that if it was determined that plaintiff in passing by the door was guilty of negligence, without which she would not have been injured, her negligence was a proximate cause of her injury. This also would result as a matter of law. As to defendant Jones, owner of the warehouse building, it was undisputed that the door was maintained in violation of the city ordinances. The jury could properly have been instructed on this subject as follows: "If you find it was reasonably to be anticipated that the opening or closing of the warehouse door would cause injury to pedestrians using the alley, and that plaintiff was injured in this manner, you should find that the maintenance of the door in violation of the ordinances was a proximate cause of plaintiff's injury."

Not only in the instances I have mentioned, but in every case, the jury must find the facts as to conduct from which it would follow, as a matter of law, whether such conduct was a proximate cause of an injury. Arguments to the jury on proximate cause are necessarily based upon opposing assumed facts. These furnish a yardstick, which is all the jury needs. Instructions should follow the same pattern. Abstract instructions furnish only a slide rule, which the jurors probably are unable to use.

Altogether, 69 instructions were given, 57 of which were taken from the book entitled "California Jury Instructions" or "Book of Approved Jury Instructions." They cover 33 pages of the reporter's transcript; 15 of them, covering 7½ pages, related to damages alone. Although all were correct statements of legal principles, not one of them was redrafted so as to fit any supposed set of facts upon which any of the parties relied. And I remark again that instructing at such length as to overtax the minds and endurance of the jurors defeats its own purpose. More-

over, numerous and repetitious instructions upon a single phase of the case tend to place undue emphasis upon it.

My comments are not critical of the able trial judge, the very capable lawyers in the case, or the form book of instructions. This work has been of considerable assistance to attorneys and the courts. I am sure, however, the authors did not intend it to be used, and that it should not be used, so as to relieve the attorneys in the case of all initiative and responsibility. I criticize the practice which assumes that jurors have unlimited capacity for the assimilation of legal phraseology. Lawyers know it is not true but continue to use their stilted, formal instructions. The rules of law applicable to the ordinary case can be stated simply, and in language a layman can understand. But what is more important, they can easily be made to fit the facts of the case. There are several good law review articles upon the general subject. Trusty, "The Value of Clear Instructions," 15 Univ.Kan.City L.Rev. 9; Chestnut, "Instructions to Jurors," 6 Ky.State B.J. No. 3, p. 48; 98 U.Pa.L.Rev. 223; 28 Ky.L.J. 469; 19 Iowa L.Rev. 603.



97 Cal.App.2d 467

**CHILD v. STATE PERSONNEL  
BOARD et al.**  
Civ. 7766.

District Court of Appeal, Third District,  
California.  
May 11, 1950.

Rehearing Denied June 10, 1950.

Action by Carl F. Child against State Personnel Board, a state agency, and Robert D. Gray and others, of and constituting the members of the State Personnel Board, and John F. Fisher, the duly appointed and acting executive officer of the State Personnel Board, to cancel civil service examinations

and the eligible lists established therefrom and to have all appointments made from such lists declared void. The Superior Court, Sacramento County, B. F. Van Dyke, J., entered judgment for the defendants and the plaintiff appealed. The District Court of Appeal, Peek, J., held that each person whose name appeared on lists and each person appointed from the lists was a necessary and indispensable party to the proceeding. Judgment affirmed.

**1. Officers** ⇨11.3, 11.4

Each person whose name appeared on eligible lists established from civil service examinations and each person appointed from such lists was necessary and indispensable party to action by plaintiff failing written portion of examinations to cancel examinations and eligible lists established therefrom and to have appointments made therefrom declared void.

**2. Administrative law and procedure** ⇨229  
**Officers** ⇨11.3, 11.4

Under rule of exhaustion of administrative remedies, plaintiff failing written portions of civil service examinations must petition for rehearing before State Personnel Board before instituting action against board to cancel examinations and eligible lists established therefrom and to have all appointments made from such lists declared void, notwithstanding that Civil Service Act does not expressly require that an application for rehearing be made as condition precedent to redress in the courts. Government Code, § 18500 et seq.

Herman D. Jerrett, Sacramento, for appellant.

Fred N. Howser, Attorney General, Wilmer W. Morse, Deputy Attorney General, for respondents.

PEEK, Justice.

Plaintiff, appellant herein, after being eliminated from further participation in two civil service examinations, brought an action to cancel the examinations and the eligible lists established therefrom, and to have all appointments made from such lists declared void.

By the first cause of his complaint it is alleged that the State Personnel Board, after notice thereof, conducted certain civil service examinations in accordance with the statement set forth in said notices; that he was a participant in said examinations; that although he passed said tests he was unlawfully failed in the written portion of each examination and arbitrarily barred from further participation, and that the eligible lists which were established as a result thereof and the appointments made thereunder are illegal and void.

The second cause alleges that the Board and its executive officer arbitrarily and in excess of their authority changed the method of computing the required minimum score in each of said examinations, that the said defendants acting in accordance with said altered method arbitrarily disqualified and eliminated plaintiff from further participation, and that a hearing was had before said Board but that his petition was denied. His complaint concludes with a prayer that such examinations be declared illegal and void, and that the examinations and eligible lists established as a result thereof likewise be declared illegal and void.

Defendants' demurrer was sustained without leave to amend and judgment was accordingly entered in favor of respondents. From the judgment so entered plaintiff has appealed.

At the outset it must be noted that only the State Personnel Board, its members and its executive officer are named as defendants. Neither the persons named in said eligible lists nor any of the persons appointed to positions therefrom are named as parties defendants.

[1] From the foregoing it is readily apparent that if any eligible lists so established by respondent Board are nullified in accordance with appellant's contentions the rights of each person appointed from such lists as well as every person whose name appears thereon would be injured, and hence every person appearing in either

category was not only a *necessary* but an *indispensable* party to the proceedings. *Bank of California v. Superior Court*, 16 Cal.2d 516, 106 P.2d 879; *Hartman Ranch Co. v. Associated Oil Co.*, 10 Cal.2d 232, 73 P.2d 1163. In the *Bank of California* case it is stated, 16 Cal.2d at page 522, 106 P.2d at page 884, that the requirement that all indispensable parties be before the court is "so fundamental, it need not be raised by the parties themselves; the court may, of its own motion, dismiss the proceedings, or refuse to proceed, until these indispensable parties are brought in. (Citing cases.) It follows that if the court does attempt to proceed, it is acting beyond its jurisdiction and may be restrained by prohibition."

[2] Equally fatal to plaintiff's cause was his failure, as appears from the face of his complaint, to petition for rehearing before the respondent Board. As this court stated in *Clark v. State Personnel Board*, 61 Cal.App.2d 800, 144 P.2d 84, although the Civil Service Act, Government Code, § 18500 et seq., does not expressly require that an application for rehearing be made as a condition precedent to redress in the courts, nevertheless the rule of exhaustion of administrative remedies requires a request for rehearing as a condition precedent to an appeal to the courts. See *Alexander v. State Personnel Board*, 22 Cal.2d 198, 137 P.2d 433. Additionally we stated in *Jensky v. State Board of Equalization*, 67 Cal.App.2d 612, 155 P.2d 87, that the plaintiff must affirmatively show that he has exhausted his administrative remedies, otherwise the complaint will be demurrable for that cause.

It necessarily follows that plaintiff for the reasons stated has failed to bring himself within the jurisdiction of the Superior Court and hence it becomes unnecessary to discuss the remaining contentions which he has raised.

The judgment is affirmed.

SPARKS, J., pro tem., ADAMS, P. J., concur.



97 Cal.App.2d 455

**DEAN v. DEAN.****DEAN v. DEAN et al.****Civ. 17270, 17271.**District Court of Appeal, Second District,  
Division 3, California.

May 10, 1950.

Ione Rose Dean sued Andrew Dean for a divorce and determination of property rights and Andrew Dean sued Ione Dean and another for a divorce from named defendant and equitable division of the spouses' community property. From a judgment of the Superior Court of Los Angeles County, Myron Westover, J. pro tem, denying plaintiff wife any relief, and an interlocutory judgment granting plaintiff husband a divorce and ordering defendant wife to pay him \$1000 from a bank account, the wife appealed. The District Court of Appeal, Vallée, J., held that the evidence was insufficient to establish or corroborate the husband's charge of the wife's cruelty or to support the trial court's findings that the total amount of the bank account was community property and that the husband contributed about \$1000 of such amount.

Judgment in wife's action affirmed, and judgment in husband's action reversed.

**1. Divorce ☞127(2)**

In husband's suit for divorce on ground of wife's cruelty, wife's failure to deny acts of cruelty testified to by husband did not constitute corroboration of his testimony. Civ.Code, § 130.

**2. Divorce ☞127(1, 2)**

One party's testimony or failure to testify cannot be taken as corroboration of other party's testimony for purpose of proving cause for divorce, but there must be evidence in addition to testimony of either or both of parties to support cause of action. Civ.Code, § 130.

**3. Divorce ☞127(4), 130**

In husband's suit for divorce, evidence was insufficient to establish or corroborate his charge of wife's cruelty. Civ.Code, § 130.

**4. Divorce ☞253****Husband and wife ☞264**

In husband's suit for divorce and equitable division of community property, evi-

dence was insufficient to support trial court's findings that total amount of \$4801 bank account in name of wife and her son by former marriage was spouses' community property and that husband contributed about \$1000 of such amount.

C. C. Dillavou and F. Carlton Myers,  
Los Angeles, for appellant.

James A. Starritt, Los Angeles, for respondent.

**VALLÉE, Justice.**

Plaintiff wife sued defendant for a divorce and a determination of the property rights of the parties (action No. D 347169). In a separate action, defendant sued plaintiff for a divorce and an equitable division of the community property of the parties (action No. D 347589). The complaint in each action alleged extreme cruelty. Pursuant to stipulation, the actions were consolidated for all purposes. In the action brought by the wife, judgment was entered denying her any relief. In the action brought by the husband an interlocutory judgment was entered granting him a divorce and ordering the wife to pay him \$1000 from a bank account. The wife appeals from the judgment in each action. The appeals have been submitted upon one set of briefs and will be decided in one opinion.

[1,2] Appellant's first point is that the testimony of the husband was not corroborated. "No divorce can be granted \* \* \* upon the uncorroborated statement, admission, or testimony of the parties \* \* \*." Civ.Code, sec. 130; *Truax v. Truax*, 62 Cal.App.2d 441, 444, 145 P.2d 88. The husband testified. He did not present any evidence in corroboration of his testimony. Respondent says that the acts of cruelty testified to by him "are corroborated by appellant's failure to deny, and in part by the witness Bedrna." The failure of the wife "to deny" did not constitute corroboration of the testimony of the husband. Neither the testimony of one party nor the failure of that party to testify can be taken as corroboration of that

of the other for the purpose of proving a cause for divorce. There must be evidence in support of the cause of action upon which the divorce is granted in addition to the evidence of either or both of the parties. *Stedman v. Stedman*, 179 Cal. 288, 289, 176 P. 437; *Lemberger v. Lemberger*, 55 Cal.App. 231, 235, 203 P. 786, opin. of Supreme Court on denial of hearing; *Sweet v. Sweet*, 64 Cal.App. 786, 222 P. 634; *Schmid v. Schmid*, 66 Cal.App. 765, 766, 227 P. 222.

[3] The witness Bedrna, a roomer in the house of the parties, was called by the wife to corroborate her testimony. The substance of his testimony is as follows: "There was a good deal of arguing." He heard it rather vaguely. He could not recall any of it specifically. "There seemed to be considerable antagonism and lack of ability to get together." On many occasions Mrs. Dean asked Mr. Dean to turn the radio down when it was playing late at night or loud. On rare occasions Mr. Dean did so. Mr. Dean "had a tendency to come home in the evening and sleep early and get up about 9:30 or 10 o'clock and then he would be on the move there and playing the radio and doing considerable whistling." He would play the radio until midnight, sometimes later. The witness recalled Mr. Dean saying to Mrs. Dean that she was always complaining about her health. Mr. Dean told Mrs. Dean he had rather have a Cadillac than a home. Mrs. Dean replied that she would sooner have a home, sooner conserve their resources and put those resources into some kind of a home, instead of an expensive car. Mr. Dean "was careless about being reasonably quiet." The witness complained to Mrs. Dean about the radio playing and whistling. This testimony is not sufficient to establish or corroborate the charge of cruelty made by the husband.

While in a contested divorce action where there is no collusion, the court is justified in granting a decree on slight corroboration if otherwise it is satisfied that the prevailing party is entitled to a divorce, *Cairo v. Cairo*, 87 Cal.App.2d 558, 197 P.2d 208, and where a number of charges of extreme cruelty are made, corroboration of a

single act may be sufficient, *Serns v. Serns*, 70 Cal.App.2d 527, 161 P.2d 417, in the present case there was no corroboration whatever of any of the testimony of the husband.

[4] The next point urged by the wife is that the evidence is insufficient to support a finding that a bank account of \$4801 was community property. The court found "there is community property belonging to said parties, located in the County of Los Angeles, State of California, consisting of 4,801.00 deposited in the Bank of America, 7th and Olive Branch, Los Angeles, California, in the name of Irene Rose Dean and William Russell DuShane, of which the latter deposited or contributed \$1200.00 to \$1500.00, Andrew Dean about \$1000.00 from his pay checks, etc., and the remainder by Ione Rose Dean from rooming-house operations." The finding is ambiguous. It finds that the entire bank account is community property and at the same time says that William Russell DuShane (son of the wife by a prior marriage, deposited \$1200 to \$1500. Respondent says, "The process of arithmetic by which the trial court awarded respondent only \$1000.00 from the community property is beyond the comprehension of respondent."

At the time the parties were married the wife owned 22 rooms of furniture, her separate property. She operated rooming houses under the name of Ione DuShane and continued to do so throughout the married life of the parties. From time to time she sold some and purchased other furniture. The husband took no part in the sales or purchase or in the operation of the rooming houses. Prior to establishing the bank account in Bank of America, the wife kept the money from the sales of furniture and operation of the rooming houses separate in a cash box. The wife testified that the husband did not contribute any part of the bank account, that it all came from the sale of furniture and the operation of her rooming houses, plus contributions by her son William Russell DuShane and contributions from a former husband while William was a minor. The record is in an unsatisfactory condition. We have studied the transcript and are satisfied that

the evidence is insufficient to support a finding that the total amount of the bank account was community property. We are unable to find any evidence to support the finding that the husband contributed "about \$1000.00 from his pay checks, etc."

The issue as to whether the bank account of \$4801 in Bank of America was separate property of the wife, or in part or in whole community property, should be tried anew.

The only points made by appellant in her brief are with respect to the judgment granting the husband a divorce. She makes no mention in her brief, and did not on the oral argument, of the judgment denying her relief in the action brought by her. She appears to have abandoned her appeal from that judgment. However, we have examined the transcript and find that the court was justified in either concluding that the declarations and acts of the husband testified to by the wife did not constitute cruelty; or if they did, that the testimony of the wife was not corroborated. See *Fitzsimmons v. Fitzsimmons*, 72 Cal.App. 2d 545, 164 P.2d 934; *Truax v. Truax*, supra, 62 Cal.App.2d 441, 145 P.2d 83.

The judgment in action No. D 347169 is affirmed. The judgment in action No. D 347589 is reversed.

SHINN, P. J., and WOOD, J., concur.



97 Cal.App.2d 385

**BROOKS v. STEWART, County Clerk.**  
Civ. 4073.

District Court of Appeal, Fourth District,  
California.

May 5, 1950.

Hearing Denied June 12, 1950.

Proceeding by Roy Brooks, petitioner, against Gladys Stewart, County Clerk, County of Tulare, to compel the acceptance and filing of nomination papers. From judg-

ment of dismissal by the Superior Court of Tulare County, Strother P. Walton, Judge Assigned, the petitioner appealed. The District Court of Appeal, Griffin, Acting P. J., held that the provisions of the Government Code, Sections 24300, 24301, authorizing Board of Supervisors to consolidate the duties of certain county offices, and to reconstitute the duties, if it deems the change to be in the public interest, does not require any previous notice or hearing before adoption of ordinance, or require a hearing and finding as to public interest.

Judgment affirmed.

# 1. Constitutional law 63(3)

## Counties 61

Statute authorizing Board of Supervisors to consolidate the duties of certain county offices does not, in violation of the Constitution, attempt to delegate to Board the power of the legislature to create a public office, or to fix the term of office, or to prescribe the duties thereof. Government Code, § 24300; Const. art. 11, § 5.

## 2. Counties 61

Legislature is not prohibited by the constitution from providing a method of consolidating county offices, or from prescribing manner in which it shall be effected. Government Code, § 24300; Const. art. 11, § 5.

## 3. Statutes 73(2)

Statute authorizing Board of Supervisors to consolidate the duties of certain county offices does not lack uniformity of operation, and is constitutional. Government Code, § 24300; Const. art. 11, § 5.

## 4. Coroners 2

### District and prosecuting attorneys 1

### Executors and administrators 24

### Sheriffs and constables 1

Under statutes authorizing Board of Supervisors to consolidate and reconstitute duties of certain county offices, where consolidated office of coroner-public administrator had been created, subsequent ordinance consolidated the duties of the office of district attorney and the public administrator, and the duties of the office of sheriff and coroner, were valid, though it might have been preferable for the subsequent ordinances to have expressly sepa-



rated the offices of coroner-public administrator, before consolidating them with the offices of sheriff and district attorney, respectively. Government Code, §§ 24300, 24301.

#### 5. Municipal corporations ⇨120

An interpretation which gives effect to ordinance is preferred to one which makes it void, and court should diligently seek for interpretation which will give it effect. Civ.Code § 3541.

#### 6. Counties ⇨61

Under statutes authorizing Board of Supervisors to consolidate duties of certain county offices, and to reconsolidate the duties, if it deems the change to be in the public interest, reconsolidation ordinances were not void because they did not allege therein that public interest required such action. Government Code, §§ 24300, 24301.

#### 7. Counties ⇨61

Under statutes authorizing Board of Supervisors to consolidate duties of certain county offices, and to reconsolidate the duties, if it deems the change to be in the public interest, previous notice or hearing before adoption of ordinance, or a hearing and finding as to public interest, are not required. Government Code, §§ 24300, 24301.

#### 8. Municipal corporations ⇨120

Where an ordinance, independent of the purpose expressed, is complete in itself, expression of purpose may be treated as surplusage.

#### 9. Municipal corporations ⇨120

An ordinance, authorized by statute, has the force of state law and is to be construed as such.

#### 10. Counties ⇨55

Under statutes authorizing Board of Supervisors to consolidate the duties of certain county offices, and to reconsolidate the duties, if it deems the change to be in the public interest, where reconsolidation ordinances did not recite that reconsolidation was required in the public interest, it would be presumed that Board of Supervisors deemed passage necessary in interest of the public. Government Code, §§ 24300, 24301.

#### 11. Counties ⇨55

Motives of members of Board of Supervisors at time of passing an ordinance do not affect its validity.

#### 12. Counties ⇨55

It is presumed that members of Board of Supervisors, in making laws, acted with integrity.

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Maddox & Abercrombie, Visalia, Erling H. Kloster, Visalia, for appellant.

Ralph N. Nickerson, County Counsel, Visalia, Frank B. Snyder, Deputy County Counsel, Visalia, for respondent.

GRIFFIN, Acting Presiding Justice.

Petitioner is the incumbent holder of the consolidated office of coroner-public administrator of Tulare County. The consolidated office was created by ordinance No. 19 of that county, adopted in 1886. In December, 1949, the Board of Supervisors thereof passed two ordinances Nos. 410 and 412. No. 410 consolidated the duties of the office of district attorney and the public administrator, and No. 412 consolidated the duties of the office of the sheriff and coroner, pursuant to section 24300 of the Government Code. They provided that the consolidation should take effect on the first Monday after the first day of January, 1951, and that the ordinances should take effect on the 13th day of January, 1950. Petitioner has presented nomination papers in due form for the office of coroner-public administrator to respondent, the county clerk of Tulare County. She refused to accept and file his nomination papers on the ground that said office no longer exists. Petitioner seeks this writ to require her to accept and file his nomination papers.

After the filing of a motion to strike, demurrer, and answer in the Superior Court, the trial court, upon hearing the demurrer, sustained it without leave to amend, and dismissed the proceeding. The appeal is from the judgment of dismissal. On this appeal, as in the trial court, petitioner challenges first the constitutionality of chapter 7 of part 1 of division 2 of the Government Code, and particularly as to section 24300 thereof, which provides that:

"Combinations authorized. By ordinance the board of supervisors may consolidate the duties of certain of the county offices in one or more of these combinations: \* \* \* (m) Public administrator and coroner. \* \* \* (p) Sheriff and coroner. \* \* \*

Section 24301 reads: "Reconsolidation: Separation. If the duties of officers are consolidated pursuant to this chapter, the board of supervisors, by ordinance, may elect to separate the duties so consolidated, and reconsolidate them in any other manner permitted by this chapter or separate the duties without reconsolidation, and provide that the duties of each office shall be performed by a separate person, if it deems the change to be in the public interest." These sections were added by Statutes of 1947, chap. 424, sec. 1, pp. 1104-1105.

In this respect petitioner claims that sec. 24300, *supra*, unlike former sec. 4017 of the Political Code after which it was patterned, fails to contain the necessary provision actually consolidating the duties of the several offices therein mentioned. It is claimed that sec. 24300 leaves the question of consolidation of the duties to the discretion of the board of supervisors and is therefore an unconstitutional delegation of the powers and duties of the legislature under article XI sec. 5 of our Constitution, and that any ordinance passed pursuant to that section is void, citing *People v. Johnson*, 95 Cal. 471, 31 P. 611; *Dwyer v. Parker*, 115 Cal. 544, 47 P. 372; *Ex parte Beck*, 162 Cal. 701, 124 P. 543; *People ex rel. Graves v. McFadden*, 81 Cal. 489, 22 P. 851, 15 Am.St.Rep. 66; *Cooley's Constitutional Limitations*, 8th Ed. pp. 227-8; *Board of Law Library Trustees of Orange County v. Board of Supervisors*, 99 Cal. 571, 34 P. 244, holding in principle that the powers conferred upon the legislature by the constitution are mandatory and may not be delegated. It is accordingly claimed that the people, through the constitutional provision, gave the legislature not only the power but also the duty to provide for the election, prescribe the duties, and fix the terms of office of the county officers here involved; that notwithstanding this

mandate the section attempts to delegate authority to fix both the manner of election and the duties of the offices in question and that the attempted delegation of the power to consolidate the offices here involved is a tampering with the duties and mode of election of the county officers. It is also argued that the consolidation changes the qualifications necessary to the office of public administrator because he must now, under the consolidation, be an attorney at law, citing *Government Code* sec. 24002, and that such duty, under article XI sec. 5 of the Constitution, is vested in the legislature and may not be delegated to the board of supervisors, citing such cases as *Doughtery v. Austin*, 94 Cal. 601, 28 P. 834, 29 P. 1092, 16 L.R.A. 161; *People v. Johnson*, 95 Cal. 471, 31 P. 611; *Dwyer v. Parker*, 115 Cal. 544, 47 P. 372; *People ex rel. Attorney General v. Wheeler*, 136 Cal. 652, 69 P. 435; *Coulter v. Pool*, 187 Cal. 181, 201 P. 120; *Forward v. County of San Diego*, 189 Cal. 704, 209 P. 993; *Arnold v. Sullenger*, 200 Cal. 632, 254 P. 267; *Cooley's Constitutional Limitations*, 8th Ed. p. 224; *Cleland v. Superior Court of Mendocino County*, 52 Cal.App. 2d 530, at pages 535-536, 126 P.2d 622; *County of Los Angeles v. Lopez*, 104 Cal. 257, 38 P. 42; *County of El Dorado v. Meiss*, 100 Cal. 268, 34 P. 716; and *Logan v. Shields*, 190 Cal. 661, 214 P. 45.

Many of the cited cases deal with the attempt of the legislature to delegate to the counties the power to fix compensation of county officers prior to the amendment of Art. XI, sec. 5 of the Constitution in 1933, Stats.1933, chap. 71, p. 3087, permitting a limited delegation of power in this regard. Other cases hold that the board of supervisors may not create new offices.

Article XI, sec. 5 of the Constitution provides generally that "The Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors \* \* \* and such other county \* \* \* officers as public convenience may require, and shall prescribe their duties and fix their terms of office." The legislature did, under the authority granted it, provide for

and create the public offices therein mentioned, prescribed their duties, fixed their terms of office and among them is the office of coroner and the office of public administrator. Sec. 4013, Political Code; 7 Cal.Jur. p. 421, sec. 23; (Coroner's duties), sec. 1510, Pen.Code, sec. 195, C. C.P., 6 Cal.Jur. pp. 541-3, secs. 2 and 3; and (Public administrator's duties), 12 Cal. Jur. pp. 272-3, secs. 1001-2.

[1,2] Sec. 24300, herein involved, does not attempt to delegate to the board of supervisors the power of the legislature to create a public office because such office has already been created by the legislature. That section does not attempt to delegate the power to such board to fix the term of office nor to prescribe the duties thereof. It only permits such board to *consolidate* the *duties* of such offices already created by it, and in one or more combinations specified. However, the board may elect to *separate* the respective duties that are thus consolidated. There is no constitutional provision prohibiting the legislature from providing a method of consolidating such offices, or to prevent it from prescribing the manner in which it shall be effected.

A like question was raised in *Ogle v. Eckel*, 49 Cal.App.2d 599, 122 P.2d 67, involving the construction of sec. 4041.12a of the Political Code providing that in counties of a certain classification "a county counsel *may be* appointed by the board of supervisors" etc. This court there held that the state may, through its legislature, and in the exercise of its sovereign power and will, in all cases where the people themselves have not restricted nor qualified such exercise of that power, apportion and delegate to the counties any of the functions which belong to it. It further held that the section was not invalid as a delegation by the legislature to the board of supervisors of authority to appoint a county counsel, and was not in violation of Art. XI, sec. 5 of the Constitution, as amended in 1933. In that case the purpose for the adoption of the amendment to that section of the constitution was pointed out as being for the purpose of vesting more power in the board of supervisors and to make the government of the county more

responsible to local demands. In the interests of economy and for other reasons, since 1873, boards of supervisors have been consolidating various offices either by statutory authority or by exercising an option, and this legislative authority has never, according to any reported decision brought to our attention, been successfully challenged. It would be a strained construction to now hold that section 24300 of the Government Code was inoperative to confer this right upon the board of supervisors of the several counties.

[3] When a board of supervisors consolidates the duties of certain offices under Government Code sec. 24300, such board has not literally *provided* for an election, nor *prescribed* any duties, nor *fixed* any term of office, nor prescribed any qualification. The legislature must be deemed to have contemplated in advance the several incidental results of each prescribed combination of duties.

✓ We therefore conclude that the section is not unconstitutional and that it cannot be said that such section lacks uniformity of operation. *Watson v. Greely*, 67 Cal. App. 328, 344, 227 P. 664; *Scott v. Boyle*, 164 Cal. 321, 326, 128 P. 941.

[4,5] The next point is that the two ordinances under attack, attached to the complaint as exhibits, should have first separated the offices of coroner-public administrator before consolidating them with the offices of sheriff and district attorney, respectively, and should have done so in express terms. While this procedure would have been proper, and might have been preferable, we do not consider it vital. The ordinances expressly recite that the duties of the named offices "are hereby consolidated" pursuant to sec. 24300 of the Government Code. It is quite apparent that when the board of supervisors passed the ordinances and combined the duties of the office of public administrator with that of district attorney, and the duties of the office of coroner with that of sheriff, that the duties of the offices of public administrator and coroner were thereby "separated". It was not necessary to the validity of the ordinances that the board



should distinctly and explicitly make the separation before the reconsolidation if the intention to do so was apparent. In interpreting an ordinance, an interpretation which gives effect is preferred to one which makes it void, and the court should diligently seek for the interpretation which will give it effect. *In re Maki*, 56 Cal. App.2d 635, 643, 133 P.2d 64; *In re Haines*, 195 Cal. 605, 613, 234 P. 883; *Lewis Sutherland on Statutory Construction*, 2d Ed. sec. 376 p. 721; *Pool v. Simmons*, 134 Cal. 621, 624, 66 P. 872; *People v. Steel*, 35 Cal.App.Supp.2d 748, 751, 92 P. 2d 815. Civ.Code sec. 3541.

[6] Appellant's next complaint is that the ordinances are void because they omit an allegation therein that "public interest" requires such action. Sec. 24301 states such consolidation or separation of duties may be brought about if the board "deems the change to be in the public interest". It is appellant's position that it was necessary for the board to have given prior public notice and to have afforded a full public hearing on the matter and to specifically make such a finding in the ordinances before it could properly exercise the power granted it by the legislature. The word "deem", as defined by Webster's Collegiate Dictionary, Fifth Edition, means: "To have an opinion; to think; judge; suppose." To "find" in law, means to determine and declare an issue. See, *California Employment Commission v. Malm*, 59 Cal.App.2d 322, 324, 138 P.2d 744.

[7-9] The statute conferring the right to consolidate does not require any previous notice or hearing before the adoption of the ordinance, nor does it require a hearing and finding as to public interest. It has been held that when an ordinance, independent of the purpose expressed, is complete in itself, the expression of purpose may be treated as surplusage. *In re Volpi*, 53 Cal.App. 229, 199 P. 1090. An ordinance, passed under the authority of an act of the legislature, has the force and effect of a law of the state and is to be construed as such. *City of San Luis Obispo v. Fitzgerald*, 126 Cal. 279, 58 P. 699. The ordinance recites that the "board

of supervisors do ordain as follows", and that the ordinance was passed and adopted by it at a regular meeting, duly and regularly convened. Three named supervisors voted for its adoption and two did not vote. It was signed by the chairman and attested by the clerk.

[10] Since there was no legislative requirement for a specific finding on the question of public interest or that such finding must be set forth in the ordinance itself, it must be presumed the board of supervisors deemed it necessary, in the interest of the public, to pass such an ordinance, when such ordinance was duly and regularly adopted in accordance with section 4057 of the Political Code.

[11,12] The motives of the members of the board of supervisors at the time of passing an ordinance are immaterial on the question of the validity of the ordinance. *Dobbins v. City of Los Angeles*, 139 Cal. 179, 184, 72 P. 970, 96 Am.St.Rep. 95. It is presumed that the members of the board of supervisors, in making laws, acted with integrity. *Beach v. Von Detten*, 139 Cal. 462, 465, 73 P. 187.

Judgment affirmed.

MUSSELL, J., and SHEPARD, J. pro tem, concur.



97 Cal.App.2d 572

PEOPLE v. HUDSON.

Cr. 2167.

District Court of Appeal, Third District.  
California.

May 16, 1950.

George Allen Hudson was convicted in the Superior Court of Nevada County, James Snell, J., of grand theft of a steer, and he appealed from that judgment and from an order denying his motion for a new trial. The District Court of Appeal, Peek, J., found the evidence sufficient to support the

trial court's conclusion, and concluded that comments made by the trial judge did not exhibit bias or prejudice on his part.

Judgment and order affirmed.

#### 1. Criminal law Ⓒ260(11)

Where there is evidence, circumstantial or otherwise, that a crime has been committed and that defendant was the perpetrator thereof, the appellate court will not attempt to determine weight of evidence, but will decide only whether on face of the evidence it can be held that sufficient facts could not have been found by trial court to warrant inference of guilt.

#### 2. Criminal law Ⓒ260(11)

If circumstances reasonably justify findings of court below, opinion of reviewing court that these circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference with determination of trial court.

#### 3. Larceny Ⓒ65

Evidence, including chemical analysis of blood stains on defendant's clothing, warranted conviction of defendant charged with grand theft of steer.

#### 4. Criminal law Ⓒ260(11)

In trial of criminal case without jury, an appellate tribunal will affirm or reverse the judgment of conviction upon errors of law alone, and will not examine trial court's remarks to discover whether it mentally applied correct law as case unfolded itself or in arriving at judgment.

#### 5. Criminal law Ⓒ260(11)

Where comments of trial court complained of by defendant in criminal prosecution for grand theft were but personal observations of the court on facts and circumstances of case and did not exhibit bias or prejudice, there was no reversible error.

information filed by the district attorney of Nevada county. He now appeals from that judgment and from the order denying his motion for a new trial.

Three contentions are made: (1) that the circumstantial evidence rule demands a reversal, (2) that there is no evidence, direct or otherwise, that identified defendant or showed that he was at any time in possession of the alleged stolen property, and (3) that by reason of the trial court's erroneous consideration of matters not properly in evidence the court thereby disclosed such bias and prejudice as would constitute reversible error.

Summarizing the evidence in the light most favorable to respondent it appears that on April 8, 1949, at about 7:30 p. m. one Palmerson and his son were checking cattle grazing in the Camp Beale area located between Nevada City and Marysville. As they started home, after observing that the gates were closed, they noticed a car approaching at a slow rate of speed. It was described as "an old blue car without any bumpers" and that its license number was 19-A-2202. They followed the car for some distance and it appeared to them to be loaded—the fenders were "right down on the tires." As they pulled alongside of the car they observed two men riding in the front seat. The driver refused to stop when they called to him to do so and forced them to the side of the road as he increased the speed of the car. The blue car was followed until it crashed through a gate at Camp Beale at a speed which was estimated to be in excess of 50 miles an hour. On the same evening and approximately an hour thereafter a car with the same license number and description was seen traveling easterly in the direction of Grass Valley. It was followed to where it stopped in the driveway of a house near that city. Two men were observed standing beside it. Shortly thereafter the car was driven from where it was parked to the town of Rough and Ready. On the same day at about the hour of eleven o'clock p. m. a car bearing the same license number was apprehended in the city of Marysville by the sheriff of Yuba county. The appel-

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Robert C. Schiffner, Nevada City, for appellant.

Fred N. Howser, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

PEEK, Justice.

Defendant was found guilty by the court of grand theft of a steer as charged in an

lant was riding as a passenger therein and a brother was driving. The front grill of the car was damaged and the glass of the right front head light was broken. A .22 caliber rifle and hunting knife were found in the car. Reddish stains were on the inside of the rear doors and on the left rear fender. The following morning the carcass of a Hereford steer was found in the Camp Beale area about four or five miles from where the head, with a bullet in it, and the entrails of the animal were discovered. The animal had been hacked in two crosswise in the middle of the back. It weighed approximately 900 to 1000 pounds with the hind quarters weighing approximately 275 pounds, and according to the owner who identified the animal one person would not have loaded the hind quarters into the car. The skin and head matched the remainder of the carcass. The owner further testified that in his opinion the steer had been killed within 12 to 18 hours of the time he saw it at noon on April 9th. David Burd, a state chemist, who was called by the prosecution, testified that the stains on appellant's shirt and shoes, which he was wearing at the time he was apprehended, were blood stains of a bovine animal; that a glove found in the car contained blood stains which matched a like stained glove found beside the carcass; that bovine blood and bovine hair was present on the blade of a knife which was found in the car, and that the broken glass found by the wrecked gate matched the glass of the broken headlight on the car. There was further testimony that a portion of the muffler found by the carcass of the steer matched the joint of the car where the muffler had been broken off.

Appellant did not testify in his own behalf. When arrested he told the officers that he and his brother were together from the time he left Sacramento, around one or two o'clock on the afternoon of April 8th seeking another brother who was supposed to be cutting wood in the vicinity of Grass Valley, until the time they were apprehended. Later when inquiry was made concerning the blood on his clothing he replied that he had been in a fight at a tavern near Marysville, that after leaving

the tavern he had some whiskey, and that he then passed out and remembered nothing until he and his brother were arrested.

[1, 2] Defendant, in support of his first contention, argues that not only was all of the evidence against him wholly circumstantial but insufficient as well, and since under such evidence the trial court could have consistently found that he did not commit the crime charged, this court must apply the circumstantial evidence rule as set forth in *People v. Lamson*, 1 Cal.2d 648, 36 P.2d 361; *People v. Staples*, 149 Cal. 405, 86 P. 886, and *People v. Yoder*, 35 Cal.App.2d 347, 95 P.2d 470, and reverse his judgment of conviction.

We find no merit in such contention. In the later case of *People v. Newland*, 15 Cal. 2d 678, 104 P.2d 778, 779, the Supreme Court first limited the rule as stated in the *Staples* case to those cases where the "reviewing court as a matter of law must conclude that there is no evidence, circumstantial or otherwise, that a crime has been committed, and therefore the evidence of guilt is insufficient." The court then pointed out that the *Lamson* case is authority for nothing except the reversal of the judgment therein since it was only on that point that there was a concurrence of a majority of the court, and therefore any approval of the rule as stated in the *Staples* case could not "be considered an adjudication or an effective approval of the declaration" of the rule as stated in that case. Finally the court disapproved of anything contained in the *Yoder* case inconsistent with its views as to the true enunciation of the rule which it stated was that in cases such as the present "where there is evidence, circumstantial or otherwise, that a crime has been committed and that the defendant was the perpetrator thereof \* \* \* [the] court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are



established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below \* \* \*.' In conclusion the court held that "If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. *People v. Perkins*, 8 Cal.2d 502, 66 P.2d 631, 635; *People v. Tom Woo*, 181 Cal. 315, 184 P. 389; also, *People v. Green*, 13 Cal.2d 37, 87 P.2d 821; *People v. Latona*, 2 Cal.2d 714, 43 P.2d 260; *People v. Tedesco*, 1 Cal.2d 211, 34 P.2d 467; *People v. Bresh*, 33 Cal.App.2d 161, 91 P.2d 193; *People v. Wilson*, 33 Cal.App.2d 194, 91 P.2d 207."

[3] Applying the rule as stated to the facts in the present case we cannot say that the evidence is not sufficient to support the trial court's conclusion that defendant was guilty of grand theft.

The second contention made by defendant, that the evidence was insufficient to support the judgment of the trial court, is likewise without merit and for the same reasons heretofore stated concerning the question raised in defendant's first contention.

[4,5] Appellant's final contention is predicated upon certain quoted comments of the trial judge which he argues shows that the court erroneously considered matters not properly in evidence, and for that reason exhibited such bias and prejudice as to constitute prejudicial error.

Our examination of the quoted excerpts does not support defendant's contentions

but to the contrary leads us to the conclusion that such comments were but the personal observations of the court on the facts and circumstances of the case and did not exhibit bias or prejudice on his part. Whatever may have been the expressed attitude of the trial judge as to the evidence presented or whatever may have been his opinion as to the law is of no concern to this court. "In the course of the trial the court may entertain an erroneous opinion as to the law and tentative but wrong opinion as to fact, and give expression thereto. None of these matters have any place upon appeal. In a criminal case tried by a judge alone an appellate tribunal will affirm or reverse the judgment of conviction upon errors of law alone. If errors of law in admitting or rejecting evidence have prevented a fair trial, or if the evidence does not support it, the judgment of conviction will be reversed. The court will not examine the trial court's remarks to discover whether or not it mentally applied the correct law as the case unfolded itself, or whether after completion of the evidence and argument it applied the correct law or reasoning in arriving at a judgment." *People v. Grana*, 1 Cal.2d 565, 571, 36 P.2d 375, 378. See also *People v. Lindsey*, 90 Cal.App.2d 558, 203 P.2d 572.

Examining the quoted excerpts from the comments of the trial court in light of the rule as stated in the Grana case we find nothing to support defendant's contention. Furthermore it should be noted that this question is being raised for the first time on appeal. The record discloses no objections by defendant during the course of the trial to any of the comments of the court.

For the foregoing reasons the judgment and order are affirmed.

ADAMS, P. J., and SPARKS, J. pro tem., concur.

97 Cal.App.2d 478

**EDWARD McROSKEY MATTRESS CO. v.  
FRANCHISE TAX BOARD.**

Civ. 7783.

Sac. 6070.

District Court of Appeal, Third District,  
California.

May 12, 1950.

Action by Edward McRoskey Mattress Company, a corporation, against Franchise Tax Board, substituted for Charles J. McColgan, as Bank & Corporation Franchise Tax Commissioner of the State of California, to recover franchise taxes paid under protest. The Superior Court, Sacramento County, Peter J. Shields, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Van Dyke, J., held that where managing head of corporation transferred amount owing him for salary from liability accounts of corporation to its "donated surplus" account for purpose of getting tax credit for amount of money being used in the business but without managing head receiving anything directly therefrom from corporation, sum so transferred was subject to franchise tax.

Judgment reversed.

**1. Taxation ☞376(2)**

Statute providing that if indebtedness of corporation is cancelled or forgiven in whole or in part without payment, the amount so cancelled or forgiven constitutes income to extent of value of property of corporation exceeds its liabilities immediately thereafter, includes, without exception, all gains from debt cancellation or forgiveness and the words "without payment" serve no purpose other than to emphasize that cancellation or forgiveness, to result in a taxable gain, must be gratuitous. Gen.Laws, Act 8488, § 6(d).

**2. Taxation ☞376(2)**

Where manager caused corporation's secretary to transfer amount owed manager from corporation's liability accounts to an account entitled "donated surplus" for purpose of getting tax credit for amount of money being used in the business, without receiving anything directly therefrom from the corporation, sum so transferred was "income" under statute providing that if

indebtedness of corporation is cancelled or forgiven without payment, the amount so cancelled or forgiven constitutes income to extent of value of property of corporation exceeds its liabilities immediately thereafter, and corporation was liable for the franchise tax thereon. Gen.Laws, Act 8488, § 6(d).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Income".

Fred N. Howser, Attorney General,  
James E. Sabine, Deputy Attorney General,  
Irving H. Perluss, Deputy Attorney General,  
for appellant.

Winston A. Langlois, Sacramento, for  
respondent.

VAN DYKE, Justice.

Respondent corporation was, during the period with which we are here concerned, a domestic corporation doing business within the state. As such it was subject to franchise taxes imposed by the Bank and Corporation Franchise Tax Act. Gen. Laws, Act 8488. For the taxable year ending December 31, 1941, it reported to the Franchise Tax Commissioner its net income and paid a tax thereon. On August 10, 1943, proceedings were begun to assess an additional tax, based upon a revision of respondent's net income as so reported. Administrative proceedings followed, as a final result of which respondent was compelled to pay an additional tax of \$637.24, with interest. This it paid under protest and, having exhausted its administrative remedies, it brought this action to recover the money so exacted. The situation which the commissioner claims justified the additional tax may be briefly stated as follows:

For a long time prior to the incidents which are about to be related, Edward L. McRoskey was the owner of approximately 77% of the corporation's issued stock and was also the managing head of the corporation. With the exception of a few qualifying shares his two sons owned the balance of the issued stock. McRoskey

was entitled to receive a salary of \$1,000 per month and was credited with that amount upon the books of the corporation regularly as the same accrued, but did not receive payment in full. The account was carried on the books of the corporation as a "drawing account," and as time passed the amount unpaid grew until over \$7,000 was owing to McRoskey. Then \$7,000 was taken from the "drawing account" and was transferred to another liability account of the corporation entitled "Notes Payable." The balance owing McRoskey in the drawing account continued to accumulate until on December 31, 1940, the amount owing him in both accounts totaled nearly \$30,000. On that date the corporation was solvent and had money on deposit in bank in excess of \$15,000. McRoskey instructed the secretary of the plaintiff to charge the balance to his credit in the account "Notes Payable," to the extent of \$7,375, and to charge his drawing account with \$8,000, and to credit the total, \$15,375, to an account entitled "Donated Surplus." These instructions were carried out and the respondent's books have at all times since reflected said transaction, without change.

McRoskey testified, when asked to explain in his own words what took place, that a new excess profit tax had been enacted and the secretary of the corporation had told him the corporation could not get credit for the amount of accrued salary money that it had been using unless he, McRoskey, "deeded that money to the corporation." So, said McRoskey, "since I owned most of the stock I told him to transfer that money to the corporation so that we could get the proper credit for the amount of money being used in the business, which he did." He said he had reported all of his salary through the years on an accrual basis and paid an income tax thereon, and it was his wish then to take the undrawn salary to his credit and "donate it to an account called 'Donated Surplus.'" He further said that the corporation had, through the years, deducted his salary each year in making its returns. Both he and the corporation reported on an accrual basis.

The trial court found the foregoing facts, and further found that when McRoskey's instructions to the secretary of the plaintiff were carried out, he, McRoskey, received constructive payment by the plaintiff corporation of the sum of \$15,375, which sum he thereupon donated to the capital of said plaintiff corporation, and that "said transaction did not constitute a cancellation or forgiveness of the plaintiff corporation's indebtedness which had previously been owing to Edward L. McRoskey."

At the time the foregoing events occurred, section 6(d) of the Bank and Corporation Franchise Tax Act read as follows: "If the indebtedness of a bank or corporation is canceled or forgiven in whole or in part without payment, the amount so canceled or forgiven shall constitute income to the extent the value of the property (including franchises) of the bank or corporation exceeds its liabilities immediately after the cancellation or forgiveness. \* \* \*

Appellant contended in the trial court that the sum of \$15,375, above referred to, by reason of the foregoing transactions, became a part of the taxable income of respondent corporation and that the Franchise Tax Commissioner was correct in levying the additional tax. The trial court decreed that respondent should recover the tax so demanded and paid, with legal interest, and from that judgment this appeal has been taken.

[1] The statute is plain. Whenever the indebtedness of a bank or corporation is canceled or forgiven by the creditor without payment, the amount so canceled or forgiven constitutes a taxable gain. The idea underlying the legislation is that by the event described the assets of the taxpayer are increased with exactly the same effect which results from income derived from any other source. The franchise tax is declared by the statute to be "a tax according to or measured by" the corporation's net income. The net income is to be computed by taking from the gross income, as defined by section 6 of the act, all allowable deductions. Section 6, in defining gross income, includes by the terms



of subsection (d) all gains from debt cancellation or forgiveness. There are no exceptions. Whenever and however the event occurs, liability for the tax arises.

The words "without payment" as used in section 6(d) serve no purpose other than to emphasize the idea that cancellation or forgiveness, to result in a taxable gain, must be gratuitous—a gain for which no direct consideration passed from the taxpayer. Certainly there could be no forgiveness with payment.

[2] When McRoskey, acting with a single and continuous purpose as described by himself, caused the corporation's secretary to transfer the amount owed him by the corporation from the liability accounts to surplus, he brought about the very taxable gain defined in the statute. He made void, by act of forgiveness, the chose in action he owned—he intended to do this gratuitously, that is, without receiving anything directly from the corporation. When the transaction is viewed in this light, the finding of the trial court that he received "constructive payment" is of no import. So long as his whole and continuous purpose and plan was to cancel and forgive the debt it would have mattered not at all if he had arrived at his goal by the circuitous route of first drawing the money out of the corporation's funds and then putting it back in. Whether he forgave and canceled directly as he did, or first drew out and then put back, would have made no difference if the method used was throughout a means adopted to arrive at gratuitous cancellation or forgiveness. His purpose throughout being to do that which would bring to the corporation a taxable gain as defined exactly by the statute, the fulfillment of that purpose rendered the corporation so acquiring the gain liable for the tax. Of course it is not material whether McRoskey considered that the corporation did or did not have to pay a tax upon his gratuity.

Respondent argues that because the trial court made specific findings that McRoskey received constructive payment and thereupon made a donation to the corporation, the transaction did not constitute a cancellation or forgiveness. It is elementary

that where a determination of fact is to be made, such determination made by the trier of fact, upon sufficient evidence, binds a court of review, and respondent says that this precludes this court on review from arriving at a conclusion that the corporation received a taxable gain. But the answer to this argument is that the ultimate question involved is whether or not the corporation did receive a taxable gain, not how it received it. It cannot be gainsaid that if McRoskey forgave the debt gratuitously, which he did, and the corporation thereby obtained the taxable gain described in the statute, then the tax must be paid; and the court's finding that there had been no cancellation or forgiveness as defined by the statute is but a conclusion based upon facts which do not support it. We have already said that within the framework of this statute there is no room for any doctrine of constructive payment. McRoskey himself stated plainly what occurred, and the statute just as plainly states that thereby the corporation received a taxable gain.

The judgment is reversed.

ADAMS, P. J., and PEEK, J., concur.



97 Cal.App.2d 557

**AGNEW v. CITY OF LOS ANGELES et al.**  
Civ. 17189.

District Court of Appeal, Second District,  
Division 3, California.  
May 16, 1950.

Malpractice action by Frances Agnew against the City of Los Angeles, Edwin Larson, and others. From a judgment of the Superior Court of Los Angeles County, Robert H. Scott, J., in favor of the defendant Larson, the plaintiff appealed. The District Court of Appeal, Vallée, J., held that a specialist in pathology was qualified as an expert to give an opinion as to cause of asep-

tic necrosis generally, as well as in particular case, and that refusal to permit him to testify was an abuse of discretion.

Reversed.

### 1. Evidence ⇨536

Medical expert must have the required professional knowledge, learning and skill of subject under inquiry sufficient to qualify him to speak with authority on the subject and must be familiar with the standards required of physicians under similar circumstances.

### 2. Evidence ⇨536

Where witness has disclosed sufficient knowledge of subject to be entitled to express opinion, degree of knowledge goes more to weight of the evidence than its admissibility.

### 3. Appeal and error ⇨971(2)

#### Evidence ⇨546

Qualification of an expert is ordinarily a matter addressed to sound discretion of trial court, and its ruling will not be disturbed on appeal unless clear abuse is shown.

### 4. Evidence ⇨546

Whether trial court has properly exercised its discretion as to qualification of an expert depends on whether witness has disclosed sufficient knowledge of subject to entitle his opinion to go to the jury.

### 5. Evidence ⇨544, 546

In malpractice action based on alleged negligence in not having X-ray pictures of injured hip taken, with ultimate result that aseptic necrosis of head of femur developed, specialist in pathology was qualified to give an expert opinion as to cause of aseptic necrosis generally, as well as in particular case, and refusal to permit him to testify was an abuse of discretion.

### 6. Evidence ⇨20(1)

#### Physicians and surgeons ⇨15(16)

The failure to make use of X-ray as an aid to diagnosis in cases of fracture amounts to a failure to use that degree of care and diligence ordinarily used by physicians of good standing in the community and the court, in absence of expert testimony, may take judicial notice of such fact.

### 7. Appeal and error ⇨1056(1)

In malpractice action, where plaintiff had introduced sufficient evidence from which jury could have reasonably concluded that relationship of physician and patient existed, that physician did not exercise degree of skill and care which an ordinarily prudent person should have exercised, that plaintiff suffered a complete fracture of right femur without displacement and a week later suffered a displacement, but plaintiff had not presented causal connection between alleged malpractice and alleged disability, exclusion of competent expert testimony offered to show that alleged negligence aggravated or was responsible for aseptic necrosis sustained by plaintiff, was ground for reversal.

Paul Overton, Los Angeles, and Neil G. Locke, Beverly Hills, for appellant.

Harold B. Pool, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment for defendant Larson entered on a verdict of a jury in a malpractice action. This case had been previously tried and resulted in a judgment of nonsuit. On appeal the judgment was reversed, *Agnew v. City of Los Angeles*, 82 Cal.App.2d 616, 186 P.2d 450, and the matter retried, resulting in the judgment here appealed from.

Defendant Larson is a physician and surgeon, specializing in surgery, licensed to practice in the State of California. Plaintiff had been a patient of his on a number of occasions from 1920 or 1921, the last in 1942. He had also treated other members of plaintiff's family.

In the early evening of March 3, 1943, plaintiff, then 51 years of age, slipped and fell on some wet leaves while walking on Hollywood Boulevard. She was assisted to her feet and taken to the lobby of a nearby hotel where she telephoned defendant. She was informed by his secretary that defendant was out of the city and was advised to go to the Hollywood Receiving Hospital. She did so, was examined by a physician,

and later sent home in a taxicab. During the night she suffered considerable pain and the next morning telephoned defendant again and conversed with him.

There is a sharp conflict in the evidence regarding this and three subsequent conversations between the parties. Plaintiff testified with respect to the first conversation that: she told defendant about her fall, that she was in great pain, was waiting for him to come over to see her, and that she had gone down so heavily she felt sure her hip was broken; he replied he had received a report from the receiving hospital that she was just bruised, it was not necessary for him to visit her, and that he was too busy; he advised her to put a pillow under her knee and keep any strain off her hip; he also prescribed anacin, rest and hot baths, and told her to call him the following morning.

Defendant testified that plaintiff told him about the fall and about going to the receiving hospital. He asked her whether any X-rays had been taken or suggested while she was in the receiving hospital, and she said "they had assured her she had only contusions and bruises"; she asked him if he would come and see her and he told her no, he could not and if she wanted him to attend her she would have to go to the hospital or at least have some X-ray pictures taken. He suggested a laboratory which had a portable X-ray machine that could be sent to her room. Plaintiff replied that in view of the fact she had been assured at the receiving hospital she had no breaks or injuries other than contusions, she did not want to go to the expense of hospitalization and X-rays. He told her if she felt she was in trouble she should go to the hospital or get a doctor in Hollywood.

Plaintiff testified that in the three subsequent conversations with defendant she told him her injured leg was turning out, the pain was increasing, and asked him if he did not think she should be in a hospital because it was difficult for her to get her meals when she was unable to get up and about; he said it was not necessary to send her to a hospital, she would get over this in a couple of weeks, reiterated again that

a bruise was more painful than a break; at no time was the subject of X-rays discussed by defendant.

Plaintiff was confined to her room until March 11th. She testified that on the 11th while she was leaning against a dressing table, her right ankle turned over and she heard her right hip-bone crack. She was immediately removed to the Cedars of Lebanon Hospital, and later to the California Hospital. On March 13th defendant called upon her and took charge of the case. X-rays taken on the 11th and 13th disclosed that plaintiff had suffered a complete, displaced fracture of the right femur, with rotation of the head. In the latter part of October and early November of 1943 plaintiff's knee commenced to hurt and she complained of increasing pain in her hip. Defendant told her this was not an unusual aftermath of a bone fracture, and continued activity and exercise would remedy the situation. Thereafter plaintiff sought the advice of other doctors and it was discovered that aseptic necrosis of the head of the femur had developed, from which plaintiff has suffered a permanent, crippling disability. Aseptic necrosis of the femur is a "disturbance of the circulation in the head of the \* \* \* femur"—a "loss of vitality," resulting in a stiffening of the hip.

The theory of plaintiff's case was that defendant was negligent in not having X-ray pictures taken between March 4th and 11th and that such negligence was a proximate cause of the further injuries sustained by her on March 11th and the admitted necrotic condition which later developed.

At the trial plaintiff produced three expert witnesses—Dr. John C. Wilson and Dr. Paul E. McMaster, both of whom had attended plaintiff, and Dr. Frank R. Webb.

Dr. Wilson, a specialist in diseases and injuries of bones and joints, testified he attended plaintiff from May to December of 1944, and that she had a healed fracture of the neck of the femur with an aseptic necrosis of the head. He explained that an aseptic necrosis of the femur is caused by injury to the blood vessels which supply



the head of the femur; about 50% of the patients get necrosis following a fracture; it never comes right away; you never can determine it in the beginning; it comes usually between the 8th and 12th month following an injury. On cross-examination he was asked: "Doctor, isn't it a more severe case of necrosis if it is an instance of an impacted or partial fracture? A. Yes, it is. I mean if it is—the so-called incomplete and impacted fractures are the ones that develop the aseptic necrosis. The complete fractures are less likely to than the others. \* \* \* Cracks are the ones that most often get it." He also testified that to his knowledge there was nothing a physician or surgeon could do to prevent the development of necrosis.

Dr. McMaster, an orthopedic surgeon, testified he treated plaintiff in the latter part of 1945 and has seen her off and on since then; that the last X-rays taken of plaintiff on October 21, 1948, show "evidence of degenerative changes, apparently the result of an inadequate blood supply to the head of the right femur"; the percentage of patients who developed necrosis after fractures such as sustained by plaintiff would run 25 to 30. After examining the X-rays taken of plaintiff on March 11th and 13th, 1943, he was of the opinion that she had suffered a complete fracture with displacement of the neck of the right femur, and that the condition of her right femur today was a direct result of that fracture. He was also of the opinion that on March 3, 1943, plaintiff suffered a "fracture of the neck of the femur on the right side," and at the time of her injury in her dressing room on March 11th she had "a displacement occurring at the site of the fracture \* \* \* there is a demonstrable displacement. There may have been some displacement before. That I don't know," due to the fact that no X-rays were taken between March 3rd and 11th. In answer to a question as to which injury—the injury of March 3rd or that of March 11th—would "be more reasonably probable to produce the necrotic condition" found in plaintiff, he answered that either injury in his opinion could have led to the necrotic condition of the head of the femur. He was

asked, "Would either one in your experience be more reasonably probable to lead to it? A. Well, that's difficult to say. A fracture at its occurrence, assuming that there is a fracture present in the neck of a femur, at that time interrupts the blood supply to the head. Now, the question of degree is a question of—the question of degree is apparently not the great importance that it is assumed to be." On cross-examination, he was asked, "Doctor, isn't it a fact that necrosis is more apt to or more liable to set in where you have a fracture without displacement than those cases in which you have a fracture with displacement, providing, of course, you get healing of the fracture where it was originally broken? A. Well, that has not been my experience." He also testified that it was possible for a person to walk who had sustained a complete fracture of the neck of the femur and also where there is a partial displacement.

It is unnecessary to relate the testimony of Dr. Webb since he testified as to a matter of fact which was contrary to plaintiff's expectation and contrary to what defendant conceded to be the fact, and plaintiff, therefore, did not question him further.

One of appellant's assignments of error is that the trial court committed prejudicial error in refusing to permit Dr. Vernon L. Andrews, a specialist in pathology, to testify. She argues, in effect, that up to the time of Dr. Andrews' testimony she had established a prima facie case from which the jury could have inferred that defendant was guilty of negligence during the period between March 4th and 11th; that it was then necessary for her to establish that such negligence was a proximate cause of the injury of March 11th and of the aseptic necrosis, the pivotal question being whether defendant's alleged negligence contributed to or aggravated in any way the resultant aseptic necrosis; that the testimony of Dr. Andrews would have established this causal connection.

The following indicates the circumstances under which Dr. Andrews was not permitted to testify. After appellant had been taken by surprise by the testimony of Dr. Webb, one of her attorneys asked for

a continuance to give him "an opportunity to determine whether or not I can produce in court tomorrow morning credible evidence on the points I have in mind." The motion was granted. Thereafter, without producing additional expert medical testimony, plaintiff rested with the reservation that she be permitted to reopen her case during the course of trial. Later the plaintiff was permitted to reopen her case to allow Dr. Andrews to testify.

Dr. Andrews testified to his graduation from medical school and membership in various medical societies, and that: since 1906 he has practiced the medical profession in one branch or another; he has been pathological director of the laboratory at the Hollywood Presbyterian Hospital for about 22 years; the laboratory has charge of all laboratory work, such as bacteriology, chemistry and the examination of the surgical specimens coming from the surgery; he has been in pathology for about 41½ years; in his branch of the profession he deals with living and dead tissue; the word "tissue" refers to the bone and the soft parts of the body; with respect to his work in the hospital he has had occasion to observe cases of treatment of fracture of the head of the femur and has been "asked in to see the patient" by the attending physicians and has "seen the X-ray pictures and talked with the doctor about the case"; he is a regular member of the staff of the hospital and was for one year president; there are regular monthly staff meetings—the staff being composed of licensed medical men in private practice in Hollywood and the immediate vicinity—where necrosis of the bone in general has been discussed; his work requires him to keep up with medical literature on the subjects of tissue and necrosis; he had had an opportunity to review the X-rays in evidence in this case.

Thereupon, the court stated: "The Court allowed this matter to be reopened for the purpose of presenting competent testimony. There is nothing up to this time to indicate that this witness is qualified to testify as an expert. \* \* \* The witness has given us no suggestion that he knows anything about X-rays, that he has treated any patients; there is nothing to indicate that he

is qualified to testify as an expert, and it certainly is not consistent with the representations made by you to the effect that you expected to have a competent orthopedic surgeon specialist. \* \* \* The Court has merely indicated what its views are. \* \* \* You may proceed."

Dr. Andrews then further testified that he views X-rays at the Hollywood Hospital very frequently; in connection with his particular type of practice it is necessary to have a knowledge of the anatomy of the body, the physiological aspects of the human body, the question of blood supply and what results from an interference with blood supply; that necrosis of the bone is not strictly an orthopedic problem; he does not treat patients and has not treated a patient in the last 22 years; he deals with living tissue while it is attached to the human body.

"Q. Doctor \* \* \* have you ever been actively connected with a case of necrosis of the bone? A. Simply as—consulting with the doctor in certain cases, yes.

"Q. You have consulted with doctors? A. Yes. That is, the patient comes into the house [hospital] and the doctor calls me in to look the patient over and see what pathological lesions are taking place, and I tell him what I think about the case.

"Q. In connection with forming such an opinion, has it been necessary for you to take into consideration X-rays? A. Yes, sir.

"Q. Histories? A. Yes, sir.

"Q. Doctors' conclusions? A. Yes, sir.

"Q. Do you have knowledge of the anatomy and the physiology of the femur, the human femur, Doctor? A. Well, I think so—some—yes.

"Q. What do you mean by 'some'? A. Well, the action, the muscles that extend and flex it, abduct, and so on, and it's circulation that comes to the femur, not only in the shaft of the bone but also in the head and neck of the femur.

"Q. Are you acquainted or do you have knowledge, from your own personal experience and your reading and knowledge,



Doctor, of necrosis of the bone and its causes? A. I think so.

"Q. I will ask you to state, Doctor, whether or not a determination of a cause of necrosis of a bone requires a knowledge of the anatomy and physiology of that particular portion of the body? A. It certainly does."

The witness was asked to assume facts previously testified to and was queried:

"Q. Do you now have an opinion, based upon those assumptions and based upon your experience and knowledge, and based upon your reading of the X-rays and the statement of facts, as to whether or not necrosis of the head of the femur would be more likely to set in in a case of a complete and dislocated fracture than in the case of a partial or incomplete or complete and impacted fracture, without displacement?" The question was objected to on the ground that it was "incompetent, irrelevant and immaterial, and no foundation laid for it due to the lack of qualification." The objection was sustained, presumably on the latter ground in view of the court's previous statements. Plaintiff's attorney then continued:

"Q. \* \* \* Doctor, what is the cause of necrosis of a bone? A. Lack of blood supply usually.

"Q. In relation to the question of necrosis of the head of a femur, what is the usual or ordinary cause of necrosis? A. Shutting off of the blood supply.

"Q. Where does that blood supply to the head of the femur come from, Doctor? A. In an elderly person largely through the capsular blood vessel.

"Q. What do you mean by the capsular blood vessels, Doctor? A. There is a fibrous capsule around the neck and head of the femur and the blood supply comes into the neck through this fibrous capsule."

Thereupon, without objection by defendant, the trial court stopped the examination with the following: "The Court will suggest to counsel that heretofore the Court has indicated that abstract discussions of the anatomy are not proper except as an incident to expert testimony. This witness is not qualified as an expert to testify in

this case. The plaintiff was allowed to reopen the case for the purpose of presenting expert testimony and this witness is not qualified to testify as an expert in this field. Therefore, the Court will preclude any further testimony from this witness on matters of anatomy in general, inasmuch as that is not within the type of testimony that the Court permitted to be offered upon this reopening of the plaintiff's case."

Appellant then made the following offer of proof: "I offer to prove on behalf of the plaintiff by this witness, first, that the cause of necrosis of the head of the femur necessarily involves a knowledge of the anatomy, physiology, blood supply of the femur. He has, parenthetically, in my opinion, qualified with respect to that particular knowledge. I offer to prove that with a fracture as of the site as testified to in this case, that an incomplete or complete and not displaced or impacted fracture would not, in reasonable medical probabilities, completely destroy or sever the blood supply to the head of the femur; that there would be more reasonable probability of revascularization of the head of the femur if the displacement did not occur; that a displacement of the type as shown in the X-rays taken March 11 and March 13, 1943, would in and of itself have the reasonable probability of destroying, completely destroying the blood supply to the head of the femur, with the result that necrosis would be a reasonable expectation or probability in this particular case."

The court then stated: "As indicated before, the Court allowed the plaintiff to reopen the case, which started two weeks ago today, on the representation of counsel for the plaintiff \* \* \* that competent medical or surgical testimony would be produced. A pathologist is not competent in this field. It is not consistent with the purpose for which the plaintiff's case was allowed to be reopened, and the opinion of Dr. Andrews is undoubtedly valuable in his field, but from his own testimony he is not qualified as an expert to testify in this case." An objection to the offer of proof was sustained.

We are unable to find anywhere in the record that the reopening of the case was



conditioned, as stated by the trial court, upon the production of a "competent orthopedic surgeon specialist." Plaintiff's attorneys had stated fully the opinions they expected to elicit from a qualified witness and these were the identical opinions they sought to elicit from Dr. Andrews.

[1-4] To qualify a witness as a medical expert it must be shown that the witness (1) has the required professional knowledge, learning and skill of the subject under inquiry sufficient to qualify him to speak with authority on the subject, and (2) is familiar with the standards required of physicians under similar circumstances. *Moore v. Belt*, 34 Cal.2d 525, 532, 212 P.2d 509; *Sinz v. Owens*, 33 Cal.2d 749, 753, 205 P.2d 3, 8 A.L.R.2d 757; 32 C.J.S., Evidence, § 537, page 261. Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility. *Cloud v. Market Street Ry. Co.*, 74 Cal.App.2d 92, 100, 168 P.2d 191; 10 Cal.Jur. 963; 2 Wigmore on Evidence, 3d Ed., 641; 31 C.J.S., Estates, §§ 86, 87, 88, pages 99-101. The qualification of an expert is ordinarily a matter addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless a clear abuse is shown. *Sinz v. Owens*, 33 Cal.2d 749, 753, 205 P.2d 3, 8 A.L.R.2d 757; *Mirich v. Balsinger*, 53 Cal.App.2d 103, 114, 127 P.2d 639. The determinative test as to whether the trial court properly exercised its discretion is whether the witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury. *Valdez v. Percy*, 35 Cal.App.2d 485, 492, 96 P.2d 142; *Hutter v. Hommel*, 213 Cal. 677, 681, 3 P.2d 554; *Pierce v. Paterson*, 50 Cal.App.2d 486, 491, 123 P.2d 544; *Mirich v. Balsinger*, 53 Cal.App.2d 103, 115, 118, 127 P.2d 639; 32 C.J.S., Evidence, § 537, page 261.

[5] We are of the opinion that the trial court abused its discretion in not permitting Dr. Andrews to testify. That he was qualified we think is not subject to debate. His qualifications far exceed those of the

average practicing physician. He is an adviser and consultant to other physicians on the very subjects with respect to which plaintiff was about to interrogate him. The fact that Dr. Andrews was a specialist in pathology does not, in and of itself, render him incompetent as a medical expert in the present case. The orthopedic question—e. g., the proper or improper setting of the fracture on March 13th—is not involved. The plaintiff makes no charge of negligence in this regard and the experts testified there was none. The basic medical question presented to Dr. Andrews related to the subject of aseptic necrosis. His professional knowledge, learning and skill on this subject clearly qualified him to speak with authority, and he was fully competent to give the jury his opinion as to the cause of aseptic necrosis generally and as to the cause in the present case. The applicable principle is stated in *Mirich v. Balsinger*, 53 Cal.App.2d 103, 127 P.2d 639, where an expert specializing in otolaryngology (ear, nose and throat), was held to be a competent expert witness in a malpractice action against a plastic surgeon, as follows, 53 Cal.App.2d at page 117, 127 P.2d at page 646: "Our attention is not directed to any rule, nor do we know of any, which militates against a physician trained in one school of medicine from testifying in a proper case concerning a treatment by a physician and surgeon trained in a different school. While such objection might be made in a malpractice case where the charges of negligence were directed against some special course of treatment to be tested by the teachings and doctrines of a particular school, it can have no applicability to a case like the instant one, where the general charges of negligence relate to matters within the knowledge and observation of every physician and surgeon, particularly so, where, as here, the witness testified that he had made a study of the causes of atresia; that he had seen many cases of it; that he had kept up on medical science and learning; that he had undertaken a course of plastic surgery under Professor Vincent Shehan, a national authority on the subject; and that he had watched various plastic sur-

geons work, including Drs. Smith, Kiskadden, Updegraff, Holden and Ginsberg. \* \* \* *Abos v. Martyn*, 31 Cal.App.2d 705, 713, 88 P.2d 797; *Ellinwood v. McCoy*, 8 Cal.App.2d 590, 593, 47 P.2d 796; *Hutter v. Hommel*, 213 Cal. 677, 681, 3 P.2d 554." See 2 Wigmore, Evidence, 665, sec. 569.

[6] The failure to make use of the X-ray as an aid to diagnosis in cases of fracture amounts to a failure to use that degree of care and diligence ordinarily used by physicians of good standing practicing in this community. The court, in the absence of expert testimony, may take judicial notice of this fact. *Agnew v. City of Los Angeles*, 82 Cal.App.2d 616, 619, 186 P.2d 450.

[7] Up to the time Dr. Andrews was called, there was, as appellant points out, sufficient evidence, direct or by way of inference, from which the jury could have reasonably concluded that: 1. The relationship of physician and patient commenced and existed on March 4th. 2. In not having X-rays taken during the period of March 4th to 11th defendant did not exercise the degree of skill and care which an ordinarily prudent physician should have exercised, based upon the history given him by plaintiff. 3. Plaintiff suffered a complete fracture of the right femur without displacement on March 3rd. 4. On March 11th plaintiff suffered a displacement of the fracture.

Up to the time the court halted the testimony of Dr. Andrews, there was no evidence on the part of plaintiff establishing a causal connection between the alleged malpractice and the disability of which she complains. If, as stated in the offer of proof, Dr. Andrews' testimony would have established this connection, it was an abuse of discretion requiring reversal for the court to exclude testimony showing that the negligence charged to defendant aggravated or was responsible for the aseptic necrosis sustained by plaintiff. In *Lawless v. Calaway*, 24 Cal.2d 81, 89, 147 P.2d 604, the court, notwithstanding it was satisfied there was no evidence showing that the defendant was negligent in the diagno-

sis or treatment of his patient's ailment, reversed a judgment of nonsuit because the trial court committed prejudicial error in limiting the scope of the examination of defendant doctor on the ground that it called for expert testimony and that an adverse party called as a witness under section 2055 could not be examined as an expert. The court stated, 24 Cal.2d at page 91, 147 P.2d at page 609: "Plaintiff failed, although it was incumbent upon her, to establish by expert testimony the standard of skill and care ordinarily exercised by practitioners in the community under like circumstances and that defendant's conduct in this instance was not consistent therewith. While it may be true that favorable answers to the questions propounded would not have supplied the deficiency in proof in this case, plaintiff was precluded by virtue of the trial court's ruling, from continuing with the examination of the witness and developing further the line of inquiry which might have elicited the essential expert testimony. The record shows that plaintiff's counsel asked and then withdrew certain questions in order to comply with the court's ruling. The questions to which objections were sustained were appropriate preliminaries to a more complete examination of the witness, and prejudice ensued from the cutting off *in limine* of all inquiry on a subject with respect to which plaintiff was entitled to examine defendant." Plaintiff should have been permitted to establish by the testimony of Dr. Andrews, if she could, a causal connection between the alleged negligence of defendant and the necrotic condition.

In erroneously excluding the testimony of Dr. Andrews, the court effectively denied plaintiff a fair opportunity to prove her case. The ruling was an abuse of discretion compelling a reversal. In view of our conclusion, other assignments of error—not likely to occur on a retrial—need not be noticed.

Reversed.

SHINN, P. J., and WOOD, J., concur.

97 Cal.App.2d 578

**PIKULINSKI et al. v. ATCHISON, T. &  
S. F. RY. CO. et al.**  
Civ. 4115.

District Court of Appeal, Fourth District,  
California.  
May 16, 1950.

Action by Jerome Pikulinski and Lorraine Anna Pikulinski, infants, by Anna Pikulinski, their guardian ad litem and others, against the Atchison, Topeka & Santa Fe Railway Company, a corporation and another, for death and injuries arising out of a collision of an automobile with a passenger train. The Superior Court, San Bernardino County, A. D. Mitchell, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding of trial court that railroad and its engineer were not negligent and that failure of motorist to heed warnings was the proximate cause of the accident.

Judgment affirmed.

**1. Railroads** ☞348(1, 6)

In action for damages for death and injuries arising out of collision of automobile with passenger train, evidence sustained finding of trial court that railroad and its engineer were not negligent and that failure of motorist to heed warnings was the proximate cause of the accident.

**2. Appeal and error** ☞989

When a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury, and when two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.

**3. Appeal and error** ☞1010(1)

In action for damages for death and injuries arising out of collision of automobile with passenger train on public highway crossing within unincorporated town, where no statute or ordinance fixed or limited speed of trains, questions of wheth-

er train was operated at such dangerous or excessive speed as to constitute negligence, of proximate cause, and whether railroad maintained adequate warning devices were for determination of trial court, and where its decision was supported by substantial evidence the District Court of Appeal would not interfere.

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**MUSSELL, Justice.**

Action for damages for death and for personal injuries arising out of a collision of an automobile with a diesel powered passenger train.

Mildred Murphy, Fontana, and Dorothea Mesny, Los Angeles, for appellants.

Robert W. Walker and Louis M. Welsh, Los Angeles, for respondents.

Plaintiffs are the surviving widow and minor children of Raymond Aloysius Pikulinski, deceased, and Walter Boysha, who was a passenger in a Ford automobile being driven by Raymond Aloysius Pikulinski at the time it collided with the Atchison, Topeka & Santa Fe Railway's Super Chief train at the Sierra Avenue crossing in Fontana, in San Bernardino County.

The action was tried by the court without a jury and judgment was entered for defendants. From this judgment plaintiffs appeal on the ground that the evidence is insufficient to support the trial court's findings and judgment.

**Facts.**

The accident occurred at approximately 7:26 o'clock a. m. on April 10, 1947, at the crossing named. Sierra Avenue is the main street of Fontana and is a paved, public highway running in a general northerly and southerly direction. Defendant Santa Fe's main line runs in a general easterly and westerly direction and intersects said Sierra Avenue at grade. At the time of the collision, the train was traveling in a westerly direction at a speed of approximately 70 miles per hour. The decedent was traveling south on Sierra Avenue and was driving his Ford at approximately 30 miles per hour, when he passed a car being driven by witness Nelson, approximately 220 feet



north of the railroad tracks. When the decedent's car passed Mr. Nelson, a third car, also being driven at about 30 miles per hour, passed on Nelson's east or left side. At this point Nelson noticed an automobile facing in a northerly direction, stopped just south of the south rail of the railroad tracks where said tracks intersect Sierra Avenue. When Nelson was in the vicinity of the intersection of Orange Way and Sierra Avenue, approximately 250 feet north of the tracks, he glanced up toward the automatic signal and saw that it was operating, the bell in the wigwag was ringing, the arm was swinging and the light in the round disk at the end of the arm was burning. Nelson gradually began to decrease the speed of his automobile and as he started to slow down, the Pikulinski car and the third car passed him, as stated. Nelson came to a full stop before the locomotive entered the intersection. Nelson testified that the Pikulinski automobile began to slow down as it approached the tracks and that he was under the impression that the car had come to a complete stop when it suddenly swung about after striking the locomotive of the train.

Defendant Murray, who was the locomotive engineer, testified that when approximately a quarter of a mile east of the intersection he began a series of four blasts of the locomotive horn; that he had the automatic bell ringing on the locomotive and the headlight was burning for increased visibility; that when he was approximately 30 feet from the crossing, he had finished the last of the four signals; that the crossing was then clear; that there was a car standing just north of the crossing, headed south; that when the cab was approximately in the middle of the crossing, he saw another car moving quite fast "for the situation". He looked back to see if the vehicle was going to get stopped and saw a big cloud of dust and dirt. He then applied the brakes and stopped the train.

The fireman testified as to the sounding of the signals by engineer Murray; that prior to the time the train entered the crossing, he saw two cars parked on the south side of the crossing, facing north, and saw

a car stopped "back a ways from the crossing" on the north side of the track. He saw the wigwag operating before the train entered the crossing, the bell was operating with the automatic bell ringing and the headlight was burning.

The evidence shows that the deceased collided with the middle portion of the second diesel unit of the train at a point approximately 65 feet from the front end of the locomotive.

A traffic officer testified that from a skid mark 36 feet long, found on the pavement just north of the tracks, he concluded that only one of the four brakes on the decedent's automobile was operating efficiently.

There was testimony that at the time of the accident a round "Automobile Club crossing sign" was in plain view at a point 350 feet north of the railroad track; that at a point about 190 feet from the track a crossing sign "R X R" was painted on Sierra Avenue in white; that on the northwest corner of the intersection of the railroad tracks and Sierra Avenue was a standard number one crossing sign; that the crossing was equipped with an electrically operated wigwag signal on the southeast corner of the crossing; and that said signal was set in operation when the locomotive was 3,271 feet east of the wigwag signal.

There was testimony that the decedent was thoroughly familiar with the crossing and had traversed it each day going to and returning from work during the four months prior to the date of the accident.

The photographs and diagram introduced into evidence indicate that a traveler on the highway at a point 70 feet north of the north rail of the railroad track can see 600 to 700 feet toward the east along the railroad track; and that a traveler on the highway 50 feet north of the north rail can see a distance of at least a quarter of a mile to the east along the track.

There was testimony that the wigwag mechanism was inspected by an employee of the railway company after the accident and it was found to be in good condition.

[1] Upon the foregoing evidence, the trial court concluded that the defendants were not negligent and that the failure of decedent to heed the warnings was the proximate cause of the accident. We are impelled to conclude that the evidence was sufficient to support the findings and judgment of the trial court.

[2] As stated in *Re Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689, 690: "The rule as to our province is: 'In reviewing the evidence \* \* \* all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary \* \* \* principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' *Crawford v. Southern Pacific Co.*, 1935, 3 Cal.2d 427, 429, 45 P.2d 183, 184."

[3] It is contended that the train was being operated at an excessive rate of speed. In this connection, the evidence shows that Fontana is unincorporated and there is no statute or ordinance fixing or limiting the speed of defendant company's trains through the area. Whether or not defendants operated the train at a speed so dangerous or excessive as to constitute negligence was one of fact for the trial court. *Young v. Pacific Electric Ry. Co.*, 208 Cal. 568, 573, 283 P. 61. Likewise, the questions of proximate cause, whether the defendant company maintained adequate warning devices and whether defendants were negligent, were all for the determination of the trial court, and where, as here, its decision is supported by substantial evidence, an appellate court will not interfere.

The finding of the trial court that "Mr. Pikulinski, apparently oblivious to the warnings being heeded by other motorists, drove into the side of the train" is supported by

the evidence and in the circumstances here shown, plaintiffs cannot recover. *Koster v. Southern Pac. Co.*, 207 Cal. 753, 279 P. 788.

Judgment affirmed.

GRIFFIN, Acting P. J., and SHEPARD, Justice pro tem., concur.



97 Cal.App.2d 497

**MACK v. WHITE.**

Civ. 17653.

District Court of Appeal, Second District,  
Division 2, California.

May 15, 1950.

Rehearing Denied May 26, 1950.

Hearing Denied July 13, 1950.

Action by Bessie Mack against Leon M. White to recover money obtained by defendant from plaintiff through fraudulent representations. The Superior Court of Los Angeles County, Ben V. Curler, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, McComb, J., held that evidence supported finding that plaintiff deeded realty to defendant in reliance upon his promise to marry her, and that public policy and statute providing no cause of action arises for breach of promise of marriage did not bar plaintiff's action.

Judgment affirmed.

#### 1. Appeal and error ⇨193(4)

Where a complaint alleges fraud in general terms and the parties go to trial without filing a special demurrer to the complaint on ground that fraud has not been sufficiently alleged, such infirmity in complaint is waived, and may not be successfully urged for first time on appeal.

#### 2. Fraud ⇨41

Complaint alleging that defendant fraudulently represented to plaintiff that he intended to marry her, if plaintiff would authorize defendant to receive one-half of sales price for certain realty, and that,

plaintiff on strength of defendant's promise and relying on his representations, authorized defendant to receive such money, was sufficient.

**3. Breach of marriage promise**  $\S$  14

Action to recover damages for having obtained money from plaintiff through fraudulent representation by defendant that he intended to marry plaintiff was an action for obtaining money upon fraudulent representations, and not one for breach of promise to marry, which would be outlawed by statute. Civ.Code,  $\S$  43.5(d).

**4. Frauds, statute of**  $\S$  119(1)

Where plaintiff sought damages from defendant for having obtained money from plaintiff through fraudulent representations by defendant that he intended to marry her, action was not founded upon a contract, but was an action ex delicto, and was not barred by statute of frauds. Civ.Code,  $\S$  1624.

**5. Fraud**  $\S$  58(4)

In action to recover damages from defendant for having obtained money from plaintiff through fraudulent representations by defendant that he intended to marry her, evidence supported finding that plaintiff relied on defendant's promise to marry her before dividing with him proceeds from sale of her property.

**6. Deeds**  $\S$  208(1)

**Fraud**  $\S$  36

In action to recover damages from defendant for having obtained money from plaintiff through fraudulent representations by defendant that he intended to marry her, testimony that at time plaintiff executed deed she did not intend to make a delivery thereof to defendant, that she did it to show her good faith and in reliance upon his promise to marry her, and that defendant told her deed was not any good and that he had burned it, supported trial court's implied finding that deed was never delivered, and execution of deed to realty showing title in plaintiff and defendant as joint tenants did not deprive plaintiff of her right to recovery.

**7. Fraud**  $\S$  36, 58(4)

In action to recover damages from defendant for having obtained the money

from plaintiff through fraudulent representations by defendant that he intended to marry her, fact that plaintiff and defendant lived in a meretricious relationship for a number of years tended to prove that plaintiff relied implicitly on defendant's promises, and did not bar plaintiff's recovery.

**8. Fraud**  $\S$  36

In action to recover damages from defendant for having obtained money from plaintiff through fraudulent representations by defendant that he intended to marry her, where sole issue presented by pleadings was whether defendant had perpetrated a fraud upon plaintiff, fact that they maintained a concubinary relationship, did not preclude recovery on ground of public policy.

**9. Appeal and error**  $\S$  1170(5)

Where appellant contended that trial court received evidence which was outside issues presented by pleadings, but did not indicate that such evidence was in any way prejudicial, District Court of Appeal was required to disregard any such alleged error. Const. art. 6,  $\S$  4½.

**10. Appeal and error**  $\S$  1011(1)

In action to recover damages from defendant for having obtained money from plaintiff through fraudulent representations by defendant that he intended to marry her, where there was conflicting evidence as to whether defendant made fraudulent representations which were relied upon by plaintiff, question was presented for determination of trier of fact, whose decision upon conflicting or contradictory evidence was binding upon the District Court of Appeal.

Nat Wilk, Los Angeles, for appellant.

Anna Zacsek and Henry Silver, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff in an action to recover damages from defendant for having obtained money from plaintiff through fraudulent representations, defendant appeals.



Prior to the events narrated herein plaintiff was married to a Mr. Mack and was still married to him when in 1934 she and defendant commenced living together as husband and wife and so continued until February, 1948. She did not procure a divorce from her former husband until 1937. In 1939 she and defendant purchased a piece of real property for \$2,800, plaintiff making the down payment of \$350.00, and defendant making all the monthly payments thereafter until the property was sold in 1947 for \$8,000. By the transaction they each netted \$3,229.92. At the time the property was purchased defendant was employed by the Works Progress Administration and for that reason title to the property was taken in plaintiff's name. Repeatedly during the time they lived together defendant promised to marry plaintiff and finally when she became insistent that he do so, he said he would when she put the title to the property in their names jointly. In 1946, in order to show her readiness "for sacrifice," plaintiff went to a notary public and signed a purported deed in which the property was placed in the name of plaintiff and defendant as joint tenants. In February 1947, the property was sold and plaintiff gave defendant half of the proceeds of the sale in consideration of his promise to marry her. Defendant admitted that he did not at any time intend to marry plaintiff and on February 2, 1948, plaintiff left defendant and thereafter demanded return of the money which she had given him in consideration of his promise to marry her.

*Questions:* First: *Since the allegations of fraud in the complaint were in general terms and not of specific facts, did the complaint fail to state a cause of action against defendant for obtaining money from plaintiff through fraudulent representation?*

[1] This question must be answered in the negative. It is the general rule that where a complaint alleges fraud in general terms and the parties go to trial without

filing a special demurrer to the complaint on the ground that fraud has not been sufficiently alleged, such infirmity in the complaint is waived and may not be successfully urged for the first time on appeal. (Campbell v. Genshlea, 180 Cal. 213, 218, 180 P. 336; McKay v. New York Life Ins. Co., 124 Cal. 270, 273, 56 P. 1112.)

In the present case the complaint alleged fraud in general terms, to wit: "\* \* \* defendant fraudulently represented to plaintiff that he had the intention of entering into a valid marriage relationship with her, if plaintiff would authorize defendant to receive one half of the sales price for said property, deposited at the escrow department of the Security First National Bank of Los Angeles \* \* \*"; and that "on or about the same time, plaintiff on the strength of defendant's promise and relying on his representations, plaintiff gave her consent and authorization that defendant could receive said money."

[2] Neither a general nor special demurrer was filed to the complaint, and the parties went to trial on the theory that the complaint stated a cause of action for fraud. Hence the above rule is applicable and the defendant may not at this time urge that the complaint failed to state a cause of action.

Second: *Was plaintiff's cause of action outlawed by the Anti-Balm Statute, Civil Code 43.5(d)?*<sup>1</sup>

[3] This question must be answered in the negative. The present action is not one for breach of promise to marry but is an action for obtaining money upon fraudulent representations. Hence section 43.5(d) of the Civil Code has no application to the case.

Third: *Was plaintiff's cause of action barred by the Statute of Frauds, section 1624 of the Civil Code?*<sup>2</sup>

[4] This question must also be answered in the negative. The section of the statute

1. Section 43.5 of the Civil Code reads in part as follows: "No cause of action arises for \* \* \* (d) Breach of promise of marriage."

2. Section 1624, subdivision 3 provides: "The following contracts are invalid, un-

less \* \* \* some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: \* \* \* [Subdivision] 3. An agreement made upon consideration of marriage other than a mutual promise to marry."

of frauds relied on by defendant is applicable to actions ex contractu, while the present action is not founded upon a contract but is an action ex delicto to recover damages for fraud perpetrated by defendant.

Fourth: *Did the evidence support the findings that plaintiff relied on defendant's promise to marry her before dividing with him the proceeds from the sale of the property which she had purchased?*

[5] This question must be answered in the affirmative. Plaintiff testified that her reason for giving him half of the sale price of the property was because she believed his representations that he would marry her if she did so.

Fifth: *Did the fact that plaintiff had executed a deed to the property showing the title in herself and defendant as joint tenants deprive her of the right to recover damages resulting from the false representation made by defendant?*

[6] This question must be answered in the negative. Plaintiff testified that at the time she executed the deed she did not intend to make a delivery thereof to defendant; that she did it to show her good faith and in reliance upon his promise to marry her. Likewise she testified that defendant told her the deed was not any good and that he had burned it. Clearly such testimony supports the trial court's implied finding that the deed was never delivered and was therefore of no effect.

Sixth: *Did the fact that plaintiff and defendant lived in a meretricious relationship for a number of years bar plaintiff's cause of action?*

[7] This question must likewise be answered in the negative. Not alone did this fact fail to deprive plaintiff of her cause of action for the wrong perpetrated upon her by defendant, but it tended to explain why she may have believed his promise to marry her. The fact that she had so much affection for him would tend to prove that she relied implicitly on his promises and there-

fore should not be barred from recovering damages for the fraud practiced by defendant.

Seventh: *Does public policy prevent plaintiff from enforcing her cause of action?*

[8] This question must also be answered in the negative. The concubinary relationship between the parties is not here the subject of investigation. The sole issue presented by the pleadings was whether defendant had perpetrated a fraud upon plaintiff. The evidence disclosing that he had done so to her damage, their personal relationship is utterly immaterial.

Eighth: *Did the trial court commit error in the admission of evidence?*

[9] This question must be answered in the negative. Defendant contends that the trial court received evidence which was outside the issues presented by the pleadings. However, he does not indicate that such evidence was in any way prejudicial. Hence pursuant to the mandate of Article VI, section 4½ of the Constitution of the State of California we must disregard any such alleged error.

Ninth: *Did plaintiff meet the burden of proof of showing fraud by clear and convincing evidence?*

[10] This question must be answered in the affirmative. The rule is established in California that where, as in the instant case, there is conflicting evidence as to whether defendant made fraudulent representations which were relied upon by plaintiff, a question arises for the determination of the trier of fact whose decision upon conflicting or contradictory evidence is binding upon an appellate court. (Beeler v. American Trust Co., 24 Cal.2d 1, 7, 147 P.2d 583.) This rule is applicable in the present case.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; SCHAUER, J., dissenting.

97 Cal.App.2d 582

**SCHMIDT v. CALLERO et al.****CHIOSSO et al. v. SCHMIDT.**

No. 14170.

District Court of Appeal, First District,  
Division 1, California.

May 17, 1950.

Action by Gerhard Schmidt against J. W. Callero, Edwin D. Chiosso and others, for a declaration that the contract for the sale of a resort to plaintiff had been rescinded, and action by Edwin D. Chiosso and others, against Gerhard Schmidt for specific performance of such contract. The cases were consolidated for trial. The Superior Court, City and County of San Francisco, Sylvain J. Lazarus, J., rendered separate judgments adverse to Gerhard Schmidt, and he appealed. The District Court of Appeal, Peters, P. J., held that Gerhard Schmidt had waived the right to rescind for non-delivery of completed title search and policy by failing to object when he was told that quiet title action was necessary before title policy could be delivered, and the vendors who apparently had acquired clear title but had failed to complete title search would be granted specific performance on their delivery of title insurance policy and deed to Gerhard Schmidt.

Judgments affirmed as modified.

**1. Specific performance ⇨94**

Vendors are entitled to specific performance of contract for sale of realty only if they have performed all terms of contract.

**2. Vendor and purchaser ⇨168**

A purchaser would not be required to pay balance of purchase price under contract stating that purchase price should be released to vendors upon completion of title search, where vendors had never completed title search.

**3. Specific performance ⇨90**

Equity will not compel purchaser to perform his contract when it cannot guarantee performance by vendor.

**4. Vendor and purchaser ⇨75**

Where neither contract for sale of resort nor any parol agreement specified definite time within which vendors should com-

plete title search and furnish clear title, vendors were entitled to reasonable time to deliver title.

**5. Vendor and purchaser ⇨159**

Purchaser waived any rights which he might have had to immediate conveyance by failing to object when he was told that quiet title action was necessary before title policy required by contract to purchase could be delivered to him.

**6. Vendor and purchaser ⇨172**

Where purchaser had not been placed in default, vendors were not entitled to interest on balance of purchase price.

**7. Specific performance ⇨101**

Where purchaser waived any right to rescind contract for vendors' failure to tender completed title search and policy as required by contract by failing to object when purchaser was told that quiet title action was necessary before title policy could be delivered to plaintiff, and vendors had apparently acquired clear title but had not yet completed title search, vendors would be granted specific performance on their delivery of title insurance policy and deed to purchaser within sixty days.

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Lorne M. Stanley, San Francisco, Douglas A. Pease, San Francisco, for appellant.

Albert Picard, San Francisco, Alfred E. Graziani, San Francisco, of counsel, for respondents.

PETERS, Presiding Justice.

Gerhard Schmidt contracted with J. W. Callero and the Chiossos for the purchase of a resort in Shasta County known as Clark Creek Lodge. The contract was entered into on March 23, 1946, and shortly thereafter Schmidt took possession. The purchase price was not paid in full, and on November 21, 1946, Schmidt served notice that he was rescinding the agreement. In May, 1947, he brought an action for declaratory relief, seeking in particular a declaration that the contract of sale had been rescinded. The Chiossos and Callero countered with an action for specific performance, and the cases were consolidated



for trial. Separate judgments were rendered in each action, both being adverse to Schmidt. The court determined that no valid notice of rescission had been given; that Schmidt had no grounds for rescission; that Schmidt should pay the balance of the purchase price; and ordered the money already in the possession of the escrow holder to be paid over to the Chiossos and Callero. From these judgments, Schmidt appeals.

The Clark Creek Lodge property, consisting of over 220 acres of land, buildings and various items of personal property, was operated as a hunting and fishing resort by Callero and the Chiossos. The sale of the property to Schmidt was negotiated through Zachary, a real estate broker. Callero and Schmidt discussed the terms of the sale in Zachary's office in March, 1946. At that time, Callero told Schmidt that he wanted to exclude from the sale a building known as the Roberts Cabin, which he desired for his personal use. Callero also stated that he wanted some additional land around the cabin on which he could build a garage and a chicken house, and that, for these purposes, he wished to reserve about an acre of land for himself. Schmidt agreed to this reservation, and told Callero that because Callero had lived in the region for so many years and knew so many people, his presence on the property would be beneficial to the Lodge's business.

Schmidt gave Zachary \$5,000, to apply on the purchase price, and a contract was drawn by Zachary and signed by the parties. It provided that Schmidt was to receive "Clark Creek Lodge, approximately 220 acres, all buildings, except cabin known as Roberts Cabin" and certain enumerated items of personal property. The balance of the \$40,000 purchase price and the bill of sale were to be placed in escrow upon the following conditions:

"1. Buyer is given title (clear) to property

"2. \$20,000.00 is placed in escrow within ten days

"3. \$15,000.00 is placed in escrow upon the sale of purchaser's home in San Francisco.

"4. Purchase price be released to Sellers upon completion of title search. That in case home of purchaser has not been sold upon completion of title search the said \$5,000.00 and the said \$20,000.00 shall be released to the Sellers and Buyer will give a promissory note for \$15,000.00 secured by the above property".

On March 27, 1946, Zachary, the Chiossos, Callero and his wife, and Schmidt met in the Redding office of Cummock, a licensed accountant, and the parties agreed to have Cummock serve as escrow holder. No written instructions were ever given to Cummock by any of the parties at this meeting. Callero again mentioned his desire to retain some land around the Roberts Cabin, and Schmidt again stated that this was agreeable to him. Schmidt gave Zachary a check for \$20,000, which Zachary turned over to Cummock, and that same day Schmidt took possession of the property. He has remained in possession until this time.

Shortly after April 1, Callero began to remodel Roberts Cabin. He was advised that extensive remodeling was impractical in view of the fact that the cabin had wooden foundations, so he tore down the cabin and on its site built a house with concrete foundations. The new house consisted of four rooms and a porch, and was completed in September or October of 1946 at a total cost of around \$17,000. The building of this house was a great source of worry to Schmidt, who feared that Callero intended to use it as a resort in competition with the Clark Creek Lodge. This fear appears to have been groundless.

In April, 1946, Cummock requested the Shasta County Title Company to make a preliminary title search. He was advised that the title was not clear. The nature of the cloud on the title is described in a letter written on October 3, 1946 by Buchtel, vendors' attorney, to Stanley, Schmidt's attorney:

"As you know, the contract drawn by the San Francisco real estate agent calls for the sale of Clark Creek Lodge containing approximately 220 acres, with a reservation of a small parcel to Callero

across Clark Creek from the Lodge. Our first problem was to have the reservation surveyed, as the description which was originally put of record some years ago did not close. This has been done, and the proper deeds and map are now recorded for that matter.

"After Chiosso and Callero acquired Clark Creek Lodge they purchased four tax titles. This matter, at first, seems comparatively simple to clear up; however, the descriptions of the tax titles are such that three of them can probably not be located on the ground. One of them, in fact, does not close, but just is a series of lines.

"The history of this property easily accounts for this in that at one time the Clark Creek area was started as a subdivision for a construction camp, and many of the original descriptions were done by people who were not surveyors. However, the perimeter description can be located on the ground and does close. In fact, there are approximately 240 acres in the Clark Creek Lodge area, and the tax title acreage amounts to less than three acres as far as we can figure. Mr Chiosso and Mr. Callero stand ready at any time to convey the area containing approximately 237 acres and can at any time give a policy of title insurance on that area. However, it has been my interpretation that when they agreed to sell Clark Creek Lodge, it should include the tax titles.

"Unfortunately the last of these tax titles was not purchased until May of 1942 and unfortunately our Title Company will not issue a policy without the reservation of re-opening of the judgment as to the tax titles for one year after the date of judgment unless the prospective period has run before the filing of the suit. Furthermore, our Title Company is very fussy about showing the non-military service of defendants that cannot be found.

"I am enclosing a copy of the Complaint. You will notice that I have used the perimeter description of the Clark Creek Lodge with certain defined exceptions that are not a part of the Clark Creek Lodge property and which can be located on the ground, and that I have set out in Para-

graph II that the defendants may claim an interest in and to the parcels therein set out, which parcels are a part of the Clark Creek Lodge property, and are the tax titles in question.

"Personally, I would like to suggest, as it was my intention to suggest to Mr. Schmidt when we called upon him, that Chiosso and Callero should now convey the 237 acres which, of course, is 17 acres more than he expected to get, and that next May we bring a quiet title suit for the three or less acres involved.

"At the time of conveyance of the 237 acres we will be willing to give a policy of title insurance and, after the quiet title suit on the tax titles is completed, we will give a continuation policy on the entire Clark Creek area.

"If this suggestion is not satisfactory we will continue with the quiet title suit and will deliver the policy as soon as possible."

Prior to the writing of this letter, Cummock and Buchtel had called on Schmidt to tell him that a quiet title suit would probably be necessary. This call was made on August 10th, and Schmidt's only comment was that he had to have a clear title. No request was made by Schmidt for immediate conveyance of a deed, no objection was made to the bringing of a quiet title action, and no objection to the delay caused by the tax title problem was raised by Schmidt.

On August 29, 1946, Schmidt wrote to Zachary, giving the latter a 45-day exclusive authorization to sell the property. The letter stated: "I can tell you one thing Bill, whoever buys the place doesn't make a mistake. If you see our Register and use your own honest judgment you can see what the place can produce. As far as I'm concerned I would never sell the property but as you know already, Mrs. Schmidt doesn't like the country and we may as well move out. The class of customers we get out here are A 1 and money doesn't mean anything, good times or bad ones." Zachary was authorized to sell the property for \$50,000 cash. Thus, it is clear that Schmidt, as late as August

29, 1946, was perfectly satisfied with his contract with Callero and the Chiossos, had no objections to the delay caused by the quiet title action, thought the property was his, but wanted to sell, at a profit, because of the objections of his wife. This explains his later actions.

On September 9, 1946, the vendors deposited in escrow a deed to the entire 240 acres.

On September 11, 1946, Stanley wrote Cummock informing him that he was Schmidt's attorney, stating that he had heard of the quiet title suit and asking for details of it. On September 26, Stanley wrote Cummock stating that he had been advised by the Shasta County Title Insurance Company that there had been a failure of title which had not been cleared. On September 27, Stanley wrote Buchtel asking for a copy of the preliminary report of the title search and for a copy of the pleadings in the quiet title action. "Also, please let me know your estimate of when you think title to this property can be cleared."

Following these communications, a lengthy correspondence between the two attorneys ensued. In this correspondence, Stanley asked that the Shasta County Title Insurance Company be substituted as escrow holder, requested information concerning the size of the Roberts Cabin tract, and the "unusual building" that was being built on the tract. Buchtel refused to change the escrow holder, gave his assurance that Callero was not going into competition with Clark Creek Lodge, and offered to furnish Stanley with a copy of the survey of the Roberts Cabin tract if Schmidt would pay the \$15 charge for such a copy. On October 8, Buchtel wrote to Stanley: "The situation is very simple in that Mr. Schmidt, if he could be reasoned with, is getting 240 acres instead of 220. We still stand ready to convey to him 237, which is more than he bargained for." On October 30, Buchtel wrote Stanley that the Roberts Cabin tract consisted of "a little over one-half an acre. \* \* \* I wish you would ascertain if Mr. Schmidt would take a conveyance with a policy of title insurance on the 237 acres of the

property involved. We, of course, would put up a bond on delivery of the good title to the three acres, and the expense would be borne by the sellers on the title insurance."

On November 21, 1946, Schmidt served the vendors with a notice of rescission. He attempted to rescind the contract "on the ground that the agreement of the undersigned to purchase the same was given because of the fraud practiced on the undersigned by you, to-wit: On your representation that you were operating said going concern with full compliance under the law; that you would deliver title forthwith; that the Shasta County Title Company would act as escrow holder; that the so-called Roberts Cabin was to be used only as a seasonal hunting or fishing cottage with a specified limited ground space; and on the further ground that through your fault the consideration for said agreement has failed; and on the further ground that such consideration has failed in a material respect; and on the further ground that such consideration is void." Schmidt offered to restore everything of value which he had received upon payment to him by the vendors of the \$25,000 he had paid on the purchase price plus the sum of \$6,000 to reimburse him for the expenditures he had made on the Lodge since taking possession.

On December 10, 1946, Buchtel wrote Stanley refusing to accept the rescission, and reiterated his offer to deliver a deed and title insurance policy to the 237 acres at once. He stated that the vendors "intend to continue to press the quiet title suit on the three unidentified floating acres to a conclusion as rapidly as is legally possible. I realize that you understand that the three acres involved were not within the area known as the Clark Creek Lodge when that Lodge was purchased by Messrs. Callero and Chiosso."

On December 23, 1946, Stanley wrote Buchtel asking for a conference to see if the difficulties between the parties could not be resolved. The conference did not take place.

On March 27, 1947, judgment was given and entered for the vendors in their quiet



title action. Buchtel notified Stanley of the entry of this judgment on the same day, and stated "We now stand ready to convey the Clark Creek Lodge property to Mr. Schmidt under the contract."

The following day Stanley replied: "I am still waiting for a letter of the title company report, a copy of the survey, a copy of the proposed deed, a copy of the survey showing the three parcels of land agreed to be delivered, a plat of the property to be delivered containing a specification of the number of acres, also the specific survey of the Roberts cabin piece. In other words, I have not received as yet anything that will show me what your clients propose to deliver."

On March 31, 1947, Buchtel replied that "If I were willing to authorize my clients to spend useless money on an additional report from the Title Company, you would find that title is vested in the Chiossos and Callero with the four exceptions therein listed. If you were to check your file you would see by my letter of March 27 that the fourth exception is the 'so-called Roberts Cabin tract.'"

On April 1, 1947, Cummock wrote the Schmidts that "I am now prepared to deliver to you a proper Grant Deed and clear title to Clark Creek Lodge property, consisting of approximately 240 acres.

"As escrow holder, demand is therefore made upon you for the sum of \$15,000.00 as the balance due set out in said Contract.

"Upon such payment I will deliver the Deed to you and request the issuance of the Policy of Title Insurance."

More correspondence between the attorneys followed, and on April 7, 1947, Stanley wrote to Buchtel a long letter reviewing the transaction, and asking again for a copy of the survey made on the property, a map showing what the property looked like, and a title company certificate of title.

No answer to this letter is revealed by the record. The present litigation followed.

[1] The vendors are entitled to judgment in their action for specific performance only if they have performed all the terms of the contract. The fundamental

question in this case is whether they substantially complied with that portion of the contract which required them to complete a title search of the property, which all parties interpret as including the necessity of tendering a title policy. Cummock testified that the title insurance company had been asked for a preliminary report on the title, but despite the frequent offers of Buchtel to supply Schmidt with a deed and title policy to 237 acres, it is clear that no title policy was ever obtained by him and no complete search was ever made. As late as April 3, 1947, when Cummock made formal demand on Schmidt for the balance of the purchase price, no title policy had yet been obtained by the vendors, and no title search had been completed. Under these conditions, Schmidt was not required by the terms of the contract to pay the balance of the purchase price. The trial court's finding that the vendors had completed their part of the transaction was based on a misunderstanding of plaintiffs' Exhibit 1. The following portion of the transcript reveals the error:

"The Court: Now, Mr. Picard, the preliminary report of the title insurance company has not been received in evidence. You remember it was received for identification. Do you feel that you are now in a position to offer it in evidence?

"Mr. Picard: Yes, I think all the deeds have been offered, if your Honor please. I think I should have offered it, I will offer it now as Exhibit 1 in evidence."

What was received in evidence as Exhibit 1 was a title insurance policy issued to the vendors in 1942 when they purchased Clark Creek Lodge. It was not a preliminary report of the title company, in connection with the transaction now before the court, nor was any such report ever submitted in evidence.

[2,3] By the terms of his contract, Schmidt was entitled to a completed title search as well as clear title, before he could be placed in default. Such a search has never been delivered to him, under the fourth condition stated in the contract, that the "purchase price be released to Sellers upon completion of title search."

Until this condition has been fulfilled by the sellers, they are not entitled to receive the purchase price. Finding VIII of the trial court, in the specific performance action, finds that "the plaintiffs have fully performed all of the terms and conditions of said contract on their part to be performed, and have always been and now are ready, willing and able to fully carry out and perform all of the terms and conditions of said contract required therein to be performed by them \* \* \*" This portion of the finding is not supported by the evidence. Equity will not compel the buyer to perform his contract when it cannot guarantee performance by the vendor. We cannot say, in the absence of evidence, that a completed title search will reveal clear title in the vendors, nor can we assure the buyer that a title insurance policy will be issued. It would therefore be inequitable to order the buyer to pay unconditionally to the vendors the balance of the purchase price, and unconditional specific performance cannot be granted. This does not require a complete reversal, however, but may be handled by a modification of the findings, conclusions and judgments as hereinafter set forth.

In his action for declaratory relief, Schmidt has asked that the court declare the rights, duties and obligations of the parties under the contract, and has also asked that the court find that the agreement between the parties has been rescinded. He asks that the court return to him the \$25,000 he has paid on the contract, \$6,000 to reimburse him for expenditures which he has made on the property, and interest.

[4] None of the grounds set forth in the notice of rescission is supported by the evidence. First, Schmidt claimed that it was represented to him that the Lodge was being operated by the vendors "with full compliance under the law." There is substantial evidence that no such representation was made to him. Furthermore, there is no evidence indicating that the resort was not being operated lawfully by the vendors at the time of sale. Second, Schmidt attempted to rescind on the ground that the vendors "would deliver title forthwith." The vendors were entitled to a rea-

sonable time to deliver title, as neither the contract nor any parol agreement specified a definite time. It must be remembered that the contract was executed on March 23, 1946, and from that date until August 10, 1946, conveyance of title was not even discussed by the parties. On August 10, Schmidt was informed by the vendors that a quiet title action would be necessary. Schmidt made no objection, and stated only that he wanted a clear title. Schmidt's attorney, who knew in September that the vendors were bringing a quiet title action, made no objection. He inquired only as to the status of the action, and asked for a copy of the pleadings. Buchtel, in his letter of October 3, 1946, replied that he was ready to convey immediate title with a title insurance policy to 237 acres. He wrote that *the following May* he would bring a quiet title suit for the three acres acquired at tax sales, and "after the quiet title-suit on the tax titles is completed, we will give a continuation policy on the entire Clark Creek area.

"If this suggestion is not satisfactory we will continue with the quiet title suit and will deliver the policy as soon as possible." In the communications which followed, neither Schmidt nor his attorney made any objection to the bringing of this action nor to the delay which would be involved. At no time did Schmidt demand an immediate conveyance of title. Any rights which he might have had to an immediate conveyance were thus waived. Thirdly, Schmidt claimed that it was represented to him that the Shasta County Title Company would act as escrow holder. The testimony of all parties other than Schmidt was that all of the parties, including Schmidt, had agreed to allow Cummock to serve as escrow holder. Fourthly, Schmidt attempted to rescind on the ground "that the so-called Roberts Cabin was to be used only as a seasonal hunting or fishing cottage with a specified limited ground space." There was no evidence that the cabin, with a limited ground space, was ever used or intended by Callero to be used for anything other than his own personal use. Schmidt's fear that the cabin was to be used as a resort in compe-

tion with the Lodge appears to have been groundless. The other grounds given for the rescission were general allegations of failure of consideration, which were without merit.

In the correspondence which preceded and followed the notice of rescission, Stanley complained that he had never received a copy of the escrow instructions, that he had not received a survey of the area involved in the sale, and that he had not received a copy of a survey made of the Roberts Cabin tract. The answers to these complaints are: First, there were no written escrow instructions, and therefore no copy could be supplied him; second, he was not entitled by the terms of the contract to a copy of the survey, and the vendors could not be subjected to this expense; third, Buchtel informed him that if he would pay \$15 for the cost of a copy of the survey of the Roberts Cabin tract, he would furnish him with a copy.

[5] It is thus apparent that, even if Schmidt had justifiable grounds for rescission inasmuch as he was not tendered a completed title search and policy, he waived this ground by failing to object when he was told that a quiet title action was necessary before the title policy could be delivered to him. The trial court's finding that the rescission was invalid because it was not made promptly, which is supported by the evidence, also prevents Schmidt from successfully basing his rescission on this ground.

As the situation now stands, the following are the basic facts: The vendors apparently have clear title, but have failed to complete a title search. In all other respects they have complied with the terms of the contract. It further appears, according to their testimony, that the only obstacle to receiving a title insurance policy (i. e., the decree quieting title to the three acres obtained at tax sale) has been hurdled, and they will now be able to deliver a title insurance policy to the entire 240 acres. Since March, 1946, they have not only been without their property but have also received only \$5,000 of the \$40,000 purchase price. (\$20,000 of the amount paid by Schmidt remains in escrow.) On

the other hand, Schmidt has been in possession of the property since March, 1946, and has been operating the Lodge as a resort since that time. For this property, he has paid only \$25,000 of the \$40,000 price.

Both parties have come into equity to ask that relief be granted and that justice be done. By prohibiting Callero, his heirs and assigns from using the Roberts Cabin tract as a commercial enterprise, and from using it in competition with Clark Creek Lodge, Schmidt is completely protected against his greatest fear. The trial court has made this a part of its decree. The trial court has also limited the size of the Roberts Cabin reservation to less than a quarter of an acre. While it is true that there is no evidence to support the precise description of the quarter of an acre reserved in the decree, this reservation is less than one-third of the land which the evidence shows Schmidt agreed should be excepted from the sale. Schmidt is benefited rather than injured by the reservation of the smaller parcel. The sellers cannot complain as they have not appealed.

Schmidt does not contend that title to the property contracted for is not clear, nor is there any evidence to indicate a cloud on the vendors' title. The record reveals that of the 240 acres which Buchtel thought should be conveyed under the contract (which called for delivery of only 220 acres), title insurance could not be obtained without a quiet title decree on three acres purchased at tax sales. Had these acres not been included in the deed offered by the vendors, and had the vendors included only the remaining 237 acres in their deed and offer of title policy, it would appear that they would have been entitled to performance of the contract by Schmidt. Out of an overabundance of caution, and what appears to be extraordinary conscientiousness on the part of the vendors' attorney, the vendors delayed making a conveyance until the entire 240 acres could be conveyed with a title insurance policy. Such delay was countenanced and acquiesced in by Schmidt, who was offered but refused to accept in October, 1946, a deed and title policy to 237 acres. It



would be grossly inequitable, under these circumstances, to permit Schmidt to rescind solely because of the failure of the vendors to present a title search and policy.

The only thing for which Schmidt has bargained and which he has not received, is a title insurance policy and deed to the Clark Creek Lodge property. If the vendors are able to deliver such a policy and deed to him, they are entitled to a decree of specific performance. Of course, if the vendors are unable to deliver such a policy and deed to Schmidt, he is entitled to the remedies provided by law.

[6] One further point should be mentioned. The judgment of the trial court awarded the vendors the balance of the purchase price with interest from May 10, 1946. How this date was selected by the court is not explained by the evidence nor by the respondents. In any event, as the vendee has not yet been placed in default, the vendors are not entitled to interest on the balance of the purchase price. Upon delivery to the escrow holder of a title insurance policy, they are entitled only to the amount called for by the terms of the contract.

[7] This is an equitable proceeding. Justice will best be served, and equity done to all parties, by a modification rather than a reversal. It is therefore ordered that the trial court shall modify the findings, conclusions and judgments by striking therefrom the provisions awarding the vendors interest on the balance of the purchase price from May 10, 1946, and by making Schmidt's liability for the balance of the purchase price conditional upon the delivery to him, within 60 days of the date this decision becomes final, of a title search and insurance policy showing clear title in the sellers to the entire 240 acres. If such search and policy are not tendered within the time limited, Schmidt is relieved of all liability for the balance of the purchase price and is entitled to a declaration then to be made by the trial court, for which purpose jurisdiction is retained, that all sums paid by him to the sellers, plus expenditures for improvements, less net profits, if any, are to be refunded to him.

As so modified the judgments are affirmed, each side to bear its own costs on this appeal.

BRAY, J., and SCHOTTKY, Justice pro tem., concur.



97 Cal.App.2d 552

PEOPLE v. COLLINS.

Cr. 4445.

District Court of Appeal, Second District,  
Division 1, California.

May 16, 1950.

Samuel D. Collins was convicted of abortion on July 16, 1946, having admitted a prior conviction of 1934 for the same offense. The judgment of conviction and order denying his motion for new trial were affirmed, 79 Cal. App.2d 226, 179 P.2d 843. On September 12, 1949 defendant filed written motion for a new trial in the 1934 case on the ground that the fine assessed against him therein was in excess of the amount allowed by law and that the state's principal witness committed perjury. The Superior Court, Los Angeles County, Robert H. Scott, J., denied the motion and defendant appealed. The District Court of Appeal, Drapeau, J., held that when trial court made its order denying defendant's motion for a new trial the right to move for a new trial had been exercised and exhausted and since the question of the excessiveness of the fine could have been considered on the appeal from the original judgment, it could not be considered in the instant proceeding.

Order affirmed.

I. Action ⇌ 6

A "moot case" is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter, which when rendered, for any reason, cannot have any

practical legal effect upon a then existing controversy.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Moot Case".

## z. Action ⚡6

Questions raised in an action may become moot as to such action, by reason of the conclusion reached and expressed by the court and although a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character it becomes a moot case or question which will not be considered by the court unless it is one of great public importance, as where it involves a determination of public rights or interests under conditions which may be repeated at any time.

## 3. Criminal law ⚡912

Once a motion for a new trial has been ruled upon in a criminal case and an order made either granting or denying such application, the only remedy for the party deeming himself aggrieved is by an appeal from such order, for the court is without authority to entertain a subsequent motion the object of which is to change or vacate its former order. Pen.Code, § 1182.

## 4. Criminal law ⚡997

Where defendant's conviction of abortion was affirmed on appeal and the issue of excessiveness of fine was not raised thereon, such question could not be considered on defendant's subsequent motion for a new trial, even though such motion were regarded as a motion for writ of error coram nobis. Pen.Code, § 672.

## 5. Criminal law ⚡997

The use of the writ coram nobis is limited to those situations in which the remedies provided by statute, such as motions for new trial and arrest of judgment, appeal and motion to recall remittitur, are not available and it cannot serve the purpose of bringing before the trial court evidence of a fact that existed at the time of the trial, does not lie to correct errors of law, and is not intended to authorize any court to review or revise its opinions.

## 6. Criminal law ⚡997

Where defendant's conviction of abortion was affirmed on appeal and defendant was represented by able counsel and no reason appeared why he should not have brought charge of perjury of state's witness to trial court's attention, such question could not be considered on defendant's subsequent motion for a new trial, even though motion were regarded as a motion for writ of error coram nobis.

## 7. Criminal law ⚡998

A motion to vacate judgment must be made within a reasonable time after the rendition thereof.

## 8. Criminal law ⚡998

Where judgment of conviction of abortion was rendered in 1934, a motion to vacate such judgment filed 15 years later was not seasonably made and would be denied.

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Samuel D. Collins, in pro. per.

Fred N. Howser, Attorney General, and Dan Kaufmann, Deputy Attorney General, for respondent.

DRAPEAU, Justice.

On or about June 25, 1934, defendant was tried by a jury and found guilty of the crime of abortion. Judgment was rendered and sentence pronounced; execution of the sentence was suspended and defendant was granted probation for a period of five years on condition that he pay a fine of \$300 within one year. Such judgment and the order denying his motion for a new trial were affirmed upon appeal, under date of January 24, 1935. *People v. Collins*, 4 Cal. App.2d 86, 40 P.2d 542.

On November 5, 1936, defendant's motion to terminate probation and to dismiss the above-mentioned cause under sections 1203.3 and 1203.4, Penal Code, was granted.

Thereafter on July 16, 1946, defendant was again found guilty of the crime of abortion and having admitted the prior conviction of 1934, he was sentenced to state prison for the term prescribed by law. Upon appeal, said judgment and the order denying his motion for a new trial were

affirmed. *People v. Emery*, 79 Cal.App.2d 226, 179 P.2d 843.

On September 12, 1949, defendant filed in the Superior Court of Los Angeles County his written motion for new trial in the 1934 case on the ground that the fine assessed against him therein was in excess of the amount allowed by law and therefore the judgment of conviction was null and void. He also alleged as additional ground for setting aside the judgment, that the principal witness for the state "did knowingly and willfully commit perjury on the witness stand."

The trial court refused to consider the motion for new trial "on the ground that the question raised has become moot." This appeal is from the order by which said application for a new trial was denied.

[1] "A moot case is one which seeks to determine an abstract question, which does not rest upon existing facts or rights. Where a concrete case of fact or right is shown, we know of no principle or policy of law which will deprive a party of a determination simply because his motive in the assertion of such right is to secure such determination." *Adams v. Union Railroad Co.*, 21 R.I. 134, 140, 42 A. 515, 517, 44 L.R.A. 273. 'It is universally understood by the bench and bar \* \* \* that a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter, which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. \* \* \* Ex parte Steele, D.C., 162 F. 694, 701." *State v. Dolley*, 82 Kan. 533, 108 P. 846, 847. See, also, 1 C.J.S., Actions, § 17c, page 1016.

[2] 1 C.J.S., Actions, § 17d, page 1017: "Effect of Matters Occurring after Action Commenced.

*"A case, originally presenting a controversy, may become moot by a decision of the court, or by acts of the parties or other causes, occurring after the commencement of the action, causing it to lose its controversial character.*

"Questions raised in an action may become moot, as to such action, by reason of the conclusion reached and expressed by the court; and although a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character it becomes a moot case or question which will not be considered by the court (*Neill v. Five C Refining Co.*, 79 Cal. App.2d 191, 193, 179 P.2d 818, citing *City and County of San Francisco v. Boyd*, 22 Cal. 2d 685, 140 P.2d 666), unless it is one of great public importance, as where it involves a determination of public rights or interests under conditions which may be repeated at any time."

[3] With respect to the prosecution of 1934, appellant not only appealed from the judgment therein, but also from the order denying his motion for a new trial. *People v. Collins*, 4 Cal.App.2d 86, 40 P.2d 542. Under section 1182 of the Penal Code, an application for a new trial must be made before judgment is pronounced. Moreover, as stated in *People v. Coronado*, 57 Cal.App. 2d 805, 815, 135 P.2d 647, 652, quoting from *People v. Paysen*, 123 Cal.App. 396, 11 P.2d 431: "' \* \* \* it is well settled in this state that, when the trial court has made its order denying a motion for a new trial, 'the right to move for a new trial had thus been exercised and exhausted.' *People v. Ingersoll*, 21 Cal.App. 763, 132 P. 1052, 1053. See, also, *People v. Martin*, 199 Cal. 240, 248 P. 908; *People v. Prudencio*, 93 Cal.App. 241, 269 P. 698; *People v. Walker*, 142 Cal. 90, 75 P. 658; *People v. Center*, 61 Cal. 191; *People v. Sing Lum*, 61 Cal. 538; *People v. Fice*, 97 Cal. 459, 32 P. 531; *People v. Wessel*, 98 Cal. 352, 33 P. 216. Once a motion for a new trial has been ruled upon in a criminal case and an order made either granting or denying such application, the only remedy for the party deeming himself aggrieved is by an appeal from such order, for the court is without authority to entertain a subsequent motion the object of which is to change or vacate its former order.'"

Although denominated a motion for new trial, appellant by the application herein



seeks to vacate the judgment and in his reply brief suggests that "more properly it could have been entitled a motion to vacate judgment in the nature of a Writ of Error, *Coram Nobis*." Even though so considered, it is clear that the judgment of conviction was not affected by the fine of \$300 which was made a condition of appellant's probation. The trial court had the power to impose a fine as a condition of probation, but the amount thereof, as prescribed by section 672 of the Penal Code, should not have exceeded \$200. See *People v. Ormes*, 88 Cal. App.2d 353, 354, 198 P.2d 690; *People v. Kuhlman*, 86 Cal.App.2d 566, 567, 195 P.2d 53, 196 P.2d 80.

[4, 5] Since the excessiveness of the fine could have been considered on appeal from the original judgment, it cannot be considered in the instant proceeding. Because, as stated in *People v. Wahrmund*, 91 Cal. App.2d 258, 261, 206 P.2d 56, 58: "The use of the writ (*coram nobis*) is limited to those situations in which the remedies provided by statute, such as motions for new trial and arrest of judgment, appeal and motion to recall remittitur, are not available and it cannot serve the purpose of bringing before the trial court evidence of a fact that existed at the time of trial. *People v. Knight*, 73 Cal.App.2d 532, 533, 166 P.2d 899. See, also, *People v. Reid*, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435. The writ does not lie to correct errors of law, and is not intended to authorize any court to review or revise its opinions. *People v. Tuthill*, supra, 32 Cal.2d 819, at page 822, 198 P.2d 505."

Appellant also urges that the judgment of conviction of 1934 is void, because it was based upon perjured testimony of the witness Brant. In his brief, he asserts that he is hard of hearing; that the witness testified in so low a tone of voice that appellant "did miss this and other relevant, objectionable testimony"; and that he did not have possession of the transcripts until after the case was decided by this court on appeal, when "he believed it was too late to challenge or reopen the case."

[6] Appellant was represented by able counsel at the trial of 1934 and no reason appears why he should not have brought

the charge of perjury to the attention of the trial court, if in fact perjury was committed.

As stated in *People v. Adamson*, 34 Cal. 2d 320, 326, 210 P.2d 13, 15: "In this state a motion to vacate a judgment in the nature of a petition for *coram nobis* is a remedy of narrow scope. See *People v. Darcy*, 1947, 79 Cal.App.2d 683, 693, 180 P.2d 752; *People v. Martinez*, 1948, 88 Cal.App.2d 767, 774, 199 P.2d 375. Its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court. *People v. Gilbert*, 1944, 25 Cal.2d 422, 442, 154 P.2d 657; *In re Lindley*, 1947, 29 Cal.2d 709, 725-726, 177 P.2d 918; *People v. Tuthill*, 1948, 32 Cal.2d 819, 821, 198 P.2d 505. The applicant for the writ 'must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief.' *People v. Shorts*, 1948, 32 Cal. 2d 502, 513, 197 P.2d 330, 336."

[7] Further, a motion to vacate judgment must be made within a reasonable time after the rendition thereof.

[8] As hereinbefore stated, the judgment of conviction was rendered on or about June 25, 1934, and the within motion to vacate that judgment was not filed until September 12, 1949, over fifteen years later.

"The courts of this state require that a showing of diligence be made in the application for a writ of error *coram nobis*." 27 Cal.L.Rev. 232. It was held in *People v. Black*, 114 Cal.App. 468, 473, 300 P. 43, that the writ should be applied for at or near the time of moving for a new trial, and in *People v. Vernon*, 9 Cal.App.2d 138, 142, 49 P.2d 326, that the application must be 'within a reasonable time' after the entry of judgment. In applying these rules the courts have held that six years and eight months was an untimely delay (*People v. Lumbley*, 8 Cal.2d 752, 761, 68 P.2d 354), that a six and one-half years' delay was un-

reasonable (*People v. Lewis*, supra, 64 Cal.App.2d 564, 149 P.2d 27), that six years was too long a period (*Vernon v. Rappaport*, 25 Cal.App.2d 281, 77 P.2d 257), and that a delay of five years was unreasonable. *People v. Harincar*, 49 Cal.App.2d 594, 596, 121 P.2d 751. In view of these authorities, all of which involved a considerably shorter period of delay than was shown to exist in the present litigation, the lower court had no alternative but to deny the motion on the ground that it was not seasonably made." *People v. Egan*, 73 Cal.App.2d 894, 900, 167 P.2d 766, 770.

For the reasons stated, the order appealed from is affirmed.

WHITE, P. J., and DORAN, J., concur.



97 Cal.App.2d 482

**MEARS v. CROCKER FIRST NAT. BANK OF SAN FRANCISCO.**

Civ. 14263.

District Court of Appeal, First District,  
Division 2, California.

May 15, 1950.

Hearing Denied July 13, 1950.

Action in conversion by John William Mears against the Crocker First National Bank of San Francisco (a corporation) because of defendant's alleged refusal to transfer certain shares of stock held by plaintiff in a mining company into block shares of twenty shares each. The Superior Court in and for the City and County of San Francisco, Robert McWilliams, J., entered judgment for the plaintiff, and the defendant appealed. The District Court of Appeal, held that there is no direct liability of a transfer agent or transfer officer to the holder for delay in transferring or refusal to transfer stock even if such delay or refusal is wrongful, and might subject corporation itself to liability and damages or in conversion and that no aggravated or malicious

misconduct of defendant bank was alleged or shown which might possibly have changed the character of its action from a mere nonfeasance to a malfeasance or misfeasance.

Judgment reversed with instructions to trial court to enter judgment for defendant.

**1. Corporations** ⇨130, 133

There is no direct liability of a transfer agent or transfer officer to holder of stock for delay in transferring or refusal to transfer stock, even if such delay or refusal is wrongful, and might subject corporation itself to liability and damages or in conversion, and agent or officer owes his duty only to company, his principal, not to individual stockholder.

**2. Trover and conversion** ⇨1

Where bank was made transfer agent for block shares of mining corporation and agent for conversion of shares into block shares, but refused to comply with plaintiff's demand to transfer his shares to block shares prior to communicating with corporation which was located in Philippine Islands, bank was not liable for conversion, even if delay or refusal was wrongful.

**3. Courts** ⇨99(1)

The application of the doctrine of the law of the case will not be extended beyond the exigencies which demand its application.

**4. Principal and agent** ⇨159(2)

Statute providing that one who assumes to act as an agent is responsible to third persons as a principal for his acts in course of his agency, when his actions are wrongful in their nature, does not eliminate distinction in agent's liability with respect to nonfeasance and misfeasance. Civ. Code, § 2343, subd. 3.

Chickering & Gregory, John Philip Coghlan, San Francisco, attorneys for appellant.

Eugene H. O'Donnell, Ralph Bancroft, San Francisco, attorneys for respondent.

PER CURIAM.

This is an action in conversion instituted by John W. Mears, owner and holder of

20,000 shares of I.X.L. Mining Company, a Philippine Corporation, herein further called the Company, against Crocker First National Bank of San Francisco, further called Crocker Bank, a transfer agent for stock of the Company, because of its alleged refusal to transfer said 20,000 shares into Block Shares of 20 shares each. The Company, mentioned in the complaint as a defendant, was not served and is not a party to the action. Judgment below was for plaintiff and Crocker Bank appeals. On a prior appeal Division One of this court reversed a judgment dismissing the action after the sustaining of a demurrer to the complaint on the ground that it did not state a cause of action, 84 Cal.App.2d 637, 191 P.2d 501, hearing denied.

The facts are undisputed. The Company has outstanding two types of stock, one of Philippine registry with a par value of 20 centavos, or 10 cents a share, the other known as Block Shares, the equivalent of twenty shares of the first type. Under the Articles of Incorporation of the Company shares of Philippine registry are convertible into Block Shares. Block Shares were created in order that the Company might have shares eligible for listing on the San Francisco Stock Exchange for which a certain minimum par value per share is required. Said Exchange also requires the maintaining in San Francisco of a transfer office or agency where all stock of the corporation listed on the Exchange shall be directly transferable. Crocker Bank at San Francisco was made Transfer Agent for the Block Shares and moreover agent for the conversion of shares of the other class into Block Shares, both by one resolution of the Board of Directors of the Company. The resolution fixes in detail the agent's duties, powers and rights and, among other things, authorizes the agent at any time to apply for instructions to an officer of the Company.

On February 15, 1946, plaintiff came to the Crocker Bank and requested that 20,000 shares of stock in the Company standing in his name under Philippine registry be transferred into Block Shares. The two certificates representing his original shares had been pledged before the war to the

Hong Kong & Shanghai Banking Corporation at Manila for a loan which at the time of the desired transfer still amounted to approximately \$500 and were then in the possession of the San Francisco office of said Bank. At the Crocker Bank plaintiff was informed in substance that Crocker Bank had received no reports from the Company from the Philippine Islands since the beginning of the war, that under Japanese domination action might have been taken impairing plaintiff's rights, that they might have become subject to war time restrictions or other claims and that therefore Crocker Bank prior to transfer would have to communicate with the Company in the Philippine Islands. Both orally and in a written demand of the same day plaintiff argued that such was unnecessary in his case because it could be proved by the San Francisco office of the Hong Kong Shanghai Banking Corporation that these certificates had been in the possession of that corporation since they were issued prior to the war in a period concerning which Crocker Bank had Company reports and that they were taken out of Manila by the United States government and returned to the San Francisco office of that corporation. Defendant did not comply with the demand to transfer. On April 3, 1946, plaintiff was informed that Crocker Bank had received authorization for conversion from the Company and was prepared to convert upon receipt of the certificates. At the time in question communication by mail from San Francisco to Manila and back took over a month. The certificates were not presented for transfer.

The trial court found that Crocker Bank failed to comply with plaintiff's demand within a reasonable time and concluded that it thereby converted the stock. Plaintiff was given judgment for its value of \$5500.

[1] Appellant urges in the first place that there is no direct liability of a transfer agent or transfer officer to the holder for delay in transferring or refusal to transfer stock even if such delay or refusal is wrongful, and might subject the corporation itself to liability in damages or in conversion. The agent or officer owes his duty



only to the Company, his principal, not to the individual stockholder.

[2] That such is the law in the absence of any express statutory provision to the contrary is borne out by numerous and unanimous authorities. 18 C.J.S., Corporations, § 438, p. 1056; 13 Am.Jur. Corporations p. 436; 1 Mechem on Agency p. 1099; 12 Fletcher on Corporations, § 5525; 6 Thompson on Corporations (3rd ed.) 309; Christy & McLean Transfer of Stock (2d ed.) p. 444; Denny v. Manhattan Company, 2 Denio, N.Y., 115; Dunham v. City Trust Co., 115 App.Div. 584, 101 N.Y.S. 87, affirmed 193 N.Y. 642, 86 N.E. 1123; Cooley v. Curran, 54 Misc. 221, 104 N.Y.S. 424 and 54 Misc. 572, 104 N.Y.S. 751; Nicholson v. Morgan, 119 Misc. 309, 196 N.Y.S. 147, 151; Palmer v. O'Bannon Corporation, 253 Mass. 8, 149 N.E. 112; Lewis v. Hargadine-McKittrick Dry Goods Co., 305 Mo. 396, 274 S.W. 1041; Fowler v. National City Bank of Rome, 49 Ga.App. 435, 176 S.E. 113; Hulse v. Consolidated Quicksilver Min. Corp., 65 Idaho 768, 154 P.2d 149. The theoretical basis of the rule is that the delay or refusal is a nonfeasance, the nonperformance of a duty owed to the principal only because of the existing agency relation, not a misfeasance or malfeasance, the breach of a duty owed individually to third parties independent of such agency relation. See especially Dunham v. City Trust Co., supra, 101 N.Y.S. at page 90; Lewis v. Hargadine-McKittrick Dry Goods Co., supra, 274 S.W. at page 1045. Thus the question of the direct liability of the transfer agent or transfer officer is brought under a general distinction with respect to the liability of agents. See Restatement of Agency § 343 and § 352; 3 C.J.S., Agency, §§ 221, 223. The direct liability of the transfer agent or transfer officer for nonfeasance with respect to transfer of stock is also denied in the cases where the action sounds in conversion. Cooley v. Curran, supra, and Hulse v. Consolidated Quicksilver Min. Corp., supra, as to officers; Palmer v. O'Bannon Corp., supra, as to transfer agent. In this state the general principle denying personal liability of a transfer officer is recognized in Lacoe v. Wolfe, 133 Cal.App. 159, 161, 23 P.2d 831,

832, where it is said: "While a corporation may be liable for such a refusal to act [to transfer stock] on the part of its secretary, if wrongful, in the absence of any statutory provision, the secretary is not personally liable for such an official act." However, the decision in that case, which upheld the sustaining without leave to amend of a demurrer for failure to state a cause of action to a complaint for damages against corporate officers, was distinguished on its facts and on change in the statutory provisions in the prior opinion in this case 84 Cal.App.2d at 641, et seq., 191 P.2d 501. There are no other California cases directly in point.

Respondent argues in the language of an opinion written by the trial judge that the above principle of nonliability and the authorities which support it were cited on the prior appeal and that rulings showing disapproval of them have become the law of the case. This is not so. The complaint, stated in detail in the prior opinion, 84 Cal.App.2d at pages 639-640, 191 P.2d at page 502, contained, over and above allegations in accord with the facts afterwards proved, the following paragraph: "That for the purpose of sale on the stock exchange, it was necessary by reason of an agreement entered into between defendant I. X. L. Mining Company, defendant Crocker First National Bank of San Francisco, and the San Francisco Stock Exchange that common shares of the I. X. L. Mining Company should be converted into blocks of 20 shares each before they could be offered for sale or sold on the San Francisco Stock Exchange." It was expressly on the basis of this specific allegation that the complaint was held to state a cause of action, the court saying 84 Cal.App.2d at page 640, 191 P.2d at page 503: "As will be noted, the only point to be decided is whether a stock transfer agent for a corporation, having entered into a three way agreement with the corporation and the stock exchange limiting sales of the corporation's stock on the exchange to blocks containing a certain specified number of shares, can by reason thereof be held liable to a stockholder in conversion for refusal upon proper demand to convert the stock-

holder's holdings of the corporate stock into blocks containing the number of shares specified in said agreement.

[3] "Respondent bank argues as a general principle that an agent is not liable to a third person for a mere nonfeasance, the failure to perform a duty owed solely to the principal, which failure on the part of the agent might incidentally affect adversely the interests of such third party. Whatever merit this argument may have as an abstract principle of law it is not applicable for in the instant case the agent went further, according to the allegation in the complaint which we must assume for purposes of this appeal to be true, and actively participated in exercising some degree of dominion over plaintiff's stock. This exercise of dominion consisted of first entering into the agreement imposing conditions upon the free exercise of plaintiff's right to sell, convey or dispose of his stock and by then refusing to perform a resultant duty." The quoted allegation was proved to be untrue. Defendant Crocker Bank did not enter into any agreement limiting sale of the Company's stock on the Exchange to Block Shares of 20 shares, but that restriction was due solely to existing rules of the San Francisco Stock Exchange, and the trial court so found. Crocker Bank was no party to any three-way agreement with the Company and the Exchange. "[I]f the respondents' evidence does not prove the allegations of the complaint which was considered upon the former appeal, the doctrine of the law of the case does not apply." *Allen v. California Mutual Bldg. & Loan Ass'n*, 22 Cal.2d 474, 482, 139 P.2d 321, 326; *Abroms v. New York Life Ins. Co.*, 64 Cal.App.2d 449, 456, 149 P.2d 217. The language of the court clearly shows that it did not intend to make any general ruling disapproving the principle of nonliability of a transfer agent for refusal to transfer irrespective of his participation in a three-way agreement as alleged. See the prior quotation from the opinion, the language 84 Cal.App.2d on page 643, 191 P.2d 501, where the court with respect to the principle of nonliability as recognized in *Lacoe v. Wolfe*, *supra*,

says that it is without the issue and that the court does not purport to decide it and 84 Cal.App.2d on page 645, 191 P.2d 501, where it is said that the contention that there was no such agreement as alleged in the complaint might be properly urged as defense upon the trial but could not be considered at the time. Each time the court repeats that it is only concerned with a transfer agent who had prior to refusal participated in a three-way agreement limiting plaintiff's right to dispose of his stock. If any of the discussions of the law by the court could possibly be considered of wider tenor (there are no definite rulings of that kind) they must under the circumstances be held to be obiter dicta to which the doctrine of the law of the case does not apply. *Hammond v. McDonald*, 49 Cal.App.2d 671, 677, 122 P.2d 332; *Millsap v. Balfour*, 158 Cal. 711, 714, 112 P. 450. The application of the doctrine of the law of the case will not be extended beyond the exigencies which demand its application. *Taylor v. Bunnell*, 211 Cal. 601, 605, 296 P. 288. The trial court should have passed on the merits of this principle as applied to the facts found and we also have to decide this point independently.

We do not find any factual circumstance which distinguishes the case as proved from the general character of the cases in which the principle of nonliability was applied. It is contended that the Crocker Bank was under an independent duty to plaintiff as third party beneficiary of the agreement or resolution by which Crocker Bank was appointed as transfer agent, but no specific provision of the resolution is cited or has been found by us which expressly shows an intent to benefit individual stockholders as section 1559, Civil Code, requires to entitle them to enforcement. Every transfer agent must necessarily be appointed and if the fact of such appointment alone would constitute the stockholders third party beneficiaries there always would be a direct obligation towards them contrary to the established rule. Neither is any such aggravated or malicious misconduct of Crocker Bank alleged or shown as might possibly change the character of its action from a mere non-



feasance to a malfeasance or misfeasance. See *Orvis v. Howe*, 183 App.Div. 1, 170 N.Y.S. 264, 267. The communication with the Company prior to transfer was clearly in good faith and its reasonableness only is doubted. Under these circumstances we must apply the rule of nonliability unless there were in force in California at the time of the demand statutory provisions or peculiar rules of case law which imposed direct liability on a transfer agent under the circumstances proved. Political Code, § 4468.

As such respondent cites in the first place sections 327, 328 and the last part of 368, Civil Code, which at the time in question read as follows: § 327: "Upon surrender to the secretary or transfer agent of the corporation of a certificate for shares duly indorsed or accompanied by proper evidence of succession, assignment or authority to transfer, it shall be the duty of the corporation to issue a new certificate to the person entitled thereto, cancel the old certificate and record the transaction upon its books." § 328: "When a transfer of shares of a domestic or foreign corporation on its books is requested and there is a reasonable doubt as to the right of the person seeking such transfer, the corporation or its transfer agent, before recording the transfer of the shares on its books or issuing any certificate therefor, may require from such person reasonable proof of his right to such transfer, and if there remain a reasonable doubt in respect thereto may refuse a transfer unless such person give adequate security or a bond of indemnity executed by a corporate surety or by two individual sureties satisfactory to the corporation as to form, amount and responsibility of sureties. If not satisfactory to the corporation, the surety or sureties shall justify before a judge of any court of record in the county where the transfer is sought and he shall determine the amount of the security or bond, and the responsibility or sufficiency of the sureties, after opportunity has been given the corporation to examine the surety or sureties as to their financial responsibility. The bond shall be conditioned to protect the corporation, its offi-

cers and/or its transfer agent or agents and/or registrar or registrars, against any loss, damage, expense or other liability to the owner of the shares by reason of the recordation of the transfer or the issuance of a new certificate for shares.

"If any such proof, security or bond be not furnished when required, as herein provided, neither the corporation nor any officer thereof shall be liable for refusing to record the transfer on its books or issue a new certificate for shares." § 368, in part: "If any officer of a corporation charged with the duty of entering a transfer of shares upon the books of the corporation and issuing a share certificate unreasonably neglects, fails or refuses to perform such duty after written request by any person entitled thereto, he shall be subject to a penalty of \$100 and the further penalty of \$10 for each day beginning five days after such request that such default shall continue, up to a maximum of \$500, to be paid to each such person aggrieved, which penalty shall be enforced by action and shall be in addition to all other remedies. Every director or other officer unreasonably causing such neglect, failure or refusal to make such entries upon the books of the corporation or to issue a certificate for shares to a person entitled thereto shall be subject to a like penalty.

"Any penalty prescribed by this section shall be in addition to any remedy by injunction or action for damages or by writ of mandate for the nonperformance of acts and duties enjoined by law upon the corporation or its directors or officers.

"The court in which an action for any such penalty is brought may reduce, remit or suspend such penalty on such terms and conditions as it may deem reasonable when it is made to appear that the neglect, failure or refusal was inadvertent or excusable."

Section 327 clearly imposed a duty on the corporation solely. In section 328 and the quoted part of section 368 the same provisions did not apply to transfer agents and registrars as to directors or officers of the corporation. With respect to the latter section 368 imposed a penalty "in addition



to any remedy by injunction or action for damages or by writ of mandate for the nonperformance of acts and duties enjoined by law upon the corporation or its directors or officers." The last part of section 328 relieved from liability for refusing to transfer the corporation and "any officer thereof" if proof, security or bond were not furnished when required, as provided in that section. With respect to transfer agents and registrars neither penalty nor other duty, nor relief from liability is mentioned. We are not concerned in this case with the liability of officers and directors and do not express any opinion on the influence of the above code sections on their liability. With respect to independent transfer agents and registrars they rather indicate the absence of liability than impose it. The only provision from which conceivably any direct liability of transfer agents or registrars could be implied is the one in section 328 requiring the conditions of the bond to protect them also against any loss, damage, expense or other liability to the owner of the shares in case a transfer made by them should infringe on his right, but although this may indicate the possibility of some liability for wrongful transfer, it clearly is insufficient to impose a liability for refusal to transfer or delay in transferring. To impose a liability where it is generally denied in the common law, certainly a liability so drastic as the one in conversion, a clearer mandate of the legislature seems required.

[4] Respondent further invokes section 2343, subd. 3, Civil Code, reading as follows: "One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others: \* \* \*

"3. When his acts are wrongful in their nature."

This provision was not intended to eliminate for California the distinction in the agent's liability with respect to nonfeasance and misfeasance, a distinction recognized by Story, to whose work on Agency the California Code Commission regularly refers in its Annotations on the title in question

in the Annotated Edition of 1872 (See Story on Agency §§ 308-312). Under section 2343 subd. 3 of the Civil Code the Commission refers to sections 311, 312 of Story, the sections on misfeasance, and then states: "The maxim *respondeat superior* does not exempt the agent from liability even for mere negligence." The note does not mention an intention to change the common law, although the Commission in its introduction to the edition promised to give in the notes the reason whenever a change in the existing law was made. It seems clear therefore that the provision was only intended to state the common law rule as to misfeasance (stated in the Restatement of Agency in § 343), but not to alter the common law rule of nonliability of the agent to third parties for failure to perform his duties to his principal (§ 352 of the Restatement). Compare the following statement of St. Sure, Distr. J. in *La Flower v. Merrill*, D.C., 28 F.2d 784, 787: "Section 2343 recognizes the elementary rule that every one is liable for his torts, and an agent or servant no exception merely because such." We think the provision cited means that and no more.

Finally respondent relies on cases like *Swim v. Wilson*, 90 Cal. 126, 128, 27 P. 33, 13 L.R.A. 605, 25 Am.St.Rep. 110 and *Weinberg v. Dayton Storage Co.*, 50 Cal. App.2d 750, 756, 124 P.2d 155, which contain general expressions to the effect that when the principal is guilty of conversion, the agent is guilty also, and points out that a corporation is liable in conversion in case of unreasonable refusal to transfer. *Ralston v. Bank of California*, 112 Cal. 208, 44 P. 476. In the *Swim* and *Weinberg* cases the agent directly assumed dominion over the plaintiff's property in a manner wrongful, independent of his position as agent, in the *Swim* case by selling and delivering property stolen by his principal from the plaintiff, in the *Weinberg* case by refusing to deliver to the plaintiff goods owned by the plaintiff which defendant had received from its principal with whom the plaintiff had stored them. Both were cases of misfeasance with respect to which the rule stated is correct. Notwithstanding its sweeping formulation the rule should

however be restricted to such cases of misfeasance and not extended to the exceptional cases of nonfeasance. It may be noted that the Restatement contains specific rules covering the agent's liability in the situation of the Swim and Weinberg cases but no general sweeping rule which would cover also the situation before us. Restatement of Torts, 233 (1) and 237.

There is nothing in the California law which compels a different solution of the problem before us than that found in the other jurisdictions. As there is no direct liability of a transfer agent for nonfeasance as proved, irrespective of its reasonableness, the reasonableness and other points submitted by the parties do not need investigation.

The judgment is reversed with instructions to the trial court to enter judgment for defendant.

Hearing denied; SCHAUER, J., dissenting.



97 Cal.App.2d 513

**CHEDA v. GRANDI.**

Civ. 1409.

District Court of Appeal, First District,  
Division 1, California.

May 16, 1950.

Action by Adolph R. Cheda against F. Lloyd Grandi, and others, for declaratory relief and determination that lease on certain business realty was valid. Some of defendants filed a cross-complaint for back rent and possession of premises from plaintiff, and damages against named defendant. The Superior Court of Marin County, Edward I. Butler, J., held that plaintiff had no valid lease of premises, but awarded him damages against named defendant, and named defendant appealed. The District Court of Appeals, Peters, P. J., held that evidence supported finding that named defendant was guilty of a breach of warranty of authority.

Portion of judgment appealed from, affirmed.

218 P.2d—7

**1. Principal and agent ⇨190(3)**

In action by lessee to recover damages from brother of owner of realty for breach of warranty of authority, evidence showed that brother held himself out to be more than ordinary agent with power simply to negotiate, and demonstrated that brother represented by his actions that he had authority to execute lease for owner. Civ. Code, § 2342.

**2. Estoppel ⇨64**

Where brother of owner of realty after drawing up lease to realty, told lessee to return all copies of lease to him after lessee had signed them, and represented that owner would sign them, and immediately started to act under lease as if it had been signed, collected rents, constructed pits in garage on realty in accordance with terms of lease, and purported to grant consents to modification of terms of lease and to alterations in premises, in lessee's action against brother to recover difference in rental provided in lease and higher monthly rental charged by subsequent purchaser of realty for balance of lease period, brother was estopped from denying that he had represented that he had power to negotiate and execute the lease. Civ. Code, §§ 2342, 3318.

**3. Principal and agent ⇨149(3)**

A third party cannot hold the agent on a breach of a warranty of authority, where such third party knows that principal is incompetent and cannot appoint an agent.

**4. Principal and agent ⇨190(3)**

In action by lessee to recover damages from brother of owner of realty for breach of warranty of authority, evidence did not compel conclusion that owner was so mentally incompetent that he could not have entered into a contract or appointed an agent, but supported an implied finding that owner at times was competent.

**5. Principal and agent ⇨136(1)**

An agent does not normally warrant capacity of his principal to contract, but if principal is completely incompetent so that he cannot be a party to a contract, agent may be liable upon such a warranty.

**6. Principal and agent — 156**

Where lessee of garage knew owner had suffered a stroke which had affected his mind, and owner's brother, assuming to act for owner, drafted a lease containing renewal option which lessee signed, but which owner or his brother did not sign, after brother stated to lessee that he would submit lease to owner for owner's signature, brother's statements to lessee were a sufficiently material misrepresentation to impose liability upon brother upon his warranty of authority, and lessee could recover from brother the difference in rental provided in lease, and higher rental charged by subsequent purchasers of realty for balance of term.

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Jerome A. Duffy, San Rafael, attorney for respondent, Adolph R. Cheda.

PETERS, Presiding Justice.

Plaintiff, Adolph R. Cheda, brought this action against F. Lloyd Grandi, his mother, individually and as administratrix of the estate of her son Henry E. Grandi, and Mr. and Mrs. J. D. McFadden for declaratory relief to have it determined that a certain lease on a piece of business property was valid, or, if declared invalid, then plaintiff prayed for money damages against Lloyd. The McFaddens cross-complained for back rent and possession of the premises from Cheda, and damages against Lloyd. The trial court held that Cheda had no valid lease of the premises, but awarded him damages against Lloyd in the sum of \$2,572.50. The appeal now before the court is by Lloyd from the money award against him. Cheda has also appealed from that portion of the judgment determining that he has no lease, but that appeal is not now before the court.

Cheda is in the garage business at Point Reyes Station, California. Originally, the business was operated in two separate buildings, the Codoni Garage and the Grandi Garage. He has been occupying the Grandi Garage since 1934. From 1934

to 1942, he had a month-to-month tenancy. In 1942, he decided it would be to his advantage to move all his tools and equipment to the Grandi Garage and use the Codoni Garage simply for storage. This was only feasible if pits were installed in, and an office constructed on, the Grandi Garage premises. Cheda was desirous of making this move only if he could secure a lease on the Grandi Garage.

At the inception of the tenancy of the Grandi Garage in 1934, Henry Grandi, brother of Lloyd, owned the premises. In August of 1941, Henry suffered a mental deterioration caused by chronic high blood pressure, and was confined thereafter in hospitals or sanitoriums until his death in April of 1943. He was declared incompetent in February, 1943, and his mother appointed guardian. She inherited the property upon his death.

Cheda was an old friend of the Grandi family and knew that the garage was owned by Henry. He also knew of the stroke suffered by Henry in August, 1941, and its general effect on his mind. After August of 1941, Lloyd assumed to act for his brother in connection with the garage, and in other matters. Lloyd was a real estate broker operating under the name of Marvelous Marin Realty Company in San Rafael. Sometime in February, 1942, Cheda talked with Lloyd about securing a lease on the premises. Under date of March 11, 1942, Lloyd wrote Cheda a letter offering him a five-year lease with an option to renew for an additional five years at a monthly rental of \$40, and offering certain tools and equipment for \$600, and providing in detail how certain back rent should be paid. The letter starts off with the following significant language: "I have analyzed the matter of your leasing Henry's garage at Point Reyes and I have attempted to arrive at a solution which would be fair to you and also to him. I have decided as follows:" There then follows the proffered terms of the proposed lease as summarized above. The letter concludes with: "Will you please give this your immediate attention and advise at your earliest convenience." A few days later Cheda told Lloyd that the proposed



terms were acceptable to him. Shortly thereafter, Lloyd prepared a lease containing the terms above described, sent three copies of it to Cheda, and requested Cheda to sign all three copies and to return them to him. Apparently, Cheda was unwilling to sign the lease as presented, and the document was redrafted by Lloyd, and again he sent Cheda three copies, requesting that Cheda sign and return all three to him. This, Cheda did. The lease provided for a signature by Henry, but Lloyd never discussed the lease with Henry, nor did he ever secure Henry's signature to it. Cheda was unaware of the fact that Henry, or Lloyd on his behalf, had not signed the lease.

Part of the agreement between Lloyd and Cheda was that Lloyd would install pits in the premises, and that Cheda, at his own expense, would construct an office. These things were done, and Cheda moved all his equipment to the Grandi Garage. Thereafter, rent was paid pursuant to the terms of the lease by Cheda, all such payments being made to the Marvelous Marin Realty Company. The lease called for a total payment of \$55 per month, \$40 as rent and \$15 as payment on the purchase price of certain equipment Cheda was purchasing from Henry. In February, 1943, Cheda requested to be relieved temporarily of the \$15 payment. Under date of February 12, 1943, Lloyd wrote to Cheda as follows: "Regarding your request to eliminate the \$15.00 payment on the equipment for 1943, I am willing to accept only the \$40.00 garage rent until such time as in my opinion conditions are such that the payments on the equipment should be renewed."

Cheda never saw Henry after August of 1941. Lloyd testified that he was acting for his brother in drawing up the lease, but admitted that he had never been authorized by Henry to act as his agent, and admitted that he never at any time discussed the lease with Henry. On previous occasions he had acted for Henry and for other members of the family in business matters, and was looked upon by the other members of the family as its business advisor. Before Henry's death, Lloyd deposited the rent payments received from Cheda in his

business trustee account, and records were kept indicating that the money was Henry's. After Henry's death, Lloyd continued to collect the rent and credited the same to his mother's account.

About July of 1946, the McFaddens started negotiations with Lloyd to purchase the Grandi Garage. Lloyd told McFadden that Cheda had only a month-to-month tenancy and had no lease, but Cheda told McFadden that he had a lease, but apparently did not tell him about the option to renew clause. Cheda, of course, had no copy of the lease, and Lloyd, at first, was unable to find the three copies signed by Cheda. He finally did find them and gave the McFaddens a copy, and Cheda a copy. Just when this was done is not clear from the evidence, but it was before the McFaddens paid the final purchase price to the seller. McFadden concluded that, since the lease was unsigned by Lloyd, it was not a valid lease and not binding on him. At any rate, the original five year term was to expire on March 31, 1947, and, not knowing of the renewal clause, McFadden was willing to buy the property whether or not there was a lease. The purchase was completed and McFadden immediately raised the rent to \$75 per month, effective October 15, 1946. Cheda refused to pay the increased rental, relying on the validity of his lease. This action followed.

On these facts the trial court found that at all times during the tenancy of Cheda, Lloyd held himself out to Cheda and others as the agent of his brother Henry, and "volunteered, assured and represented" himself as such; "that prior to March of 1942, said Henry E. Grandi became incompetent at times and thereafter was unable at times to manage his own affairs; at the time he actually became incompetent in the year 1941, he was known to be incompetent by the plaintiff 'Cheda,' who knew that he was unable at times to manage his affairs or his property"; that Lloyd submitted the lease to Cheda for signature with the understanding that if the lease were executed by Cheda and returned to Lloyd, the lease would be properly executed by Henry; that during the negotiations for the lease, Lloyd purported and assumed to

act as the agent of Henry and represented himself as such; that Cheda relied upon these representations and believed that Lloyd was the duly authorized agent of Henry.

The court concluded that Cheda had no enforceable lease and gave judgment in his favor against Lloyd for \$2,572.50 for breach of warranty of authority, the same being the difference between the \$40 rental provided in the lease, and the \$75 monthly rental charged by the McFaddens over the balance of the period of the lease.

Both parties to this appeal agree that the basic legal question involved is whether the evidence supports the findings that Lloyd was guilty of a breach of warranty of authority. Section 2342 of the Civil Code provides: "One who assumes to act as an agent thereby warrants, to all who deal with him in that capacity, that he has the authority which he assumes," while section 3318 of that code provides that the measure of damages in such cases is "the amount which could have been recovered and collected from his principal if the warranty had been complied with \* \* \*."

Lloyd contends that at no time did he represent that he had authority to *execute* a lease for Henry, but contends that he simply had power to negotiate for a lease, and for that reason Cheda had no right to assume that the proposed lease had been or would be executed by Henry, or that Lloyd would execute it on his behalf. As to the letter of March 11, 1942, appellant contends that it dealt with three subjects: (1) The terms of the proposed lease; (2) back rent and (3) the sale of equipment, and that, as to the lease, the letter indicates that he was acting on behalf of Henry and therefore only had power to negotiate, but as to the other two items he was representing he had power to execute. Appellant also points out that the lease called for Henry's signature, and that Cheda believed that Henry, not Lloyd, was to sign it. Appellant claims that at no time did he represent that he had power to sign the lease, or that it had been signed. Appellant concludes that all he did was to represent that he had power to negotiate for a lease, and that, although this representation was false,

such false representation did not legally injure Cheda. It is also urged that the evidence shows that Cheda was not deceived by any representation of Lloyd's because he knew that Henry was incompetent.

[1] We think the evidence shows that Lloyd held himself out to be more than an ordinary agent with power simply to negotiate. Lloyd's letter of March 11, 1942, states that "*I have analyzed the matter,*" and "*I have attempted to arrive at a solution,*" and "*I have decided.*" The transaction outlined in the letter was an integrated transaction. Reasonably construed it impliedly represented that Lloyd had power to execute the lease. The subsequent actions of Lloyd strengthens this construction. It was Lloyd who collected all payments, and they were the very payments called for in the lease. It was Lloyd who granted Cheda permission to make alterations in the premises, the lease providing that such permission had to be secured from the lessor. It was Lloyd who, by letter dated February 12, 1943, allowed Cheda to discontinue the \$15 monthly payments on the equipment, and in that letter states: "*I am willing to accept only the \$40.00 garage rent until such time as in my opinion*" etc. Lloyd admitted that he often acted as Henry's agent in real estate and other business transactions. All of this evidence demonstrates that Lloyd represented by his actions that he had authority to execute the lease for Henry. There was, therefore, a breach of the warranty defined in section 2342.

[2] Even if the evidence did not show a breach of warranty, under the admitted facts, and under the findings, a proper case is presented to estop Lloyd from denying that he had represented that he had authority to execute the lease. Lloyd told Cheda to return all copies of the lease to him after Cheda signed them, and represented that Henry would sign them. He never told Cheda that the lease was unsigned by Henry, but immediately started to act under the lease as if it had been signed. He collected the precise rents called for by the lease. He constructed pits in the garage for Cheda. He purported to grant the consents to a modification of

the terms of the lease and to alterations in the premises. Under such circumstances, while the principal Henry could not be estopped, he having made no representations, the agent Lloyd is estopped to deny that he had represented that he had power to negotiate for and to execute the lease in question.

[3] Appellant also claims that the evidence shows that Cheda knew that the property belonged to Henry and also knew, after August of 1941, that Henry was incompetent to execute a lease. Thus, it is argued, since one mentally incompetent cannot appoint an agent, Cheda knew that Lloyd could not legally act for Henry, and was therefore not deceived. It is, of course, the law that a third party cannot hold the agent on a breach of a warranty of authority where such third party knows that the principal is incompetent and cannot appoint an agent.

The difficulty with this argument is that the evidence as to the mental condition of Henry during this critical period, and Cheda's knowledge of it, is in conflict. There was evidence that Henry became incompetent in August of 1941, and remained in that condition until his death. But there is also conflicting evidence. Lloyd testified, when asked if his brother, after the stroke, knew what he was doing: "Well, he would be rational one day and the next day he wouldn't," and again, "He might be rational one day and not the next \* \* \*." Cheda's testimony is somewhat confusing. On his deposition he made the general statement that in August of 1941, he knew that Henry was incompetent and unable to handle his own affairs, and that when he returned the lease to Lloyd he knew that Henry was then in no condition to sign it. But at the trial he positively testified that after August of 1941, he did not know that Henry was entirely incapable of handling his affairs. He also testified that he believed that Lloyd was going to discuss the lease with Henry; that Lloyd told him that he was going to do so, and that Lloyd told him that, in fact, he had done so. He also testified that he never saw Henry after August of 1941.

[4] We cannot say, as a matter of law, that this evidence compels the conclusion that after August of 1941, Henry was so mentally incompetent that he could not have entered, at any time thereafter, into a contract or appointed an agent. In addition to the presumption of sanity (14 Cal.Jur. p. 362, § 19), the evidence is susceptible of the reasonable construction that after August, 1941, Henry had lucid intervals, and that he could have entered into the lease or appointed Lloyd as his agent for that purpose. See, *Burgess v. Security-First Nat. Bank*, 44 Cal.App.2d 808, 816-818, 113 P.2d 298. The finding on this issue, while not as clear as might be desired, seems to be in accord with this view of the evidence. It is that prior to March of 1942, Henry "became incompetent *at times* and thereafter was unable *at times* to manage his own affairs." (Italics added.) The reasonable implication is that if only *at times* Henry was incompetent, that *at times* he was competent. That implied finding is amply supported.

[5, 6] It should be mentioned that even though Henry was totally incompetent after 1941, and therefore could not have appointed Lloyd his agent, that fact alone would not compel a reversal of the judgment against Lloyd if Cheda did not know of the total incapacity. While the rule is that an agent does not normally warrant the capacity of his principal to contract (Restatement of agency, § 332), that is not an absolute rule. As stated in "Comment a" to section 332, "if the principal is completely incompetent so that he cannot be a party to a contract, the agent may be liable upon a warranty." (See, Restatement of Agency, § 329, and "Comment d" thereunder.) Lloyd's statements to Cheda that he would submit the contract to Henry, if he then knew that Henry was totally incompetent, would be a sufficiently material misrepresentation to impose liability upon Henry upon the warranty.

The portion of the judgment appealed from by F. Lloyd Grandi is affirmed.

BRAY, J., and SCHOTTKY, Justice pro tem., concur.



**FUGL v. WITTS.**  
**Civ. 17568.**

District Court of Appeal, Second District,  
Division 2, California.

May 15, 1950.

Rehearing Denied May 31, 1950.

Hearing Denied July 13, 1950.

Action by Thursa Fugl, executrix of the estate of Q. A. Knouse, sometimes known as Quincy A. Knouse, deceased, against John Wits, to quiet title to seven parcels of realty in which defendant filed a cross-complaint seeking to have title quieted in him to the same pieces of land and plaintiff as an affirmative defense thereto pleaded that defendant had not been seised or in possession of the premises in question, or any part of them, within five years prior to the date of the commencement of the present action. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered judgment in favor of plaintiff and defendant appealed. The District Court of Appeal, McComb, J., held that where defendant had not been seised or possessed of the premises within five years before commencement of the action he neither had a cause of action entitling him to have the title quieted in him to the property nor a defense to cause of action to have the title to the property quieted in plaintiff.

Judgment affirmed.

**1. Appeal and error** *Code Civ. Proc.* § 931(1)

Where trial court found plaintiff's allegation to be true, and defendant did not question the sufficiency of evidence to sustain such finding, the District Court of Appeal was required to assume that there was substantial evidence to support it.

**2. Limitation of actions** *Code Civ. Proc.* § 19(3), 40(1)

Where defendant was not seised or possessed of the premises within five years before commencement of the action, he neither had a cause of action entitling him to have title quieted in him to the property,

nor a defense to plaintiff's cause of action to have the title to the property quieted in plaintiff. *Code Civ. Proc.* § 319.

Guy E. Ward, and Clarke A. Knically,  
Beverly Hills, for appellant.

E. C. Pyle, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff (cross-defendant) and against defendant (cross-complainant) in an action to quiet title to certain real property, defendant appeals.

[1] *Facts:* The present action was tried on the issues raised by plaintiff's amended complaint seeking to quiet title to seven parcels of real property, defendant's amended cross-complaint seeking that title be quieted in him to the same pieces of land, and the respective answers of the parties to the pleadings. Plaintiff, as an affirmative defense, pleaded that defendant had not been seised or in possession of the premises in question, or any part of them, within five years prior to the date of the commencement of the present action. The trial court found that this allegation was true. Since defendant does not question the sufficiency of the evidence to sustain such finding this court must assume that there was substantial evidence to support it.

*Question: Did the trial court err in giving judgment in favor of plaintiff?*

[2] This question must be answered in the negative. Since defendant was not seised or possessed of the premises in question within five years before the commencement of the action, he neither had (1) a cause of action entitling him to have title quieted in him to the property, nor (2) a defense to plaintiff's cause of action to have the title to the property quieted in plaintiff. (*Sec. 319, Code of Civ. Proc.*)<sup>1</sup>

1. Section 319 of the Code of Civil Procedure reads thus: "No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the

action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person was seised or possessed of the premises in question within five years before the commencement of the act[ion] in respect to which such action is prosecuted or defense made."

The other questions urged by defendant as grounds for reversal of the judgment are immaterial in view of the foregoing rule, since the judgment would of necessity have gone for plaintiff irrespective of the decision of the trial court on other points urged by defendant.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



97 Cal.App.2d 615

**BUDDE et al. v. SUPERIOR COURT IN  
AND FOR SAN FRANCISCO  
COUNTY et al.**  
Civ. 14527.

District Court of Appeal, First District,  
Division 2, California.  
May 18, 1950.

Hearing Denied July 13, 1950.

Henry F. Budde and Fred J. Budde, petitioners, brought prohibition proceedings against the Superior Court for the State of California, in and for the County of San Francisco, the Honorable Timothy I. Fitzpatrick, as Judge thereof, to prohibit the Superior Court from hearing without a jury petitions for appointment of a guardian for the person and estate of Henry F. Budde on ground that he was incompetent. The District Court of Appeal, Goodell, J., held that the filing by petitioners of written opposition to petitions for appointment of a guardian, were effective to raise and frame an issue of fact, and that such issue was triable by a jury, as demanded by the petitioners, that prohibition would lie, and that if jury should find incompetency, question as to appointment of guardian would be exclusively one for decision of the Superior Court.

Order that a peremptory writ issue.

Nourse, P. J., dissented.

**1. Insane persons** ⇨33(1)  
**Jury** ⇨19(8)

The filing by alleged incompetent person and his son of written oppositions to

petitions for appointment of a guardian for alleged incompetent person, was effective to raise and frame an issue of fact, and such issue was triable by jury as a matter of right, when alleged incompetent person and his son demanded a jury trial. Probate Code § 1230; § 1461, as amended by St. 1943, p. 2005.

**2. Prohibition** ⇨3(3)

Prohibition lay to prohibit superior court from proceeding with hearing without a jury of petitions for appointment of a guardian of person and estate of an alleged incompetent person, where alleged incompetent person and his son filed written opposition to petitions for appointment of a guardian and demanded trial by jury, since alleged incompetent person and his son did not have a plain, speedy, and adequate remedy at law.

**3. Insane persons** ⇨33(1)

If jury should find alleged incompetent person to be incompetent at hearing on petitions for appointment of guardian of the person and estate of the alleged incompetent person, question as to appointment of a guardian would be exclusively one for decision of the superior court judge. Probate Code, § 1230; § 1461, as amended by St. 1943, p. 2005.

Doyle & Clecak, San Francisco, for petitioners.

Walter Carpeneti, John D. Costello, San Francisco, for respondents.

J. Joseph Sullivan, San Francisco, for Albert F. Budde, real party in interest.

GOODELL, Justice.

The petition herein shows that on February 17, 1950, Louisa A. Budde filed in the Superior Court her petition for appointment as guardian of the person and estate of Henry F. Budde, an alleged incompetent person. The hearing was set for March 2 at 2 p. m. and on the morning of that day a petition was filed therein by Albert F. Budde for the appointment of himself as such guardian. On March 10 the present petitioners, Henry F. Budde and his son Fred J. Budde, filed therein written opposition to

both petitions, and demanded a trial by jury of the issues of fact raised by such opposition. There were several continuances of the hearing but it was finally set for March 22. On the 21st the Judge expressed to counsel his intention to proceed on the 22nd with the hearing *without a jury*, which precipitated the filing of this proceeding to prohibit him from doing so.

The sole question presented is whether on an application for an adjudication of incompetency and the appointment of a guardian, a jury trial may be had as a matter of right, if demanded.

Probate Code, § 1461 reads in part as follows: "Any relative or friend may file a verified petition alleging that a person is insane or incompetent, *and setting forth the names and residences, so far as they are known to the petitioner, of the relatives of the alleged insane or incompetent person within the second degree residing in this State; \* \* \* notice of the nature of the proceedings and of the time and place of the hearing \* \* \* shall be mailed at least five (5) days before such hearing date to each of such relatives \* \* \*. Any relative or friend of the alleged insane or incompetent person may appear and oppose the petition. \* \* \**" (Emphasis added.) That part of the section which we have emphasized was added by amendment seven years ago, Stats. 1943, p. 2005.

Section 1461 is silent respecting a jury trial of the issue raised by the appearance and opposition.

Section 1230, Prob. Code, formerly §§ 1716-1717 Code Civ. Proc., reads: "All issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions. The party affirming is plaintiff, and the one denying or avoiding is defendant. When a party is entitled to a trial by jury and a jury is demanded, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice, must settle and frame the issues to be tried. If no jury is demanded, the court must try the issues joined, and sign and file its decision in writing, as provided in civil actions.

\* \* \*

Section 1230 fails to specify the instances in which a jury trial may be had in probate.

Petitioners contend that under the 1943 amendment to § 1461 an issue of fact as to the alleged incompetency is raised by a written *appearance and opposition* and that such issue is triable by jury, if demanded.

Respondents contend that a probate matter is triable by jury only when the statute expressly so provides and they point to five sections of the Probate Code which do so provide, namely, §§ 371 and 382 (will contests before and after probate); § 928 (contests over allowed claims); § 1081 (determination of heirship), and, particularly, § 1471 (proceedings for restoration to capacity.)

Perhaps the strongest argument that can be made against a jury trial in an incompetency hearing arises from the fact that § 1461, on the one hand, is silent as to a jury in an incompetency *adjudication* hearing, while § 1471, on the other, requires that in a *restoration to capacity* proceeding a jury trial must be given if requested. See *In re Bundy*, 44 Cal.App. 466, 473, 186 P. 811.

Respondents point to *In re Estate of Dolbeer*, 153 Cal. 652, 657, 96 P. 266, 268, 15 Ann.Cas. 207, where the court said: "Only in those probate proceedings where the statute expressly confers a right to a trial by jury does the right exist [citations]."

That statement was probably not intended to be as broad as it sounds since it might be taken to limit the right to jury trial to proceedings arising under such sections as 371, 382, 928, 1081 and 1471, which within their four corners "expressly" confer the right. A review of the authorities, however, shows that the right has been extended well beyond such specific instances. In *re Estate of Bundy*, *supra*, a very well considered case, clears this up in the following statement at pages 469-470 of 44 Cal.App., at page 813 of 186 P.: "The section just quoted provides for three distinct proceedings, to wit: (a) The filing of written findings in court cases; (b) trial by jury; and (c) a motion for new trial; and it implies a fourth, (d) the necessity for written issues in the cases to which it relates. There are three general classes of probate proceedings



in this state with reference to the right of trial by jury. In the first class are those in which express provision is made for jury trials, such as the contest of a will before probate, the contest of a will after probate, and proceedings under section 1766, Code of Civil Procedure, for the restoration to competency of a person theretofore adjudged to be incompetent. See sections 1312, 1330, and 1766, Code Civ.Proc. In the second class are all those cases wherein a jury may be demanded under sections 1716 and 1717, above quoted. These are the cases in which written issues must be framed and in which a party can move for a new trial, and in which, if tried before the court, written findings of fact must be filed. An example of this class is the case of a petition for partial distribution. In re Estate of Baird, 173 Cal. 622, 160 P. 1078. In the third and largest class are embraced all those matters in the trial of which a party has not the right to demand a jury, such as settlement of accounts, family allowances and exemptions, admeasurement of homesteads, etc."

The problem of the right to a jury trial has been before the courts many times in various phases of probate procedure other than incompetency proceedings, including contests over the settlement of accounts; those respecting heirship, and in those arising on partial and final distribution. It has arisen in an incidental way in disputes over the right to move for a new trial in probate contests because, as was said in Re Estate of Baird, 173 Cal. 617, 621-622, 160 P. 1078, 1080; "The provisions relating to the right to move for a new trial and those upon the right to a trial by jury, under these sections, are similar; the two propositions are cognate and are governed by the same general principles." See § 1231, Prob. Code, also In re Estate of Perkins, 21 Cal.2d 561, 134 P.2d 231, infra.

In all these cases the courts have resorted to the test, *Whether a triable issue of fact was presented.*

In re Estate of Moore, 1887, 72 Cal. 335, 340, 13 P. 880, 883, the contest was over an administrator's account. An heir filed numerous objections and demanded a jury, which the court allowed, and special issues were framed. It was held that a jury to try

such issues was not a matter of right but merely advisory. In so holding, however, the court used this language which is interesting in view of the present problem: "We think the courts would have little difficulty in conforming the operation of these sections [ §§ 1716-1717, Code Civ.Proc.] to those cases in which the Code has expressly authorized issues of fact to be framed. Without such a provision under the decisions, parties to a contest in the probate court would never be entitled to a jury trial." (Emphasis added.)

Estate of Sanderson, 1887, 74 Cal. 199, 208, 15 P. 753, 757, involved a contest of the account of an executor who claimed the right to a new trial of the contest. The court held that the parties were not entitled to move for a new trial, drawing on Estate of Moore, supra, as a precedent. In doing so the court said: "*There may be a manifest propriety in requiring, at the request of a party, issues of fact such as* ordinarily arise in the contest of the probate of a will *(was the testator of sound mind? was he subjected to undue influence?) to be tried by a jury.* But the proceeding in probate for the settlement of an account is *sui generis*, bearing but a distant and incomplete analogy to the procedure for an accounting in equity." (Emphasis added.) Obviously the question whether a person is incompetent or not is the same type of issue as those used above as illustrations by Justice McKinstry. Thus the "manifest propriety" of a jury trial in such a case as this was recognized by the Supreme Court over sixty years ago, although, it must be conceded, it was only by way of a dictum.

The general question was fully discussed in Carter v. Waste, 1910, 159 Cal. 23, 112 P. 727, where the Judge was mandated to settle, allow and sign a statement on motion for new trial after a contest on final distribution. The court held that the right to move for a new trial existed *because an issue of fact had been raised and tried.* 159 Cal. at pages 27-28 112 P. at page 729 the court said: "We are satisfied that it must be taken as established in this state that, under our law as it now exists, a motion for a new trial of any issue of fact actually made and determined in any proceeding in probate

will lie when the law expressly authorizes issues of fact to be framed in such proceeding, and that *provisions authorizing written objections on the part of persons interested in the estate and providing for the hearing and determination of those objections do expressly authorize issues of fact to be framed.*" And 159 Cal. at page 29, 112 P. at page 729 "If the papers so filed had been designated 'answer' or 'objections' to the petition \* \* \* and had in terms denied the allegations of facts showing petitioner to be an heir of deceased and the other petitioners not to be heirs, it would have to be admitted, in view of what we have said, that issues of fact had been made under express authorization of law." (Emphasis added.)

In Estate of Baird, 1916, 173 Cal. 617, 160 P. 1078, supra, the question was again thoroughly reviewed. That was a petition for partial distribution which presented the question whether a claimant was entitled to inherit. The demand for a jury trial of that issue was refused. This was held to be error and led to a reversal of the order denying a partial distribution. In a comprehensive discussion the court repeatedly referred, as it did in Carter v. Waste, supra, to the question whether an issue of fact had been raised, holding 173 Cal. at page 621, 160 P. at page 1080 that "The test stated in Estate of Sanderson would authorize a jury in the present case." That test has been already discussed by us.

In re Estate of Perkins, 1943, 21 Cal.2d 561, 134 P.2d 231, sums up the entire question, and brings practically up to date the long line of cases on the subject. Section 1020 of the Probate Code, with which it deals, is as silent with respect to a jury trial as is § 1461 with which we deal. In deciding that the right existed there to move for a new trial in proceedings on final distribution the court said 21 Cal.2d at pages 566-567, 134 P.2d at page 234:

"The point raised concerning the motion for a new trial requires a construction of section 1231 of the Probate Code, which reads: 'A motion for a new trial in probate proceedings can be made only in cases of contests of wills, either before or after probate, in proceedings to determine heirship

and interests in estates, and in those cases where the issues of fact, of which a new trial is sought, were of such character as to entitle the parties to have them tried by a jury, whether or not they were so tried.' Section 1020 of the same code provides that any person interested in the estate may resist an application for distribution. In construing the predecessor sections of sections 1231 and 1020 (Code Civ. Proc., §§ 1714, 1665, 1668) this court held that *the test to be applied in determining whether the motion will lie in a particular probate proceeding is whether the law expressly authorizes an issue of fact to be framed in such a proceeding. It has been held that a party to a probate proceeding is entitled to a trial by jury when there is statutory authority for the formation of issues of fact upon the question to be determined.* Carter v. Waste, 159 Cal. 23, 112 P. 727; In re Estate of Baird, 173 Cal. 617, 160 P. 1078; O'Brien v. Nelson, 164 Cal. 573, 129 P. 985; In re Estate of Sutro, 152 Cal. 249, 92 P. 486, 1027; and In re Estate of Wickersham, 138 Cal. 355, 70 P. 1076, 71 P. 437. In deciding these cases, the court found the necessary statutory authority in the language of section 1668 of the Code of Civil Procedure, reading: 'At the time fixed for the hearing \* \* \* any person interested in the estate may appear and contest the petition by filing written objections thereto.' That section has since been repealed, but the Probate Code, now in effect, makes provision for an application to distribute the estate of a decedent, which is to be heard upon notice. 'Any person interested in the estate or any coexecutor or coadministrator may resist the application.' § 1020, Prob. Code. Although this language is not as definite as that which was used in section 1668 of the Code of Civil Procedure, effective resistance to an application for final distribution requires written objections, and, at least where issues of fact are formed in that way, as they were in the present case, any party may demand a jury trial and, after verdict and judgment, make a motion for a new trial." (Emphasis added.)

The requirements of § 1461 that the petition set forth the relatives' names and residences, and for the mailing to them of a five-day notice, and the provision that not



only they, but any friend, "may appear and oppose the petition" clearly invite the written joinder of issue on the question whether the person alleged to be incompetent is, in fact, incompetent. We think the words "appear and oppose" in § 1461 are even stronger than those in § 1020, i. e., "any person interested in the estate \* \* \* may resist the application" for distribution, first, because of the requirement of notice to the relatives, and, second, because *to appear* is to answer or to give "the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." § 1014, Code Civ.Proc. And under our probate practice "The party affirming is plaintiff, and the one denying or avoiding is defendant." § 1230, Prob. Code, supra.

[1] Following the reasoning of the Perkins case—which, in turn, follows that of the earlier cases which we have cited—we are satisfied that in the instant case the filing by these petitioners of "written opposition to the said petitions for the appointment of a guardian," as they allege in their petition herein, were effective to raise and frame an issue of fact, and that such issue is triable by a jury, as petitioners have demanded. The very least that may be said for "appear and oppose" in § 1461, is that those words are the equivalent of "resist" in § 1020, and that the legislative purpose in both sections was evidently the same.

Respondents rely on *In re Bundy*, 1919, 44 Cal.App. 466, 186 P. 811, supra. That case presented the same question as the one now before us, and it definitely held that there was no right to a jury trial in a hearing for an incompetency adjudication. It was decided, however, under § 1763, Code Civ. Proc., predecessor of § 1461, Prob. Code, and there was nothing in § 1763 requiring notice to the relatives, or, as the Bundy opinion points out 44 Cal.App. at p. 471, 186 P. at page 814 providing "for objections or answer of any kind, whether written or oral." Indeed such provisions were not added until 1943, some 12 years after the Probate Code was adopted. The opinion in the Bundy case repeatedly recognizes the necessity for the raising of issues of fact, points out that § 1763 does not contemplate such issues, and cites the Dol-

beer, Baird and Moore cases and *Carter v. Waste*, supra. Petitioners concede that the Bundy case was correctly decided, but they point to the change in the legislation as distinguishing it from the instant case. There can be no doubt that it is clearly distinguishable on that score.

In the recent case of *Knight v. Superior Court*, 95 Cal.App.2d 838, 214 P.2d 21, the court reached the same conclusion as that which we have reached.

[2] Respondents resist the granting of the writ on the broad ground that prohibition does not lie in any event because there is a plain, speedy, and adequate remedy at law. On that phase of the case we adopt what the court said in the Knight case at p. 839 of 95 Cal.App.2d, at page 22 of 214 P. 2d.

[3] What has been said herein is of course limited to whatever questions of fact are raised respecting the alleged incompetency. If the jury finds incompetency, the question as to the appointment of a guardian is exclusively one for the decision of the Judge.

It is ordered that a peremptory writ issue, prohibiting the trial court from proceeding with the hearing of the issue of incompetency otherwise than by jury trial.

DOOLING, J., concurs.

NOURSE, Presiding Justice.

I dissent. I agree with what is said in *In re Bundy*, 44 Cal.App. 466, 186 P. 811, in which the Supreme Court denied a hearing. That is a well reasoned opinion and, with the approval of the Supreme Court, has been the settled law of procedure for the last thirty years. The legislature has never shown any intention of changing that rule. On the other hand *Knight v. Superior Court*, 95 Cal.App.2d 838, at page 839, 214 P.2d 21 at page 22 does not consider the question at all, the court merely saying: "Without reviewing the authorities, this court is definitely of the opinion that the trial court was in error in this respect." The Knight case did not go to the Supreme Court so there is direct conflict of decision between the second and third districts which cannot be cleared by any opinion of this district.



I cannot believe that the legislature contemplated a jury trial in section 1461 of the Probate Code since it provided for a trial by jury for "restoration" within five days of the commitment. Sec. 1470, Probate Code. Section 5125, Welfare & Institutions Code is based on 2174 of the Political Code enacted in 1903 relating to hearing by jury of those adjudged insane. This right of trial by jury for restoration completely negatives any theory that a jury trial was contemplated for the original commitment because if such trial is authorized under the theory of the majority opinion the losing party would have the right to move for a new trial and to appeal. During all that period a new trial to a new jury could be had under sec. 1471 of the Probate Code. It would not be possible to determine which of the two verdicts was operative and endless confusion would follow.

I believe the better reasoning is that Probate Code, sec. 1460 et seq. contemplate a summary proceeding to take immediate charge of an incompetent and his estate, preserving his right to demand a quick trial by jury if he so desires.

Hearing denied; SPENCE, J., dissenting.



97 Cal.App.2d 691

**AHERN et al. v. S. H. KRESS & CO. et al.**  
Civ. 14262.

District Court of Appeal, First District,  
Division 1, California.

May 23, 1950.

Hearing Denied July 20, 1950.

Action for personal injuries by Estelle Ahern and another against S. H. Kress & Co., a corporation, and T. La Bara and others, for injuries sustained by first named plaintiff resulting from a fall in a store of the first named defendant. Judgment for plaintiff for \$7,000 in the Superior Court, in and for the City and County of San Francisco, William F. Traverso, J., and the defendant appeals. The Court of Appeal,

Schottky, J., pro tem, held that the evidence sustained the implied finding of the jury that it had taken the puddle, into which plaintiff fell, a sufficient length of time to accumulate, so that defendants by reasonable care should have discovered and remedied it.

Judgment affirmed.

#### 1. Appeal and error ⇨931(1), 989

Before an appellate tribunal will reverse a judgment for insufficiency of evidence, record must show, that accepting full force of evidence adduced, together with every inference favorable to the prevailing party which may be reasonably drawn therefrom, and excluding all evidence in conflict therewith, it still appears that law precludes such prevailing party from recovering a judgment.

#### 2. Appeal and error ⇨931(1)

Evidence must be construed most strongly against the losing party in determining whether to reverse a judgment for the insufficiency of evidence and every favorable inference and presumption which may fairly be deduced from the evidence, should be resolved in favor of the prevailing party.

#### 3. Negligence ⇨32(1)

A store keeper is not an insurer of the safety of his customers but owes to them the duty to exercise reasonable care in keeping the store premises safe for the customers.

#### 4. Negligence ⇨32(1)

While the degree of care imposed upon a storekeeper for the safety of his customers is reasonable care, the quantum of care necessary to constitute "reasonable care" is more exacting in a public store than in an apartment lobby or the like.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Reasonable Care".

#### 5. Negligence ⇨134(5)

In action for injuries against a store by customer sustained when she slipped and fell in an oily puddle which was partly in a store aisle and partly underneath a counter containing paints and related substances, evidence sustained implied finding of the jury that it had taken the puddle a

sufficient length of time to accumulate, so that the defendants by reasonable care should have discovered and remedied the condition.

#### 6. Negligence ⇨134(2)

In action for injuries sustained by customer when she slipped in a puddle of oil on the floor of a store, the length of time the puddle was on the floor could be proved by circumstantial as well as by direct evidence.

#### 7. Negligence ⇨136(22)

Where customer slips and falls on a puddle of oil in a store, it is generally a question of fact for the jury as to whether under all the circumstances the defective condition existed long enough, so that a reasonable man, exercising reasonable care, would have discovered it.

Hoge, Pelton & Gunther, San Francisco, Leo V. Killion, Reginald M. Watt, San Francisco, of counsel, for appellants.

Doyle & Clecak, San Francisco, for respondents.

SCHOTTKY, Justice pro tem.

Plaintiffs brought this action to recover for personal injuries resulting to plaintiff Estelle M. Ahern from a fall in the store of defendant S. H. Kresse & Company. The cause was tried before a jury which brought in a verdict of \$7,000 for plaintiff. Defendants have appealed from the judgment entered on the verdict, contending that the evidence is insufficient, as a matter of law, to establish any negligence on their part.

[1,2] It is a rule too well established to require the citation of authorities that before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence it must appear from the record that, accepting the full force of the evidence adduced together with every inference favorable to the prevailing party which may reasonably be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party

from recovering a judgment. The evidence must be construed most strongly against the losing party. Every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party.

Bearing in mind this familiar rule, we shall set forth a brief summary of the evidence as shown by the record.

On September 23, 1946, at about 4:30 p. m., the plaintiff wife, Estelle Ahern, entered the store of defendant Kress & Company at 2712 Mission Street in San Francisco to shop for some cups and saucers. She entered the right-hand entrance of the store and proceeded down the left side of the aisle on the extreme right of the store. This aisle was approximately 100 feet long and had a solid line of counters on the right-hand side, and on the left had counters which were broken by aisles running at right angles the width of the store. There were few people in the store at that hour, and Mrs. Ahern testified that she did not notice any one in her aisle as she walked along the aisle after entering the store, nor did she notice any one ahead of her when she turned around at the end and started to come back the same aisle. Like the average shopper in a store carrying the wide variety of merchandise sold by defendant company, she was "looking at the different things on the different counters" as she proceeded back along the aisle. After she had traveled back about half the length of the aisle, she slipped and fell in a puddle of liquid that, according to the testimony of the store manager, defendant Paul La Barbara (sued herein as T. La Bara), was about 12 inches in diameter and was located "directly underneath the part of the counter that juts over the aisle \* \* \* partly in the aisle and partly underneath." The counter under which the puddle was located was one which contained paints, oils, turpentine, paint remover and thinner and related substances. A salesgirl was on duty at this counter and salesgirls were on all counters close to it and the store was very well lighted.

Plaintiff Estelle Ahern testified that the liquid on the floor which caused her to fal

"looked to me as though it was an oily substance of some kind. \* \* \* it had kind of a shine to it." Her husband, plaintiff Andrew Ahern, examined her clothing and found what appeared to him to be oily spots on her slacks and coat. The store manager, defendant La Barbara, testified that he used rags and paper to clean up the puddle and after mopping it up he covered the spot with a paper bag "just long enough to absorb the moisture"; that the liquid was water and had no odor; that there was no water faucet within 50 or 60 feet of the puddle and that there were no leaks from the roof. The day was clear and there was no question of rain involved.

[3,4] Appellants argue that there is no direct or circumstantial evidence to show that defendant store was in any way responsible for the presence of the puddle on the floor, or that the puddle was on the floor for a sufficient length of time to bring into operation the rule of constructive notice to defendant store. Appellants state correctly that "The law provides that a storekeeper is not an insurer of the safety of his customers, but owes to the customers the duty to exercise reasonable care in keeping the store premises safe for the customers. While the 'degree' of care is 'reasonable' care, the 'quantum' of care necessary to constitute 'reasonable' care is more exacting and greater in a public store such as that of defendant 'Kress store' than in an apartment house lobby or the like."

In *Louie v. Hagstrom's Food Stores*, 81 Cal.App.2d 601, at pages 606-607-608, 184 P.2d 708, at page 711, this court said:

"Admittedly, the plaintiff, as a customer, was the business invitee of defendant. Admittedly, the defendant is not an insurer of the safety of business visitors. The true rule is that the owner or occupier of business premises owes to invitees a duty to exercise reasonable care in keeping the premises reasonably safe for such invitees. *Tuttle v. Crawford*, 8 Cal.2d 126, 63 P.2d 1128; *Owen v. Beauchamp*, 66 Cal.App.2d 750, 152 P.2d 756; *McKellar v. Pendergast*, 68 Cal.App.2d 485, 156 P.2d 950. To impose liability for injuries suffered by an invitee due to the defective condition of the premises, the owner or occupier 'must have

either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it.' *Hatfield v. Levy Brothers*, 18 Cal.2d 798, 806, 117 P.2d 841, 845; see, also, *Rothschild v. Fourth & Market St. R. Co.*, 139 Cal. App. 625, 34 P.2d 734; *Stoddard v. Roberts Public Markets, Inc.*, 27 Cal.App.2d 166, 80 P.2d 519; *Wills v. J. J. Newberry Co.*, 43 Cal.App.2d 595, 111 P.2d 346; *Williamson v. Hardy*, 47 Cal.App. 377, 190 P. 646.

"The same rule is adopted by the Restatement of Torts. Section 343 reads as follows: 'A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he (a) knows, or by the exercise of reasonable care should discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them.'

"\* \* \* The true rule is that, while plaintiff must prove that the defective condition existed long enough so that by the use of reasonable care it should have been discovered and remedied, that fact, like other facts, may be proved by circumstantial as well as by direct evidence. It is generally a question of fact for the jury as to whether, under all the circumstances, the defective condition existed long enough so that a reasonable man exercising reasonable care would have discovered it. In *Rothschild v. Fourth & Market St. R. Co.*, 139 Cal.App. 625, 627, 34 P.2d 734, the court stated: 'However, the question whether the condition which caused the injury had existed so long as to be discoverable by the defendant within a reasonable time is one for the jury.'

"In *Tuttle v. Crawford*, 8 Cal.2d 126, 130, 63 P.2d 1128, 1130, the Supreme Court stated the rule as follows: 'Whether the floor of a store or public market place was so negligently maintained as to render the person responsible for its condition liable



in damages is a question of fact to be decided by the jury.'

"The same court in *Hatfield v. Levy Brothers*, 18 Cal.2d 798, 807, 117 P.2d 841, 846, declared: 'Further, the question of whether the condition which caused the injury had existed so long as to be discoverable by the store owner within a reasonable time is for the jury.'

"The exact time the condition must exist before it should, in the exercise of reasonable care, have been discovered and remedied, cannot be fixed, because, obviously, it varies according to the circumstances. A person operating a grocery and vegetable store in the exercise of ordinary care must exercise a more vigilant outlook than the operator of some other types of business where the danger of things falling to the floor is not so obvious."

Appellants cite the case of *Girvetz v. Boys' Market, Inc.*, 91 Cal.App.2d 827, 206 P.2d 6, which involved a suit by a plaintiff who slipped on a banana peel in defendant's vegetable market. The only evidence as to how long the peel had been there was the testimony that some one had seen it there a minute and a half before plaintiff fell. The verdict of the jury was in favor of plaintiff and the trial court granted a motion for judgment notwithstanding the verdict. In affirming the judgment, the appellate court said: "The location of her fall, therefore, was such as to afford no ground for an inference that the dangerous condition was created by the defendant proprietor, it being as reasonable to infer that the banana was dropped by a customer after leaving the vegetable check-stand as to infer that it got there in any other manner."

"The only evidence as to how long the dangerous condition had existed prior to plaintiff's fall was the testimony of a customer that she saw the banana on the floor 'a good minute and a half' before the happening of the accident." 91 Cal.App. 2d at page 828, 206 P.2d at page 7.

"\* \* \* But where the only evidence is that the foreign object has been on the floor of the market for 'a minute and a half', it must be held that it is insufficient

to support an inference that the defendant proprietor failed to exercise the care required of him." 91 Cal.App.2d at page 831, 206 P.2d at page 9.

Appellants also cite *McKellar v. Pendergast*, 68 Cal.App.2d 485, 156 P.2d 950, in which the plaintiff sought to recover for injuries received when she slipped on a greasy-like substance on the floor of an apartment house lobby. There was no evidence to indicate how the substance came to be on the lobby floor, and in affirming a judgment in favor of defendants notwithstanding the verdict the court said: "Applying this rule to the evidence reviewed it is readily apparent that such evidence presented no basis for the conclusion of the jury other than mere speculation. Or, stated in another fashion, it is no more speculative to presume that the oily substance was dropped by another than it is to speculate that the janitor dropped it. In either event the conclusion reached can be only the result of speculation, and therefore was not sufficient to support the verdict of the jury. *Reese v. Smith*, 9 Cal.2d 324, 70 P.2d 933. Nor can a plaintiff recover where the facts go no further than to establish a possibility that defendant's negligence was the proximate cause of the injury. *Wilbur v. Emergency Hospital Ass'n*, 27 Cal.App. 751, 151 P. 155." 68 Cal.App. 2d at page 489, 156 P.2d at page 952.

"\* \* \* An owner of premises is only responsible for not removing a dangerous foreign substance brought upon the premises by others if the owner actually knew of the presence of such substance, or if it had been present for a sufficient length of time that he should have known of its presence. (Citing cases.)" 68 Cal.App.2d at page 491, 156 P.2d at page 953.

In *Owen v. Beauchamp*, 66 Cal.App.2d 750, 152 P.2d 756, also cited by appellants, the court held that the trial court properly directed a verdict for defendant where the plaintiff slipped on a piece of dental wax in defendant dentist's reception room and there was no evidence as to who dropped the wax or how long it had been there. The court said 66 Cal.App.2d at page 754, 152 P.2d at page 758: "The wax found on appellant's shoe could have been imported

by another invitee or by an employee of respondent one minute before appellant fell, without the knowledge of respondent. Inasmuch as the evidence of the presence of the wax on the floor did not warrant an inference of appellee's negligence the court correctly instructed the jury to return a verdict for defendant. *Lacey v. Porter*, 103 Cal. 597, 37 P. 635."

Respondents in reply argue that the location of the puddle justifies an inference that the dangerous condition was created by defendants and also that the evidence was sufficient to justify the inference that the puddle had been on the floor long enough for appellant company or its employees in the exercise of ordinary care for the safety of its patrons to have discovered and removed the danger. They cite *Louie v. Hagstrom's Food Stores*, supra; *Travis v. Metropolitan Theatres Corporation*, 91 Cal.App.2d 664, 205 P.2d 475; *Tuttle v. Crawford*, 8 Cal.2d 126, 63 P.2d 1128.

In *Louie v. Hagstrom's Food Stores*, supra, a customer in a super market fell in a pool of syrup which had formed from a broken syrup bottle in a bag which was found near by. This pool was right at the entrance door of the store. A man with a broom who customarily swept the floors had not been there for approximately 25 minutes and a clerk at the check stand could easily have seen the condition as her duties required her to face the front of the store on frequent occasions. There was evidence that there was an egg-shaped puddle of syrup of about six or eight inches; that the syrup was quite thick and possessed adhesive qualities; that the day was cold and that on such a day the syrup would flow quite slowly. In affirming a judgment for plaintiff this court said, 81 Cal.App.2d at pages 608-609, 184 P.2d at page 712: "It is a reasonable inference that for this heavy thick fluid to have seeped through the paper bag and to have formed a puddle of appreciable proportions would take a substantial period of time. When this evidence is considered, keeping in mind that this was a very busy grocery and vegetable store, and keeping in mind the obvious dangers that exist in such establishments,

we think there was ample evidence under the rule of the cited cases, to sustain the jury's implied finding that this condition existed long enough so that defendant should, in the exercise of ordinary care, have discovered and remedied it."

In *Travis v. Metropolitan Theatres Corporation*, supra, the plaintiff was injured when she slipped in a deposit of vomit as she was walking between rows of seats to take her seat in a theatre. Defendant contended that plaintiff had not shown how long the deposit had remained on the floor. The plaintiff introduced evidence that part of the deposit had formed a crust on top but was moist in the middle. In affirming a judgment for plaintiff the appellate court said, 91 Cal.App.2d at page 668, 205 P.2d at page 477:

"From such evidence the jury could reasonably infer that a substantial period of time had elapsed since the occurrence that caused the deposit. \* \* \*

"The evidence is sufficient to sustain the jury's implied finding that the condition existed long enough to require the agents of appellant in the exercise of ordinary care to discover and remove it. \* \* \*

In *Tuttle v. Crawford*, supra, a judgment for a plaintiff was affirmed where she had fallen in the vegetable department of a store when she slipped on some lettuce leaves on a wet cement floor. The condition had been noted by an employee who said he had swept the wet space five to eight minutes before the accident, but the court said that if he had swept "he swept poorly." The court also said that it did not follow that plaintiff was negligent because she did not see the lettuce leaves. The court said further, 8 Cal.2d at page 130, 63 P.2d at page 1130:

"That it is the duty of storekeepers to keep the floors of their premises safe for those who must pass over them in the transaction of their business must be conceded. The fact that the attention of persons who visit public markets is attracted by the display of the wares offered for sale and more or less absorbed by the transactions which they have in mind would seem to increase the necessity of exercising care to the end

that the floor spaces and aisles allotted to the use of customers should be made safe and kept fit for such purpose.

"It is the rule in California that the keeper of a public place of business is bound to keep his premises and the passageways to and from it in a safe condition, and must use ordinary care to avoid accidents or injury to those properly entering upon his premises on business.' [Citing cases.] \* \* \*

It is apparent from the foregoing cases that every case must be judged upon its own facts in applying the legal principles involved. In the instant case we are convinced that, accepting, as we must, the full force of the evidence adduced together with every inference favorable to the prevailing party which may reasonably be drawn therefrom, and excluding all evidence in conflict therewith, the judgment in favor of plaintiffs finds support in the record.

[5] The oily puddle in which plaintiff Estelle Ahern fell was directly underneath the part of the counter that juts over the aisle, partly in the aisle and partly underneath. This counter contained paints, oils, paint remover and thinner and related substances. The puddle appeared to be composed of an oily substance. There was no broken bottle, can, bag or anything similar on the floor near the puddle, from which this oily substance could have come. Defendant La Barbara, manager of the store, testified that it was a superficial puddle lying on top of the floor and that it was about 12 inches in diameter, which would indicate that it was somewhat circular in shape. There was a salesgirl of defendant store on duty in charge of the counter. We believe that from those facts the jury was entitled to draw an inference that the puddle was the result of some leakage from the contents of the counter, and that the jury was also entitled to infer that this circular oily puddle, 12 inches in diameter, had taken some time to accumulate, because if it had accumulated rapidly it would not have been confined to such a small area. The store was well lighted, there were few customers in the store at that hour, and there were salesgirls at practically all the counters. As hereinbefore stated, plaintiff

Estelle Ahern walked the full length of the aisle on the left-hand side, a distance of about 100 feet, and then came back along the right-hand side, looking at the various things on the different counters, a distance of about 50 feet, when she slipped in the puddle and fell. She did not notice any one in the aisle either going down the aisle or coming back.

[6,7] There is no direct evidence as to how long the puddle was on the floor but, as was held in *Louie v. Hagstrom's Food Stores*, supra, that fact, like other facts, may be proved by circumstantial as well as by direct evidence, and it is generally a question of fact for the jury as to whether, under all the circumstances, the defective condition existed long enough so that a reasonable man exercising reasonable care would have discovered it.

If, as we believe, the jury was entitled to draw an inference that the puddle was the result of some leakage from the paints counter, it was entitled also to infer that the accumulation of the puddle was due to some negligence of defendants. And even if the jury was not entitled to draw the inference that the accumulation of the puddle was caused by defendants, we believe that the size, location, shape and nature of the puddle, together with the other facts and circumstances hereinbefore set forth, were sufficient to sustain the implied finding of the jury that it had taken the puddle a sufficient length of time to accumulate, so that defendants by the exercise of reasonable care should have discovered and remedied it. There is a striking similarity between the instant case and that of *Louie v. Hagstrom's Food Stores*, supra, where the court held that it was a reasonable inference that it would take a substantial amount of time for the syrup to have seeped through the bag and to have formed the puddle there in question.

There is nothing in the cases cited by appellants that in our opinion compels a different conclusion than the one at which we have arrived. We have hereinbefore reviewed those cases and the factual situations in them are different than the facts in the instant case. While under the evi-



dence the jury might well have arrived at a different verdict, yet, taking the evidence as a whole, we believe it was a matter for the jury to determine, and that their verdict in favor of plaintiffs finds ample support in the record.

In view of the foregoing, the judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; EDMONDS and SCHAUER, J.J., dissenting.



97 Cal.App.2d 399

**PEOPLE v. AGAJANIAN.**

Cr. 4417.

District Court of Appeal, Second District,  
Division 2, California.

May 8, 1950.

Bill Kookas Agajanian was convicted in the Superior Court, Los Angeles County, Clement D. Nye, J., of the illegal possession of narcotics, and he appeals. The District Court of Appeal, Wilson, J., held that the evidence sustained the conviction, that the district attorney was not guilty of misconduct and that there was no error requiring reversal in rulings on evidence and in refusal of certain instructions.

Judgment affirmed.

**1. Criminal law**  $\S$  777, 1186(4)

In prosecution for illegal possession of narcotics, failure to instruct on matter of expert testimony was error, but such error did not require reversal where it did not appear that the omission affected the verdict. Pen.Code,  $\S$  1127b; Health and Safety Code,  $\S$  11500; Const. art. 6,  $\S$  4½.

**2. Criminal law**  $\S$  814(17)

Testimony of officer that defendant charged with illegal possession of narcotics appeared to have marijuana cigarette in his hand, that after reaching over a curtain his hand was empty and that later

cigarettes were found on the ground constituted direct evidence so as to render unnecessary an instruction on circumstantial evidence. Health and Safety Code,  $\S$  11500.

**3. Criminal law**  $\S$  814(17)

Instruction with respect to circumstantial evidence is unnecessary when such evidence is incidental to and corroborative of direct evidence.

**4. Criminal law**  $\S$  1038(3)

Alleged failure to give certain instructions would not be considered by reviewing court where it did not appear that defendant requested such instructions, and no reason for instructions or prejudice was shown.

**5. Criminal law**  $\S$  814(13)

In prosecution for illegal possession of narcotics, where there was direct evidence connecting defendant with possession, failure to instruct on inferences to be drawn from defendant's presence was not prejudicial. Health and Safety Code,  $\S$  11500.

**6. Criminal law**  $\S$  824(11)

Failure to instruct that defendant was a competent witness in his own behalf and that his testimony should be judged by standard applicable to other witnesses was not error in absence of any request for such an instruction.

**7. Criminal law**  $\S$  824(5)

In prosecution for illegal possession of narcotics, failure to instruct that certain exhibits marked for identification, but not received in evidence, were not to be considered by jury was not error, where defendant did not request such an instruction and, from circumstances, jury should have understood that such exhibits were not to be considered. Health and Safety Code,  $\S$  11500.

**8. Witnesses**  $\S$  331½

Testimony offered solely for purpose of impeachment was not subject to objection that it was hearsay.

**9. Criminal law**  $\S$  1043(2)

Where testimony upon cross-examination was objected to at trial upon ground that it was hearsay, objection could not be

raised on appeal that such testimony was not within scope of the direct examination and was upon a collateral matter.

**10. Criminal law** ⇨698(1)

A defendant is deemed to have waived all grounds of objection not stated by him.

**11. Criminal law** ⇨1043(2)

An objection to evidence cannot be made for the first time on appeal and precise ground of objection must be made at the time of its offer.

**12. Criminal law** ⇨683(1)

In prosecution for illegal possession of narcotics where witness was asked on cross-examination whether he had stated to third person that he and defendant had beat some one out of some marijuana, refusal to permit defendant to testify on surrebuttal as to whether he had ever beat any one out of some marijuana was not error. Health and Safety Code, § 11500.

**13. Criminal law** ⇨730(3)

In prosecution for improper possession of narcotics, presence of certain exhibits, which were not introduced in evidence, did not constitute misconduct of district attorney on ground that they were presented merely to influence the jury, where it was made clear to jury that exhibits were not to be considered. Health and Safety Code, § 11500.

**14. Poisons** ⇨9

Evidence that marijuana cigarettes were found in room in which defendant was apprehended and that he had disposed of a cigarette sustained conviction for illegal possession of narcotics, although none were found on his person. Health and Safety Code, § 11500.

Leland E. Zeman, Los Angeles, for appellant.

Fred N. Howser, Attorney General, William E. James, Deputy Attorney General, for respondent.

WILSON, Justice.

Defendant and one Garcia were charged by information, in two counts, with the violation of section 11500<sup>1</sup> of the Health and Safety Code. Both defendants entered pleas of not guilty, Garcia later withdrawing his plea and entering a plea of guilty as to count 1. Count 2 was dismissed as to defendant Agajanian and after a trial by jury he was found guilty as charged in count 1, possession of the flowering tops and leaves of Indian hemp (*cannabis sativa*), commonly referred to as marijuana. His motion for new trial and his application for probation having been denied, defendant appeals from the judgment and from the order denying his motion for a new trial.

As grounds for reversal defendant contends: (1) the jury was improperly instructed; (2) the court erred in admitting certain testimony over his objections; (3) the district attorney was guilty of prejudicial misconduct; (4) the verdict is contrary to the law and the evidence.

Tracy A. Bjorklund, deputy sheriff, testified that he saw defendant and Garcia get out of a rubbish truck and go into the rear of a one story residence; he and three other officers followed them, pushed the door open and walked in; defendant and Garcia were in the room they entered, a bedroom underneath the house which was built on a sloping hill; Garcia was in the middle of the room and defendant was in the far corner to the left; he saw defendant making a motion, apparently picking up something from the bed; as defendant raised his hand he had in it what appeared to be a marijuana cigarette, the end being folded in a manner characteristic of such cigarettes; he saw defendant reach up over a curtain, put his hand in back of it and remove his hand; there was nothing in his hand when he removed it; the curtain covered an opening about four feet wide and six and a half feet high; a person could pull the curtain back and go under-

1. Section 11500 reads: "Except as otherwise provided in this division, no person shall possess, transport, sell, furnish, administer or give away, or offer to transport, sell, furnish, administer, or

give away, or attempt to transport a narcotic except upon the written prescription of a physician, dentist, chiroprapist, or veterinarian licensed to practice in this State."

neath the house in back of the room; he asked defendant what he had thrown behind the curtain; defendant did not answer; he went behind the curtain and found 28 cigarettes scattered on the ground; other objects were on the ground but they were five or six feet away; thereafter he, together with the other officers, searched both rooms in the presence of defendant and Garcia; among other things they found cigarettes in the pocket of some trousers hanging in the closet, a hypodermic needle, a spoon and an eyedropper, a bundle of cellophane, nine cigarettes wrapped in newspaper and a Prince Albert tobacco can in the pocket of a corduroy coat hanging in the closet, a small manila envelope containing white powder, a small bindle in the pocket of a leather jacket hanging in the closet, a box containing a leafy, alfalfa looking substance, and a pipe; he again asked defendant what he had thrown behind the curtain, whether he had thrown anything there, and defendant said "no"; he asked Garcia whether all the clothing in the closet was his and he said "yes"; Garcia said "the narcotics are mine" and said he lived in the house and all the clothes and everything in the house were his.

A chemist testified that he made a microscopic examination of the 28 cigarettes and determined that they contained marijuana.

[1] *Jury Instructions.* Defendant contends that the failure of the trial court to instruct the jury on the matter of expert testimony pursuant to section 1127b of the Penal Code constitutes reversible error. The jury was instructed that they were the sole and exclusive judges of the effect and value of evidence and of the credibility of the witnesses. Defendant stipulated as to the qualifications of the chemist to give an expert opinion. Moreover, it does not appear that there was any dispute as to the narcotic content of the cigarettes. Garcia, who testified on behalf of defendant, was asked whether he remembered the officer picking up the bundle of marijuana cigarettes and replied that he did and that they were his; upon being asked whether he had had any other marijuana cigarettes in the room he testified that he

had some in his pants pockets. Although the failure to give the statutory instruction was error, upon reviewing the entire cause, including the evidence, it would be unreasonable to believe a different verdict would have been rendered had the omitted instruction been given. Since the error did not result in a miscarriage of justice it does not constitute reversible error. Sec. 4½, Art. VI, Cal.Const.; *People v. Williamson*, 134 Cal.App. 775, 781, 26 P.2d 681; *People v. Brac*, 73 Cal.App.2d 629, 639, 167 P.2d 535.

Defendant asserts that the court erred in failing to instruct the jury (1) on the matter of circumstantial evidence; (2) that where evidence is susceptible of two reasonable constructions it is the duty of the jury to adopt that pointing to innocence and acquit the defendant; (3) that all instructions are to be considered as a whole; (4) in regard to rulings on objections to evidence; (5) on the matter of inferences and presumptions; (6) that defendant is a competent witness in his own behalf and (7) that the exhibits marked for identification but not received in evidence were not to be considered by the jury.

[2,3] The evidence was not circumstantial, as contended by defendant, but was direct evidence. Officer Bjorklund's testimony concerning defendant's motion, apparently picking up something, raising his hand, having in it what appeared from the manner in which it was folded to be a marijuana cigarette, his reaching over a curtain, his empty hand when removed, the officer's finding 28 marijuana cigarettes on the ground and no other loose objects nearby, was direct evidence of defendant's possession of the forbidden article. Defendant relies on *People v. Bender*, 27 Cal.2d 164, 163 P.2d 8. In that case the evidence was entirely circumstantial. In the instant case it was not necessary for the jury to draw inferences when they had the direct evidence of officer Bjorklund. The court is not required to instruct upon the rules of law applicable to circumstantial evidence when it is incidental to and corroborative of direct evidence. *People v. Jerman*, 29 Cal.2d 189, 197, 173 P.2d 805; *People v. Lapara*, 181 Cal. 66, 70, 183 P.



545; *People v. Nunn*, 65 Cal.App.2d 188, 194, 150 P.2d 476. The rule stated in the cases cited by defendant is applicable only where the evidence is entirely or largely circumstantial and is not pertinent in the instant case.

[4] Although defendant contends the court erred in failing to instruct the jury that all instructions are to be considered as a whole and in failing to instruct regarding rulings on objections to evidence, it does not appear from the record that defendant requested such instructions nor does he give any reason for the necessity thereof or show wherein he was prejudiced.

[5] Defendant asserts the court erred in failing to instruct the jury on the matter of inferences and presumptions; that the evidence rests largely on what inferences the jury might draw from defendant's presence in the room and that the jury must have drawn therefrom an inference of ownership or possession. Since there was direct evidence connecting defendant with possession, failure to give the instruction was not prejudicial.

[6] Defendant further maintains that the court erred in failing to instruct the jury that he is a competent witness in his own behalf and that his testimony is to be judged by the standard applicable to any other witness, citing *People v. Rodondo*, 44 Cal. 538. Defendant did not request such an instruction and the case cited holds that if a defendant in a criminal case becomes a witness in his own behalf and gives testimony tending to exonerate himself the court need not on its own motion instruct the jury as to the credit to be given his testimony; that only when there is something peculiar in the testimony itself or in the manner of giving it or in the circumstances surrounding the case is the court required to explain to the jury how they should consider and weigh the testimony.

[7] Defendant contends it was error for the court not to instruct the jury that exhibits marked for identification but not received in evidence were not to be considered by the jury. Defendant did not request such an instruction. At the close of

the prosecution's case defendant's counsel stated: "I am just wondering at this time whether your Honor, having shown all these things to the other witnesses, spoons and eyedroppers, whether it would not be proper at this time before I open my case to admonish the jury at this time that the other exhibits have nothing to do with this case." The court then stated: "They are not in evidence. There is nothing before the Court at this time in that respect. It is quite obvious that the District Attorney is abandoning Count 2 of the amended information." The district attorney thereupon stated he had no evidence on count 2 and at that time moved to dismiss it. The motion was granted and defendant's counsel then stated: "Now the only thing we are proceeding with is the cigarettes." The court remarked "That is right." It is apparent from the above that the jury could have been under no misapprehension with respect to exhibits 2 to 14 and that the only exhibit which was in evidence and which they needed to consider was exhibit 1, the 28 cigarettes.

*Testimony admitted over objection.* Defendant contends that the court erred (1) in permitting the prosecution over his objection to cross-examine the witness Garcia concerning an alleged conversation with Bjorklund; (2) in permitting Bjorklund to testify that he had the alleged conversation with Garcia; (3) in admitting Bjorklund's testimony regarding the alleged conversation because there was no testimony in the record to show the marijuana cigarettes were the same as those supposedly obtained by any joint enterprise and (4) in not permitting defendant to testify on sur-rebuttal as to whether he had ever "beat anyone out of some marijuana." Garcia was called as a witness on behalf of defendant. On direct examination he testified that defendant had nothing to do with the marijuana in the room or with the marijuana which was in the 28 cigarettes. Garcia was asked on cross-examination whether he had stated to Bjorklund that he and defendant "had beat someone out of a pound and a half of marijuana" and that they had divided it three ways, defendant getting one third of it. Defendant object-

ed to the question upon the ground that it was hearsay. The testimony was admitted for the purpose of impeachment only and the jury was so instructed.

[8-11] The testimony of Bjorklund was introduced solely for the purpose of impeachment. Moreover, no objection was made by the defendant to the testimony of either Garcia or Bjorklund upon the ground that it was not within the scope of the direct examination and was upon a collateral matter, the objection to the testimony being only upon the ground that the alleged conversation was not in the presence of defendant and was hearsay. There was no error in the court's overruling the defendant's objection that it was hearsay when it was offered solely for the purpose of impeachment and the objection now raised cannot be urged for the first time on appeal. Defendant made no motion to strike. A defendant is deemed to have waived all grounds of objection not stated by him. An objection cannot be made for the first time on appeal and the precise ground of objection must be made at the time of its offer. *People v. Lindsey*, 90 Cal. App.2d 558, 567, 203 P.2d 572; *People v. Sellas*, 114 Cal.App. 367, 378, 300 P.2d 150.

[12] Also untenable is defendant's contention that it was error for the court to decline to allow him on surrebuttal to testify as to whether he had beaten any one out of marijuana. As hereinabove stated, the testimony was introduced solely for the purpose of impeaching the witness Garcia by showing he had made a prior inconsistent statement. Consequently any testimony as to whether or not defendant had assisted Garcia was not proper surrebuttal and would not have constituted "rehabilitation" of Garcia's credibility since it did not relate to any prior statement of the witness.

[13] *Alleged misconduct of the district attorney.* Defendant's assertion that the district attorney was guilty of misconduct during the trial is based upon his theory that exhibits 2 to 14, consisting of the various articles found in Garcia's room, were

improperly before the jury; that the district attorney had no intention of offering them in evidence and his only purpose was to influence the jury to defendant's prejudice. The exhibits referred to were not in evidence and it was made clear to the jury that they were not in evidence and that the only exhibit which was introduced against defendant was exhibit 1, consisting of the 28 cigarettes. We find no prejudicial misconduct upon the part of the district attorney.

[14] *The evidence.* Finally defendant contends that the verdict is contrary to the law and the evidence. He maintains that the cigarettes were found in Garcia's room; that no cigarettes were found on defendant's person and that therefore they were not in his custody or under his dominion or control. There is no merit in defendant's contention. The testimony of Bjorklund was ample evidence that defendant had in his possession one of the marijuana cigarettes; that he disposed of it behind the curtain and that it was found among the 28 cigarettes on the floor, there being no other loose objects nearby. The facts are similar to those in *People v. Rodrigues*, 25 Cal. App.2d 393, 77 P.2d 503. In that case the defendant and two others were jointly charged with violation of the State Narcotic Act. One of the defendants pleaded guilty. The three men were apprehended in a room rented by the one who pleaded guilty and as the officers entered, Rodrigues threw some of the narcotics outside. They were found in a light well and were shown to have been in the same type of container as others found in the room. The defendant there argued that he could not have had exclusive possession because it was his co-defendant's room. The court held that the facts fully justified the inference that defendant was in possession of so much of the drug as he threw out the window, which was sufficient to sustain the judgment.

Judgment and order affirmed.

MOORE, P. J., and McCOMB, J., concur.

97 Cal.App.2d 393

**BAKER et al. v. PHILBIN et al.**

**Civ. 17389.**

**District Court of Appeal, Second District,  
Division 1, California.**

**May 8, 1950.**

**Rehearing Denied May 31, 1950.**

**Hearing Denied July 6, 1950.**

Action by Samuel F. Baker, Malcolm H. B. Weikel and William H. Citrin, individually and doing business under the style and firm name of Weikel and Mahony, against Philip Philbin and others, to recover amount allegedly due plaintiffs under agreement whereby plaintiffs gave up rights they had in contract with third party concerning property which defendant wished to purchase from that party and for causing such third party to breach his contract with plaintiffs. The Superior Court, Los Angeles County, William J. Palmer, J., sustained a general demurrer to plaintiff's second cause of action and entered judgment for plaintiffs against named defendant on the other claim and plaintiffs and defendant appealed. The District Court of Appeal, Drapeau, J., held that since trial court had found parties had compromised their differences and rendered judgment accordingly, all of plaintiffs' claims were of necessity included in that judgment.

Judgment affirmed.

**1. Contracts ⇨65(3)**

Where plaintiffs contracted to obtain necessary funds for party seeking to purchase certain realty, in return for a commission on amounts so obtained, and contract provided that plaintiffs were to be appointed top consulting engineers for whole project, but thereafter purchaser sought to sell his interest to defendant and plaintiffs agreed to release their interest in return for a certain sum, contract and conduct of parties presented situation whereby plaintiffs had a claim and there was consideration for defendant's promise to pay for release of plaintiffs' rights.

**2. Brokers ⇨86(1)**

**Contracts ⇨90**

**Licenses ⇨39.41**

In action to recover amount allegedly due plaintiffs in return for agreement to release their rights under contract with prospective purchaser of tract of realty whereby plaintiffs were to obtain funds for

purchaser at agreed commission and were to be appointed top consulting engineers for whole project, evidence sustained finding that plaintiff's claim for agreeing to release their rights to defendant was asserted in good faith and that plaintiffs were not acting as civil engineers or business opportunity brokers. Business and Professions Code, § 10250 et seq.

**3. Judgment ⇨204**

In action to recover amount allegedly due plaintiffs in return for their agreement with defendant to release all interest which plaintiffs had in contract with third party whereby plaintiffs were to assist such party in obtaining funds for purchase of certain realty, where trial court found parties had compromised their differences and rendered judgment accordingly, judgment of necessity included all claims which plaintiffs had against defendant.

**4. Compromise and settlement ⇨17(1)**

A valid compromise agreement has many of the attributes of a judgment and in absence of a showing of fraud or undue influence is decisive of rights of parties thereto.

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Loeb & Loeb, Los Angeles, H. F. Birnbaum, Los Angeles, of counsel, for appellants and cross-respondents.

Victor Ford Collins, Los Angeles, Hyman Smith, Los Angeles, Frank J. Kanne, Jr., Los Angeles, of counsel, for respondents and cross-appellants.

**DRAPEAU, Justice.**

Edward Schulz made an offer to buy Camp Anza from the War Assets Administration, and deposited \$2,500 to bind the bid. The purchase price was \$510,000. He had to have \$99,500 to make his down payment. He was a man of limited finances, and quite likely was greatly surprised when the government notified him that his bid was to be accepted. Most certainly he was exceedingly disturbed. For, unless he could raise the down payment he stood to lose \$2,500. So he immediately commenced a search for capital.



In his search he met plaintiffs, who told him they would raise the money for a 5% commission, and if he would employ them as engineers on the disposal of the property. None of the plaintiffs was licensed as a business opportunity broker, or registered as a civil engineer.

Mr. Schulz agreed to the proposal, and one of the partners typed up a memorandum of agreement, the construction of which will determine the basic issues in this case. The writing provided for payment of \$250 by Mr. Schulz, by way of a retainer. Mr. Schulz didn't have \$250, and so the partners sent him out to get it. He dug it up in a day or two, whereupon the document was signed and delivered, and is as follows:

"This an agreement between Mr. Edward F. Schulz of Fontana, California and the firm of Weikel and Mahony of Los Angeles, whereby the two parties to this agreement agree to the following, to wit,

"(1) Weikel and Mahony agree to use their best efforts to raise sufficient monies for Mr. Schulz so he can complete the purchase of the property known as Camp Anza, California from the War Assets Administration, upon which he has already made a down payment, and

"(2) for this and other services to be rendered in conjunction therewith, Mr. Schulz on his part agrees to pay the firm of Weikel and Mahony the sum of \$250.00 upon the signing of this agreement, as a retainer fee, upon a best performance basis, without any further guarantees or warranties, and further if

"(3) the firm of Weikel and Mahony are successful in raising any monies to complete the purchase as stated above, Mr. Schulz agrees to pay Weikel and Mahony an additional fee of \$25,000.00, or on a basis of five per centum, for any part of the monies so raised, it being understood that the fee of \$25,000.00 is only payable if the property is turned over to Mr. Schulz so he can proceed with his intended operations, and if only a part is raised, then the five per cent rule only, shall apply, and further if the project is completed *withby* Mr. Schulz can legally proceed with said operation, then the

"(4) firm of Weikel and Mahony shall be appointed top consulting engineers for the whole project with a further fee to be mutually and reasonably agreed upon by the parties hereto, and

"(5) the firm of Weikel and Mahony hereby agree at all times to protect to the best of their ability, the best interests of Mr. Schulz without any liability except wilful fraud, and is exclusive with this firm.

\* \* \*

"Accepted this date September 5 1947 in the City of Los Angeles,

|                                                |                                                                    |
|------------------------------------------------|--------------------------------------------------------------------|
| By <u>X Edw. F. Schulz</u><br>Edward F. Schulz | By <u>Saml. F. Baker</u><br>Weikel and Mahony<br>(Senior Partner). |
|------------------------------------------------|--------------------------------------------------------------------|

"Witnessed by M. H. B. Weikel in two copies only."

Plaintiffs contacted a number of sources of investment capital. Conferences were held, a layout of a plan of development and disposal of the property was made, with residential, business and manufacturing sections. Then they learned that Mr. Schulz was about to sell his right, title and interest in Camp Anza to defendant Philip Philbin. Mr. Schulz, however, did not say anything to them about that until they called him up and asked if it was true.

However, Mr. Schulz did tell Mr. Philbin of his contract with plaintiffs and that he thought they might make trouble for him. Mr. Philbin called them on the telephone, and a conference followed between two of the plaintiffs and Mr. Philbin and a friend of his.

Mr. Philbin said: "I don't want to buy into a lawsuit." Mr. Baker (one of the plaintiffs) replied: "Well, Phil, it looks like you might." Mr. Philbin said: "If you will step out of the picture, I will pay you \$12,000." Plaintiffs agreed to this proposal, and they all shook hands on the bargain. In passing, it should be said that the evidence is in sharp conflict as to this. Mr. Philbin and his friend testified directly to the contrary of the conversation quoted.

Plaintiffs stepped out of the picture. Mr. Philbin went on with his purchase from Mr. Schulz, and from the government. But Mr. Philbin would not pay the \$12,000.

Plaintiffs sued him for that amount, and also, in a second cause of action for damages for causing Mr. Schulz to breach the contract. Plaintiffs also sued Mr. Schulz for breach of the contract.

The court sustained a general demurrer to plaintiffs' second cause of action, that Mr. Philbin caused Mr. Schulz to breach the contract. And the judgment was that plaintiffs take nothing because of the alleged tort.

The remaining issues were consolidated and tried together. The court found for plaintiffs against Mr. Philbin, on the \$12,000 claim. This was on the theory that the cause of action rested upon a compromise agreement for settlement of a controversy, and also a promise not to interfere with Mr. Philbin's purchase from Mr. Schulz. Also the court found and adjudged against the plaintiffs on their complaint against Mr. Schulz.

Mr. Philbin and plaintiffs appeal from the judgment. No appeal has been taken by Mr. Schulz.

Mr. Philbin contends: (1) that the contract on its face is so uncertain, ambiguous and unilateral as to be unenforceable, and that plaintiffs' mere belief that they had a valid claim against Mr. Philbin was not sufficient consideration to support his alleged promise to pay them \$12,000; (2) that, *ex dolo malo non oritur actio*, as a matter of law, plaintiffs could not enforce any claim based upon the contract, because they were not registered as business opportunity brokers, or licensed as civil engineers: Business & Professions Code, sec. 10250 et seq., and (3) that the contract had been revoked by Mr. Schulz before the compromise agreement was made.

Both parties to the appeal have cited City Street Improvement Co. v. Pearson, 181 Cal. 640, 185 P. 962, 20 A.L.R. 1317, and each relies upon one of the two principles set forth and discussed in that case. That case deals with a compromise of an asserted claim against an abutting street landowner for street improvements. The court held that an invalid claim, wholly without foundation and absolutely void, constituted no consideration for a compromise of a de-

mand based upon it. In that case the court also discussed the other phase of the rule: A promise given in consideration of the settlement or compromise of a dispute or controversy the event of which is uncertain or doubtful, is founded upon a sufficient consideration.

[1] In the case at bar it cannot be said that the contract was wholly meaningless and unenforceable. If the plaintiffs had secured the necessary \$99,500 for Mr. Schulz within a reasonable time, undoubtedly they would have been entitled to the 5% compensation provided by the contract. Therefore, the contract, and the conduct of the parties presented a situation whereby plaintiffs had a claim, and there was consideration for the promise of Mr. Philbin. Hart v. Kanaye Nagasawa, 218 Cal. 685, 24 P.2d 815.

[2] The trial court found that the claim was asserted in good faith. This was a finding of good consideration for the compromise, even though the claimant might not have prevailed in a lawsuit based on the contract. Union Collection Co. v. Buckman, 150 Cal. 159, 88 P. 708, 9 L.R.A.,N.S., 568, 119 Am.St.Rep. 164, 11 Ann.Cas. 609.

On the question of illegality of the contract, there is an express finding that the plaintiffs were not acting as civil engineers or business opportunity brokers. The terms of the contract and the conduct of the parties support the finding.

On the question of revocation, the contract is not one solely of agency. Revocation of it by Mr. Schulz did not necessarily terminate all rights of plaintiffs under it.

Consideration of the cross-appeal by plaintiffs is next in order.

Plaintiffs contend that the order sustaining the demurrer, and the judgment, are erroneous as to them because Mr. Philbin induced Mr. Schulz to violate his contract with them; that this was a tort for which they had the right to sue and recover.

In their briefs plaintiffs say that the theory of their second cause of action is based upon the law as declared in Imperial

Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631. Mr. Philbin reiterates his contentions: That there was no binding contract; that in any event it was illegal; and that it had been revoked.

[3,4] But the court found that the parties had compromised their differences, and rendered judgment accordingly. The judgment of necessity included all claims which plaintiffs may have had against Mr. Philbin. As was said in *Silver v. Shemanski*, 89 Cal.App.2d 520, at page 532, 201 P.2d 418, 426: "It is established law in this state that a valid compromise agreement has many of the attributes of a judgment, and in the absence of a showing of fraud or undue influence, is decisive of the rights of the parties thereto."

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.



97 Cal.App.2d 432

**PEOPLE v. MUNOZ.**

Cr. 4433.

District Court of Appeal, Second District,  
Division 1, California.

May 10, 1950.

Charles Richard Munoz was convicted in the Superior Court for Los Angeles County, Harry J. Bordé, J., of robbery in the first degree, and he appealed. The District Court of Appeals, White, P. J., held that the evidence supported the conviction.

Judgment affirmed.

**1. Criminal law** ⇨1144(13), 1159(2)

Before appellate tribunal in criminal prosecution can set aside verdict of jury on ground of insufficiency of the evidence to support a conviction, conclusion reached in court below must be shown to be devoid of sufficient substantial evidence upon any hy-

pothesis whatsoever to support it; and in the District Court of Appeal there must be an assumption in favor of the verdict of the existence of every fact which the jury could have reasonably deduced from the evidence.

**2. Robbery** ⇨22

Where there was positive direct testimony that accused was perpetrator of robbery in the first degree, accused was required to show that testimony was inherently unbelievable in order to prevail.

**3. Criminal law** ⇨1159(2)

A statement, to bear upon its face the brand of improbability or to be unbelievable per se, must involve a claim that something has been done that it would not seem possible could be done under the circumstances described, or involve conduct that no one but a person of seriously caltured mentality would be likely to do. Code Civ.Proc. § 1844.

**4. Criminal law** ⇨742(1)

In prosecution for first degree robbery, whether victim was telling the truth in identifying defendant as a participant was a question for the jury. Code Civ. Proc. § 1844.

**5. Criminal law** ⇨1159(3)

Claimed inconsistencies and uncertainty in testimony of a prosecuting witness were matters which should have been directed to attention of the jury and could not be successfully urged on appeal.

**6. Criminal law** ⇨698(1)

In prosecution for robbery in the first degree, where no objection was made at trial to introduction of a certain weapon in evidence, failure to object amounted to a waiver of any objection that might have been made to its admission.

**7. Robbery** ⇨24(1)

Evidence supported conviction of robbery in the first degree.

Leland E. Zeman, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Gilbert Harelson, Deputy Attorney General, for respondent.



WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with the crime of robbery and that at the time of the commission of said offense he was armed with a deadly weapon, to-wit, a revolver. It was also alleged in the information that at the time of his arrest for the offense therein charged, he was armed with a concealed deadly weapon, to-wit, a revolver. This latter charge, being armed with a concealed deadly weapon at the time of his arrest, was subsequently stricken.

Following trial by jury, appellant was found guilty of robbery in the first degree. From the judgment of conviction he prosecutes this appeal.

The sole contention of defendant on this appeal being that the verdict is contrary to the weight of the evidence, it becomes necessary to epitomize the factual background which gave rise to this prosecution. The record reflects testimony that on the evening of April 21, 1949, at about 4:30 o'clock, Andrew A. Demetriou was working alone in his retail liquor store in the city of Santa Monica. That the defendant entered the front of the store while no one else other than the proprietor was there. A light was burning in the store at the time. Mr. Demetriou walked out front to wait on the defendant. When the former got behind the counter he asked the latter what he could do for him. Whereupon defendant pointed a gun at Demetriou saying, "Give me the money". At that time defendant was about two or three feet from the store proprietor. When defendant pointed the gun at Demetriou the former placed his right elbow on his forehead but prior to this time there was nothing concealing defendant's face from Demetriou's view. The latter then asked defendant what he wanted him to do and was told to "put the money in the bag". The store proprietor took the money out of the cash register, estimated to be approximately \$20.00, and put it in a bag. Defendant then said, "Give it to me", with which demand Demetriou complied. Defendant "put the bag of money inside his shirt" with his

right hand, which was the hand he previously had on his forehead. Defendant then asked Demetriou for a pint of whiskey, which the latter put into a bag and gave to defendant. The latter, using his right hand, put the whiskey "between" his shirt. He was holding the gun with his left hand. Defendant then asked Demetriou to give him some more money but the latter stated that it was all that he had, showing defendant his wallet. Thereupon, defendant told him "to go back, to get out". When Demetriou got about three feet from the front door defendant compelled him to return to the rear of the store. During this time defendant dropped his gun and when it hit the floor "it exploded—went off". Thereupon defendant picked up the weapon and ran out. Later that evening after the arrest of defendant, the witness Demetriou went to the police station where he identified defendant in a so-called "lineup". Demetriou identified a gun shown to him at the trial as the one defendant used in the robbery and the weapon was introduced into evidence.

Peter A. Breceda, a police officer, testified that about 8 o'clock on the evening of the robbery he arrested the defendant at an auto park. Upon searching him the officer found a gun inside defendant's shirt. The gun was the one that was identified by the liquor store proprietor as the one used in the robbery. It contained five shells, one of which was "spent" at the time of the arrest. There was testimony by another officer that when he received the gun from Officer Breceda, it contained four "live" shells and one "spent". Officer Donatelli testified that during the evening following the robbery he examined the liquor store and found a bullet hole in the wall about three inches above the floor.

Another police officer, Robert G. Holbrow, testified that he had a conversation with the defendant on the morning following the latter's arrest and that upon questioning him with regard to the robbery the defendant stated that he had no knowledge of any robbery.

In answer to interrogatories concerning his whereabouts on the preceding afternoon, the defendant replied that he left home at

about noon with his father's revolver, taking the same from the father's home without permission; that he took the weapon to Ocean Park in an attempt to sell it but had been unable to dispose of it.

Testifying as a witness in his own behalf, defendant stated that some days previously he had discussed the sale of a gun with a stranger whom he met at an employment office. That subsequently this stranger came to the defendant's home in connection with the purchase of a gun; that the gun belonged to the defendant's father. That the ostensible purchaser has asked defendant to permit him to take the weapon for the purpose of trying it out. That on the afternoon of the day of the robbery at about 3 or 3:30 o'clock defendant testified he met the prospective purchaser who returned the gun to the defendant stating that he had no desire to purchase it because it was too big and heavy. Defendant testified that he then continued to walk around Ocean Park in an attempt to sell the gun and that at about 6:30 o'clock he was arrested with the weapon in his possession. He denied participation in the robbery, stating he was elsewhere at the time. He admitted, however, that the gun which was introduced into evidence and identified by the liquor store proprietor as the one used in the robbery was in his possession on that day.

In support of his sole ground for reversal, appellant urges insufficiency of the evidence because of the asserted weakness of the testimony given by the prosecuting witness in his identification of appellant; that there was no showing that the gun found in his possession at the time of his arrest was the gun used in the robbery of the liquor store.

[1] Our approach to this contention must be in the light of the well-established rule that before an appellate tribunal can set aside the verdict of the jury upon the ground now under consideration, the conclusion reached in the court below must be shown to be devoid of sufficient substantial evidence, upon any hypothesis whatsoever, to support it. Furthermore, in this court, there must be an assumption in favor of the verdict of the existence of every fact which the jury could have reasonably deduced

from the evidence. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778.

The claimed weakness of the testimony identifying him as a participant in the crime charged is answered by what this court said in *People v. Alexander*, 92 Cal.App.2d 230, 234, 206 P.2d 657, 659, as follows: "On the question of identification of the perpetrator of the crime, it has been repeatedly held by the courts of this state that such a question is essentially one for determination by the triers of fact, and that their verdict or decision will not be set aside unless the appellate court can say as a matter of law that there was no substantial evidence to support the conviction. *People v. Ash*, 88 Cal.App.2d 819, [825], 199 P.2d 711; *People v. Farrington*, 213 Cal. 459, 463, 2 P.2d 814; *People v. Hightower*, 40 Cal.App.2d 102, 106, 107, 104 P.2d 378. Unless it can be said that the evidence of identity was so weak as to constitute practically no evidence at all, an appellate court is not entitled to set aside a jury's finding of guilt. *People v. Braun*, 14 Cal.2d 1, 5, 92 P.2d 402. In the instant case appellant has not met the burden imposed upon her to show that the identification evidence is inherently unbelievable. The claimed inconsistencies and uncertainties in the testimony of the prosecuting witness were matters which should have been directed to the attention of the jury, and can not be urged upon appeal. *People v. Skaggs*, 80 Cal.App.2d 83, 97, 181 P.2d 390; Code Civ.Proc. sec. 1847."

With reference to appellant's testimony in an attempt to establish an alibi, what we have just said is equally applicable. The jury was authorized to stamp this testimony as false.

[2-4] Except in prosecutions for perjury and treason, direct evidence of one witness who is entitled to full credit is sufficient proof of any fact. Code Civ.Proc. sec. 1844. In a case such as the present one, where there is positive direct testimony that the appellant was the perpetrator of the crime, it is incumbent upon him to show that the testimony is inherently unbelievable in order to prevail. "A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable *per se*, must

involve, we think, a claim that something has been done that it would not seem possible could be done under the circumstances described, or involve conduct that no one but a person of a seriously calentured mentality would be likely to do." *People v. Haydon*, 18 Cal.App. 543, 555, 123 P. 1102, 1108, 1114. Considering all of the evidence in the case now engaging our attention, it cannot be said, as a matter of law, that the testimony of the liquor store proprietor was so improbable as to be devoid of all belief.

[5, 6] What we have hereinbefore said is equally applicable to appellant's contention that there was no showing that the gun found in his possession at the time of his arrest was the gun used in the holdup of the liquor store, thus rendering the admission of the gun into evidence irrelevant. Furthermore, the record does reveal that the liquor store proprietor testified that he recognized the gun introduced into evidence and that it was the gun used by appellant at the time of the robbery. On cross-examination this witness stated that he saw rust on the gun used in the holdup, and in the trial court he pointed to a rust spot on the gun introduced into evidence. The witness also pointed to a little rod underneath the barrel of the gun as a distinguishing feature which had made an impression on his mind. There was also testimony that there was but one "spent" shell in the weapon. The claimed inconsistencies and uncertainty in the testimony of the prosecuting witness were matters which should have been directed to the attention of the jury, and cannot be successfully urged upon appeal. *People v. Skaggs*, supra, 80 Cal.App.2d at page 97, 181 P.2d at page 390. Furthermore no objection was made at the trial to the introduction of the weapon into evidence. The failure to object in the trial court amounts to a waiver of any objection that might have been made to its admission. *People v. Cucco*, 85 Cal.App.2d 448, 453, 193 P.2d 86; *People v. Garnier*, 95 Cal.App.2d 489, 213 P.2d 111.

[7] From what we have hereinbefore said, it follows that on appeal in this case, appellant's contention that the evidence,

\* Subsequent opinion 223 P.2d 244.

both direct and circumstantial, is insufficient to establish his guilt, cannot prevail. The evidence against appellant if believed is clearly sufficient to support the jury's conclusion that he was the perpetrator of the robbery charged against him. The rule applicable on appeal, where there is evidence, circumstantial or otherwise, that a crime has been committed and that the defendant was the perpetrator thereof, is succinctly set forth in *People v. Newland*, supra, 15 Cal. 2d at page 681, 104 P.2d at page 778.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



# COYNE v. KREMPELS et al.

Civ. 17164.

District Court of Appeals, Second District,  
Division 3, California.

May 15, 1950.

As Modified June 2, 1950.

Hearing Granted July 13, 1950.\*

Action by A. B. Coyne against Michael Kremfels and another to recover damages for breach of contract giving plaintiff right to sell bus and retain proceeds in excess of stated amount. The Superior Court of Los Angeles County, William B. McKesson, J., entered summary judgment for plaintiff and an order denying named defendant's motion to vacate the judgment and named defendant appealed. The District Court of Appeal, Shinn, P. J., held that affidavits were insufficient to entitle plaintiff to summary judgment in view of verified answer.

Judgment reversed and appeal from order denying motion to vacate judgment dismissed.

## I. Judgment ¶185

Plaintiff is not entitled to summary judgment unless facts stated in affidavits filed in support of motion for judgment are



sufficient to entitle him to a judgment. Code Civ.Proc. § 437c.

## 2. Judgment ◉185

Where owner in answer to action for breach of contract giving plaintiff right to sell bus and retain proceeds in excess of stated amount alleged breach of agreement by plaintiff and that plaintiff had not produced a purchaser at any price, affidavits alleging that plaintiff had some unnamed prospects who would have purchased bus for specified amount if, after examination and demonstration, they considered it a good buy at such price, were insufficient to entitle plaintiff to summary judgment. Code Civ.Proc. § 437c.

## 3. Judgment ◉185

Verified answer to action for breach of contract giving plaintiff right to sell bus and retain proceeds in excess of stated amount, alleging breach of contract by plaintiff and that plaintiff had not produced a purchaser for bus at any price, was itself evidence of a valid defense without supporting affidavits and, in absence of showing that it was a sham answer, failure to file supporting affidavits did not entitle plaintiff to summary judgment by default. Code Civ. Proc. §§ 437c, 453.

## 4. Pleading ◉354(2)

An answer which sets up a good defense should not be stricken out except upon a clear showing that the defense is not asserted in good faith. Code Civ.Proc. § 453.

## 5. Judgment ◉181(6)

Where defendant by verified answer set up specific facts which would constitute a good defense to action and denied specifically the allegations upon which plaintiff depended for a recovery, the case was one of the credibility of witnesses for trial on the merits and plaintiff was not entitled to summary judgment. Code Civ.Proc. § 437c.

## 6. Appeal and error ◉790(3)

Reversal of judgment rendered appeal from order denying motion to vacate judgment dismissable as moot. Code Civ.Proc. § 473.

Jesse A. Hamilton and Joseph T. Forno, Los Angeles, for appellant.

Jerrell Babb and Joseph L. Fainer, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an appeal by Michael Krempels from a summary judgment in favor of A. B. Coyne on a cause of action for damages for breach of contract. On the motion of Coyne the court struck out the answer of Krempels and rendered judgment against him for the sum of \$4,000 and costs.

The facts as disclosed by the pleadings and affidavits are the following: Krempels owned a bus; it was turned over to Coyne, who agreed to pay Krempels \$4,000 within five days and a balance of \$500 when he had made a sale of the bus; Krempels, not having received any money, brought suit on the agreement and caused the bus to be attached. The parties thereafter agreed in writing that Krempels would cause the bus to be stored at a service station where it could be shown and demonstrated to prospective buyers; Coyne was given the right to sell the bus within a period of 60 days, and the right to retain any sums received in excess of \$4,500 which, it was agreed, Krempels would receive over and above any brokerage fees or expenses if a sale was effected by Coyne. This agreement appears to have been arrived at as a means of settlement of the Krempels suit. Although Krempels caused his attachment to be released, the bus was not parked at the service station, and it was not sold by Coyne. The present action for damages was instituted by Coyne who alleged that Krempels had refused to allow him to show or demonstrate the bus, that he, Coyne, had within the 60 day period procured a buyer, ready, willing and able to purchase the bus for the sum of \$8,500, and that he had been damaged in the sum of \$4,000. Krempels filed an answer in which he denied that plaintiff "procured a buyer ready, willing and able to purchase said bus for the sum of \$8,500," and alleged that Coyne demanded that the bus be delivered to his home, together with the certificate of ownership, and refused to comply with the agreement upon any other terms. It was also alleged

"that plaintiff has at no time produced a buyer ready, willing and able to pay the sum of \$8,500 or any other sum for said bus;" Coyne thereafter filed an affidavit in which he averred "that during the 60 days following June 16, 1948, effective date of said written agreement, plaintiff has had several buyers who agreed to purchase said bus, subject to examination, demonstration and production of certificate of title, at a price and upon conditions which would have netted this plaintiff \$4,000." Coyne also caused to be filed the affidavit of one John E. Miller who stated on information and belief that Coyne found four prospects who were ready, able and willing to purchase the bus for \$8,500, "subject only to said purchasers seeing said bus to observe whether or not it was as represented and the testing and operation of same." These affidavits were made the basis of plaintiff's motion for summary judgment. Defendant did not file an affidavit. The ground of the motion was "that there is no defense to the action," and not that it was a sham answer, insufficient upon its face. See section 453, Code of Civil Procedure.

[1, 2] It is unnecessary to discuss more than one aspect of the showing made by plaintiff, in order to demonstrate its insufficiency. Plaintiff was not entitled to a summary judgment unless the facts stated in his affidavits were sufficient to entitle him to a judgment. Code Civ.Proc. sec. 437c. They were clearly insufficient. Defendant's answer alleged that plaintiff had not produced a purchaser for the bus at any price and asserted breach of the agreement by plaintiff. The affidavit of plaintiff asserted only that he had some unnamed prospects, who would have bought the bus for \$8,500 if, after an examination and a demonstration of its capabilities, they thought it was a good buy at \$8,500. It was not alleged that he ever notified defendant that he had any such prospects. There was no showing of any sort tending to prove that any of the alleged prospects would have been pleased with the bus and willing to buy it after they had examined it and ridden in it. The inadequacy of this showing is so clear as to require no further comment.

[3-5] It appears to be the contention of respondent that he was entitled to have his motion granted by default in the absence of an affidavit filed in support of the answer. The point is not well taken. Defendant's verified answer, containing the specific denials and allegations we have mentioned, was itself evidence of a valid defense. In the absence of any showing that it was a sham answer, it was not required to be supported by additional affidavits. Although a defendant resisting the motion must make a showing by affidavit of a good defense, the law does not require idle acts, and we think the verified answer was sufficient. It alleged specifically plaintiff's refusal to perform under the contract. A separate affidavit repeating these allegations would have served no purpose. The answer denied that plaintiff had found a purchaser ready, able and willing to purchase the bus. This denial was sufficient to put plaintiff on his proof. We do not see how defendant could have stated anything further by affidavit with respect to plaintiff's alleged unnamed prospects. More might have been required of defendant if plaintiff had alleged evidentiary facts which were not specifically denied by the verified answer. An answer which sets up a good defense should not be stricken out except upon a clear showing that the defense is not asserted in good faith. Where, as here, the defendant has set up by verified answer specific facts which would constitute a good defense to the action, and has denied specifically the allegations upon which plaintiff depends for a recovery, the case is one of the credibility of witnesses for trial on the merits, and a summary judgment should not be granted. *Eagle Oil & Ref. Co. v. Prentice*, 19 Cal.2d 553, 122 P.2d 264; *U. S. Fidelity & Guar. Co. v. Sullivan*, 93 Cal.App.2d 559.

[6] Defendant made a motion under section 473, Code of Civil Procedure, to vacate the order striking out the answer and granting summary judgment. New attorneys made this motion. It was supported by the affidavits of defendant and his original attorney and was accompanied by a proposed amended answer. Affidavits in opposition were filed on behalf of plaintiff.

It is not necessary to go into the merits of this motion further than to say that defendant made a strong showing for relief and we think the motion should have been granted. Defendant gave notice of appeal from this order. Our conclusion that the appeal from the judgment should be sustained renders the appeal from the order moot, and it should be dismissed.

The judgment is reversed and the appeal from the order denying a motion to vacate the judgment is dismissed.

WOOD and VALLÉE, JJ., concur.



97 Cal.App.2d 594

**BROWN v. TROPHY-CRAFT CO.**

Civ. 17140.

District Court of Appeal, Second District,  
Division 3, California.

May 17, 1950.

Rehearing Denied June 8, 1950.

Hearing Denied July 13, 1950.

Action by Carl W. Brown against Trophy-Craft Company, a corporation, to recover money allegedly due as commissions under oral contract of employment. The Superior Court of Los Angeles County, Charles S. Burnell, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Wood, J., held that findings of trial court regarding provision of oral agreement were supported by the evidence.

Judgment affirmed.

See also 85 Cal.App.2d 246, 192 P.2d 779.

**1. Principal and agent** ⚡81(5)

A principal cannot deprive his agent of commissions on goods ordered through him, by discharging him before orders are filled.

**2. Master and servant** ⚡80(10)

In action by salesman for commissions under oral agreement to sell trophies and bronze articles manufactured by defendant,

which commissions were allegedly earned on orders obtained by salesman but which were not filled until after salesman's discharge, evidence sustained finding that salesman earned and became entitled to receive commissions when merchandise was shipped to customer and without regard to whether salesman was employed by defendant at time of shipment.

**3. Master and servant** ⚡80(10)

In action by salesman for commissions under oral agreement to sell trophies and bronze articles manufactured by defendant, evidence sustained findings that defendant was to pay salesman \$100 a week as a guaranteed minimum compensation and expense account, an accounting was to be taken each month, and that if commissions then due salesman did not equal guaranteed minimum paid, salesman and defendant should take nothing further from each other on account of said period.

George Boshae, Los Angeles, for appellant.

Borah & Borah, Los Angeles, for respondent.

WOOD, Justice.

Action to recover money allegedly due as commission under an oral contract of employment. After an accounting, judgment was entered in favor of plaintiff for \$3,280.21. Defendant appeals from the judgment.

On February 2, 1946, plaintiff and defendant entered into an oral agreement which provided in part as follows: Plaintiff would sell trophies and bronze articles manufactured by defendant; his sales territory was Arkansas, Oklahoma, Louisiana and Texas; his compensation would be a commission of 10 per cent on all sales made in those states, irrespective of whether the sales resulted from the efforts of plaintiff; plaintiff would be paid \$100 a week, in advance, and would be given an accounting once each month. Pursuant to that agreement plaintiff went to said territory (to which the State of Mississippi was added later) and worked as a salesman. There-



after the sales of defendant's goods in that territory increased substantially. About June, 1946, plaintiff returned to Los Angeles where he worked in defendant's factory about seven weeks. Then he went back to his territory, and a few weeks thereafter he was notified by the defendant that his employment would be terminated on August 30, 1946. On said date of termination of plaintiff's employment some of the goods which had been ordered by customers in his territory had not been delivered by defendant. Subsequently, deliveries were made of part of the goods but plaintiff was not paid a commission on the sale of such goods. During the period he was employed by defendant, plaintiff was paid \$100 a week or a total sum of \$3,200. He was not given an accounting, however, during such period. After receiving notice of termination of his employment, plaintiff demanded an accounting, and was told by Mr. Gill that he had no "commissions coming."

Defendant asserts that plaintiff was not entitled to a commission on any sales if the goods were delivered after his employment had been terminated; and that the sums of \$100, which were paid to plaintiff each week, were to be deducted from his commissions when earned.

Plaintiff asserts that he is entitled to a commission on all sales made in the five states (above mentioned) during the period of his employment—regardless of whether delivery of the goods was made before or after his employment was terminated. He also asserts that the sum of \$100 a week received by him was a guaranteed compensation which was to be deducted from commissions only when the commissions for the same period exceeded such amount.

The trial court found that by the terms of the oral agreement plaintiff was to receive from defendant a commission of 10 per cent on all sales made by defendant and solicited by plaintiff in the States of Texas, Arkansas, Oklahoma, Louisiana, and Mississippi; that plaintiff was to receive a commission of 10 per cent on all other sales made by defendant in those states, which sales were the result of orders received, taken, or solicited during the period

of plaintiff's employment, whether solicited by plaintiff or not; and that "plaintiff earned and became entitled to receive said commissions when such merchandise was shipped to the customer, and without regard as to whether or not plaintiff was still employed by defendant." It also found that by the terms of the agreement defendant was to pay plaintiff \$100 a week as a "guaranteed minimum compensation and expense account to plaintiff"; that the parties further agreed that an accounting should be taken each month; that if at the end of each month the commissions earned by plaintiff exceeded "his guaranteed minimum paid to him during said monthly period, the defendant agreed to pay to plaintiff the amount of such excess; that if at the end of said monthly period, the commissions due plaintiff did not equal or were less than the guaranteed minimum paid during said monthly period, the plaintiff and defendant should take nothing further from each other on account of said monthly period."

Appellant contends that the evidence was not sufficient to support those findings.

Plaintiff testified that at the time of entering into the agreement Mr. Gill, sales manager of defendant corporation, told him that he was to receive a 10 per cent commission on all merchandise sold (in his territory) while he (plaintiff) "was in the employ of the company," and that he was to receive an "expense account of \$100 per week minimum"; he and Mr. Gill then discussed the shortage of metals; plaintiff asked Mr. Gill what would happen if defendant could not "deliver orders," and Mr. Gill stated "We will keep your orders on file and they will be a backlog for your territory"; there was no discussion as to what would be done about commissions in the event plaintiff's employment should be terminated while a backlog of orders was in existence; Mr. Gill told plaintiff that he had had salesmen "who had \$90,000 in the backlog." Plaintiff testified further that during the period of his employment he sent orders to defendant amounting to approximately \$59,400.

A witness, called by defendant, testified on direct examination that he was formerly

employed by defendant; about May, 1946, while so employed, he had a conversation with plaintiff regarding their employment; plaintiff said his agreement provided that he "would definitely receive a 10% commission on all merchandise sold in his territory, regardless of when it was delivered."

Mr. Gill, called as a witness by defendant, testified that he told plaintiff the defendant would pay him "10% commission on all net sales into an assigned territory during the time that he was employed" by defendant, and defendant would advance him \$100 weekly as a drawing account which would be deducted from commissions earned; he explained to plaintiff that he (plaintiff) was not going into a new territory—that formerly defendant had representatives in that territory and had advertised therein and, inasmuch as defendant was giving plaintiff commissions on established business, it was understood that when plaintiff's employment was terminated there would be no further commissions payable to him; he told plaintiff that defendant had a right to discharge him at any time, and if he were discharged when he had a backlog of orders he would not get any commission on those orders. He testified on cross-examination that during the period plaintiff worked in defendant's factory he was working at defendant's direction, and he had no opportunity to take orders; during said period plaintiff was "charged" with the \$100 a week which he was paid; plaintiff worked in the factory knowing that the money would have to be returned and that he was working for no compensation.

Mr. Metz, vice president of the defendant corporation, testified that he talked with plaintiff in January, 1946, and explained to him that he was being hired as a salesman, a collector, or to work as defendant might direct; at that time it was agreed that defendant would advance plaintiff \$100 per week "against earned commissions while in the territory in the interest of the company"; it was agreed that defendant would pay plaintiff 10 per cent on net shipments "into his assigned territory during the period he was employed"; the witness told

plaintiff that upon termination of his employment there would be no further advances or commissions paid.

There was a conflict in the evidence as to the provisions of the oral agreement. The evidence, viewed in the light most favorable to the plaintiff, shows that Mr. Gill told plaintiff that he would receive 10 per cent commission on all merchandise sold while he was in the employ of the company; that plaintiff asked Mr. Gill what would happen in the event defendant was unable to deliver merchandise ordered in his territory, and he replied that defendant would file such orders as a backlog for plaintiff's territory; that there was no discussion as to what would be done about commissions if plaintiff's employment should be terminated when there was a backlog of orders; and that during the period of plaintiff's employment he sent defendant orders amounting to approximately \$59,400. During the period plaintiff was employed no accounting was made by defendant, and no commissions in excess of \$100 a week were paid to plaintiff. Plaintiff did not know to what extent deliveries had been made in his territory. If defendant had withheld deliveries of all merchandise ordered in plaintiff's territory until after the termination of plaintiff's employment, the plaintiff, according to defendant's evidence regarding the oral agreement, would have been deprived of all commissions and would have been indebted to defendant for the total amount of the weekly sums advanced to him, namely, \$3,200. The trial judge said that he did not believe the testimony on behalf of defendant regarding the provisions of the agreement. It could be inferred from the evidence that it was the intention of the parties that plaintiff would receive a commission on all sales in his territory, which were the result of orders received or solicited during the period of plaintiff's employment, whether the goods were delivered before or after the termination of his employment.

[1] Furthermore, it is the "general rule that a principal cannot deprive his agent of commissions on goods ordered through him by discharging him before the orders are

filled." *Gantner & Mattern Co. v. Hawkins*, 89 Cal.App.2d 783, 788, 201 P.2d 847, 850. "If the contract contemplates that the agent shall receive compensation for sales of which the agent was the procuring cause, the agent is entitled to a commission on sales procured by him although the sales were actually consummated by the principal after the termination of the agency." \* \* \* *Zinn v. Ex-Cell-O Corp.*, 24 Cal.2d 290, 296, 149 P.2d 177, 180.

As to the finding that the payment of \$100 a week to plaintiff was a guaranteed minimum compensation, plaintiff testified that Mr. Gill told him that he would receive an expense account of \$100 a week "minimum." The fact that plaintiff was paid \$100 per week during the seven weeks he worked in defendant's factory, during which time he had no opportunity to solicit orders, would indicate that such sums were intended as a compensation. It would not seem reasonable that plaintiff was required, as asserted by defendant, to return such payments to defendant.

[2,3] The findings of the trial court regarding the provisions of the oral agreement were supported by the evidence.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



97 Cal.App.2d 494

**WARNER MFG. CO. v. STANDARD INTERSTATE MFG. CO.**

Civ. 17480.

District Court of Appeal, Second District,  
Division 2, California.

May 15, 1950.

Action by Warner Manufacturing Company, a corporation, against Standard Interstate Manufacturing Company, a corporation, in which plaintiff obtained an attach-

ment against defendant. The Superior Court of Los Angeles County, William B. McKesson, J., dissolved the attachment, and plaintiff appealed. The District Court of Appeal, McComb, J., held that where plaintiff's cause of action was on an implied contract for recovery of money, and defendant was a nonresident of the state, the writ of attachment properly issued.

Judgment reversed.

#### Attachment ¶6

Where judgment debtor, a foreign corporation, wrongfully took possession of plaintiff's realty and personalty, and used it without plaintiff's permission, plaintiff's cause of action against defendant was on an implied contract for recovery of money against a nonresident defendant, and plaintiff was entitled to writ of attachment. Code Civ.Proc. § 537, subd. 2.

Rinehart, Merriam, Parker & Berg, Pasadena, for appellant.

No appearance for respondent.

McCOMB, Justice.

From an order dissolving an attachment obtained against defendant Standard Interstate Manufacturing Company, a foreign corporation, in an action seeking to recover damages because defendant had taken possession of plaintiff's property, real and personal, and used it without plaintiff's permission, plaintiff appeals.

*Question: Under the foregoing facts was plaintiff entitled to a writ of attachment against defendant under the provisions of subsection 2, section 537 of the Code of Civil Procedure?*

This question must be answered in the affirmative. Plaintiff is entitled to levy an attachment upon property in an action upon a contract, express or implied, against a defendant not residing in this state. Sec. 537, subd. 2, C.C.P.

It was alleged in the complaint that defendant was a foreign corporation doing business in California. Hence it was a nonresident defendant within the meaning of section 537, Code of Civil Procedure. (*Title Insurance & Trust Co. v. California De-*



velopment Co., 171 Cal. 173, 218, 152 P. 542.) It was also alleged that defendant had wrongfully taken possession of the real and personal property of plaintiff and used it without the permission of the owner. Therefore plaintiff's cause of action was on an implied contract for the recovery of money, and under the provisions of section 537, subdivision 2 of the Code of Civil Procedure, since defendant was a nonresident of this state, the writ of attachment properly issued in the first instance and the trial court erred in dissolving it.

Reversed.

MOORE, P. J., and WILSON, J., concur.



97 Cal.App.2d 627

**CROSSLEY v. CROSSLEY.**  
Civ. 17384.

District Court of Appeal, Second District,  
Division 1, California.  
May 19, 1950.

Rehearing Denied June 13, 1950.  
Hearing Denied July 13, 1950.

Divorce action by Sidney Allen Crossley against Myrtle Crossley. The defendant cross-complained. The Superior Court, Los Angeles County, Charles A. Paulsen, J., awarded defendant a divorce on her cross-complaint and found that the party's second property agreement was valid and binding and that defendant was not entitled to support and maintenance and defendant appealed from the judgment and from orders denying motion for new trial and denying entry of another and different judgment. The District Court of Appeal, Drapeau, J., held that the findings which lead to the judgment relative to the property agreement was supported by the substantial evidence and was therefore conclusive and fact, standing alone, that husband and wife resumed marital relations did not terminate property agreement.

Purported appeals from the order denying a motion for a new trial, and from an order

denying entry of another and different judgment dismissed. Judgment affirmed.

**1. Divorce** ⚭239

In divorce action, evidence sustained finding that party's second property agreement was valid and binding, and that it was not the result of fraud or duress of husband and that wife was not entitled to support and maintenance.

**2. Appeal and error** ⚭1010(1)

Findings supported by substantial evidence are conclusive on appeal.

**3. Husband and wife** ⚭278(1)

Where parties' property agreement was fair and reasonable, considering circumstances of parties, and was entered into in good faith, and wife knew as well as husband what its terms and effects were, and wife also knew how to terminate it had she so desired, and wife managed at all times property given her by agreement, wife was bound by it.

**4. Husband and wife** ⚭279(1, 3)

The mere fact that after husband and wife entered into property settlement agreement, they resumed marital relations, did not terminate agreement, and wife's rights to maintenance and support were included within terms of agreement.

**5. Divorce** ⚭223

In divorce action, award to wife of \$3500 for her counsel fees was not an abuse of discretion.

**6. Divorce** ⚭253

In divorce action, where there was a property settlement agreement, evidence supported implied finding that there was no balance due from husband to wife on termination of the marriage.

Krag & Sweet and Charles R. Hand, Alhambra, for appellant.

Hahn, Ross, Goldstone & Saunders, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff and defendant were married March 28, 1942. It was a stormy marriage.

They would quarrel and one would leave the other; then they would make up and resume marital relations. Once their disagreement went so far that defendant got a divorce from plaintiff. But they made it up once more. Finally came the last quarrel, and they separated for good September 2, 1947.

At the time of the marriage plaintiff owned nine liquor stores—or, rather, California cocktail bars or cafes, where liquor is served and sold, state law requiring that food also be served. The cafes were good money makers, especially during the second World War.

The husband and wife entered into two property settlement agreements. The first agreement was terminated by mutual consent and agreement just after the divorce and reconciliation above mentioned. Whether the second agreement is valid and binding is the principal question in this appeal.

Plaintiff brought his action for divorce; defendant cross-complained; trial was had for a number of days; the court found mental cruelty of the plaintiff toward the defendant, and awarded her a divorce on her cross-complaint. No one complains of this.

The court found further that the second property agreement was valid and binding; that it was not the result of fraud or duress of plaintiff to defendant, and that she was not entitled to support and maintenance. Interlocutory judgment followed accordingly.

Defendant appeals from those portions of the interlocutory judgment as to the property agreement, as to support and maintenance denied defendant, and, on the ground of inadequacy, as to \$3,500 for her counsel fees.

In support of her contention that the property agreement was procured by fraud and duress defendant argues: That she and her husband lived together without the formality of a marriage ceremony from September 29, 1940, until their marriage in 1942; that the plaintiff had an infant daughter by a prior marriage, about eight months old when the parties began to live together; and that defendant always gave

to this child care, and love, and affection. She also contends that she was coerced into signing the property agreement by threats of plaintiff that he would take the child away from her, and by her desire to maintain a home and peaceable relations with him. Such threats were denied by plaintiff. And there is no persuasive evidence of fraud or misrepresentation in the inception of the contract.

At the time they began to live together, the plaintiff had four cafes and two parcels of real property. When they were married he had acquired five additional cafes and one additional parcel of real property. There's no doubt that the wife helped her husband in every way. While he was away in the armed services she took charge of the business; at all times she took an active part in it. In fact it is not an unreasonable inference to draw from the testimony that she was as good, if not a better "businessman" than he was.

In addition to fraud and duress, defendant asserts that the property agreement was discharged and cancelled by an executed oral agreement; that in equity she is entitled to a share of the property acquired both before and after the marriage; and that several transactions between her and her husband, in which she claims a balance was due to her, were not taken into account by the trial court.

[1,2] The findings which led to the judgment relative to the property agreement are supported by substantial evidence, and are, therefore, conclusive on this appeal. *Powell v. Pacific Electric Railway Co.* 35 Cal.2d 40, 216 P.2d 448.

[3] The property agreement was fair and reasonable, considering the circumstances of the parties. It was entered into in good faith, and the wife knew as well as her husband what its terms and its effects were. She also knew how to terminate it, had she so desired. She managed at all times the property given her by the agreement, and the trial court properly found that she was bound by it.

[4] The fact, standing alone, that the husband and wife in this case resumed marital relations, does not terminate the

property agreement. In re Estate of Brimhall, 62 Cal.App.2d 30, 143 P.2d 981.

Having come to this conclusion, the defendant's rights to maintenance and support are included within the terms of the property agreement.

[5] Assuming, without deciding, that the trial court had power to allow counsel fees, the amount found was well within its discretion.

[6] And the evidence supports the implied finding that there was no balance due from plaintiff to defendant upon termination of the marriage.

Purported appeals from the order denying a motion for a new trial, and from an order denying entry of another and different judgment are dismissed. The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



97 Cal.App.2d 637

**JENSEN v. UNION PAVING CO.**

No. 14245.

District Court of Appeal, First District,  
Division 1, California.

May 20, 1950.

L. C. Jensen sued Union Paving Co. (a corporation), for breach of an alleged oral contract for plaintiff to install sewers and drains. The Superior Court in and for the County of San Mateo, Edmund Scott, J., rendered a judgment that plaintiff take nothing and plaintiff appealed. The District Court of Appeal, Bray, J., held that finding that no such oral contract was entered into was supported by substantial evidence.

Judgment affirmed.

#### 1. Appeal and error ⇨931(1), 1010(1)

On appeal from take nothing judgment, all reasonable inferences would be indulged

in support of judgment, and judgment would not be reversed unless there was no substantial evidence to support judgment.

#### 2. Contracts ⇨28(1)

In action for breach of an alleged oral contract, plaintiff had burden of proving existence of the oral contract on which he relied.

#### 3. Contracts ⇨28(3)

In action for breach of alleged oral contract for plaintiff to install sewers and drains, finding of trial court that no such oral contract was entered into was supported by substantial evidence.

#### 4. Evidence ⇨5(2)

It is common knowledge among judges and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial in a phonographic record.

#### 5. Appeal and error ⇨931(1)

Appellate courts, if there is any reasonable doubt as to sufficiency of evidence to sustain a finding, should resolve doubt in favor of finding, and in searching record and exploring inferences to discover whether doubt exists, court should be realistic and practical.

Mathew Weber, San Francisco, for appellant.

Henry F. Wrigley, San Francisco, for respondent.

BRAY, Justice.

In an action for breach of an alleged oral contract, the superior court rendered judgment that plaintiff take nothing. Plaintiff appealed.

Question Presented.

[1] Plaintiff recognizes the well established rule that all reasonable inferences are to be indulged in support of the judgment and that, in order to reverse it, this court must hold that there is no substantial evidence to support the judgment. Plaintiff contends that there is no such evidence in



this case. There is no merit to this appeal. In his opening brief, plaintiff quotes merely the evidence favorable to his contention, completely ignoring the defendant's evidence and the inferences which the court had the right to draw from the inconsistencies in the plaintiff's own testimony, and the fact that the court had the right to disbelieve plaintiff.

#### Evidence.

Plaintiff's entire claim of a contract with defendant is based upon alleged conversations with one Corson who was defendant's general superintendent in charge of all its construction work in question here. Corson died prior to the filing of the complaint in this action, and hence his version of the conversations was unobtainable. Plaintiff's testimony follows: About January 28, 1947, Corson asked him to submit a price for the installing of sewers and drains on what was called the "Yew Avenue job." The pipe for the job had been ordered by defendant and was on the ground at that time. On January 30 plaintiff gave his written bid to Corson in the defendant's San Carlos office. Corson said he would "take it under advisement. He would check it over." On February 11, Corson told plaintiff his "prices were o. k.," and he could start on the job, and asked him how soon he could start. Plaintiff told him within a week. Plaintiff had no further conversation with Corson about the job except that on one occasion, probably around the 14th or 15th of February, Corson asked plaintiff if he knew anything about any of the pipe disappearing "up there." Plaintiff said he did not. On February 17, plaintiff learned that Corson had given the job to one Jarvis, and yet did not discuss the matter with Corson. On cross-examination plaintiff reiterated that he had not talked to Corson or anyone else about the job prior to his talk with Corson on January 28; yet he admitted giving Corson a bid dated January 25, which differed from the copy of the bid which he said he gave Corson on January 30 in that it contained a provision for progress payments and a space for acceptance, neither of which were on the January 30 bid. The bid dated January 25 was stamped "Feb 20 1947" which was

admittedly the date it was received in defendant's San Francisco office. Plaintiff was further confused by pencil changes of the typed cost figures on the bid dated January 25. At first he was not sure whether he or defendant made the changes, and then stated that they could be his handwriting.

Plaintiff then called Jarvis to whom Corson on February 18 had awarded a contract to do the work, as his bid was lower than plaintiff's. He testified that he had submitted a written bid to Corson at San Carlos on February 3. This bid was also stamped "Feb 20 1947" evidently the time it was received in defendant's San Francisco office.

Plaintiff's last witness was one Telfer, a former employee of defendant, who at the time in question worked in defendant's San Carlos office. He testified that between the early part of January and March 4, 1947, he heard a conversation between plaintiff and Corson about the Yew Avenue job; that plaintiff submitted a paper to Corson who said, "Well, those prices look all right. The job is yours," or words to that effect. (Plaintiff had testified that when he handed his bid to Corson, the latter had said he would take it under advisement and check it over.) Telfer never heard Corson say he would take plaintiff's bid under advisement.

Defendant called Joseph A. Dowling, defendant's president, who testified that at no time did plaintiff, other than by producing the bid, ever make an offer to do any of the work, nor did he ever move any equipment to the job.

Defendant's next witness was Frank Dowling, who was Corson's assistant. He testified that approximately February 11 or 12, "around there," he questioned plaintiff about some sewer pipe which was missing, and asked plaintiff if he knew where it might be or who might have taken it. Plaintiff said he did not, and that was the only subject they talked about.

[2,3] Plaintiff had the burden of proving the existence of the oral contract on which he relied. A reasonable inference from all the evidence is that plaintiff submitted two bids; that prior to Corson's alleged acceptance of plaintiff's second bid, Jarvis had submitted a lower bid; that Cor-

son, with a lower bid in his possession, would not orally accept plaintiff's higher bid and then give Jarvis a written contract. In his discussion of the lost pipe with Frank Dowling, plaintiff gave no intimation that he claimed to have the contract to do the job. After learning on February 17 that Jarvis had been given a written contract to do the work, plaintiff did not discuss the matter with Corson, or, so far as the record shows, with any other employee of the company. He made no effort to assert his rights until nine months after discovering that the work had been given to another and over five months after the death of Corson. He testified that on February 11 he had told Corson he could start the work within a week, and yet up to six days later when he learned that Jarvis had a contract, he had moved no equipment to the job or made any effort to start. His actions were hardly consistent with those of a man who has a contract to do a job and then learns that another has a later contract for the same work. All these were matters which the trial court had the right to, and evidently did consider, and were facts from which the court very well could, and did, draw the conclusion that plaintiff had not been given an oral contract by Corson. There is substantial evidence to support the court's finding that no such contract was entered into.

[4, 5] Moreover, the trial court was not necessarily required to believe plaintiff and his witness Telfer, even assuming that their evidence was uncontradicted. "Uncontradicted evidence is not necessarily binding on the court or a jury, but may be disbelieved where it is inherently improbable, or inconsistent with the facts and circumstances in evidence." *MacDiarmid v. McDevitt*, 97 Cal.App. 414, 418, 275 P. 500, 502. As said in *Re Estate of Bristol*, 23 Cal.2d 221, 143 P.2d 689: "It is common knowledge among judges and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial—if it can be reflected at all—in a phonographic record. Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sus-

tain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover, whether such doubt or conflict exists, the court should be realistic and practical." 23 Cal.2d pages 223-224, 143 P.2d page 690; see also *In re Estate of Teel*, 25 Cal.2d 520, 526, 154 P.2d 384.

Judgment affirmed.

PETERS, P. J., and SCHOTTKY, J. pro tem, concur.



97 Cal.App.2d 470

**MONROE v. SUPERIOR COURT IN AND  
FOR LOS ANGELES COUNTY.**

Civ. 17612.

District Court of Appeal, Second District,  
Division 1, California.

May 12, 1950.

Petition for writ of mandate by Nelta Marie Monroe to compel the Superior Court of Los Angeles County to set aside its order sustaining objections to certain questions and to require the answering of such questions propounded on the taking of a deposition. The District Court of Appeal, Doran, J., held that where wife in a divorce action charging husband with adultery, failed to comply with statute requiring service of pleadings upon husband's associates in alleged adulteries, and did not make such women parties to action, wife was not entitled to a writ of mandate directed at trial court to compel husband to answer inquiries about women in a pre-trial deposition.

Writ denied.

**I. Mandamus ⇐28**

A writ of mandate is not designed and should not be utilized to unduly control the ordinary activities of trial courts, and will not lie to control matters involving discretion, except in those rare instances

wherein under the facts it can be exercised in but one way.

**2. Divorce** ⚖️145  
**Mandamus** ⚖️40

Where wife instituted a divorce action for adultery, but wife did not comply with statute requiring service of pleadings upon husband's associates in alleged adulteries, and did not make such women parties to actions, refusal of trial court to compel husband upon pretrial deposition, to answer questions concerning whereabouts of such women was not an abuse of discretion, and wife was not entitled to a writ of mandamus. Code Civ.Proc. § 1019.

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Robert G. Blanchard, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Irvin C. Evans and Paul J. Otto, Los Angeles, for John Edward Monroe (real party in interest).

DORAN, Justice.

According to the petition, an action for divorce was filed on August 24, 1949 by the petitioner, Nelta Marie Monroe, against John Edward Monroe. In the amended complaint the husband was charged with adultery committed with eleven women; extreme cruelty was also alleged in that the husband "associated with women other than his wife". These women were not named as correspondents in the divorce action. Both charges were denied in the husband's answer.

Thereafter, the wife, petitioner herein, commenced the taking of a deposition of the husband as the adverse party, pursuant to Sections 2031 and 2055 of the Code of Civil Procedure. During the course of the deposition John Edward Monroe testified that he was acquainted with the women named in the complaint, and thereafter, upon advice of counsel, refused to answer questions relating to the following matters: "Where certain of said women lived at the time of his meeting with them", and where such women lived at present; "When was

the last time he saw certain of them; and \* \* \*. What were the circumstances surrounding his meetings with certain of them". The husband further refused to answer an inquiry as to the last time he went out with any one other than his wife.

Objections to the above questions were made on the grounds that the same were incompetent, irrelevant and immaterial and outside the issues of the complaint; that no foundation had been laid, and that questions were highly prejudicial to the defendant's interests. Upon the hearing of an order to show cause, the Superior Court sustained the objections and refused to require defendant to answer the inquiries.

The petition for writ of mandate avers that "By reason of the foregoing orders \* \* \* petitioner has been prevented from obtaining \* \* \* answers to questions which are legal and pertinent to the matter at issue \* \* \* (and) By reason of respondent's action and its failure to perform its judicial duty \* \* \* petitioner has been deprived of her lawful opportunity to complete the said deposition and will \* \* \* be required to proceed to trial without the benefits of said deposition \* \* \* and without any means of obtaining the information necessary to prepare her case".

Respondent's points and authorities present the proposition that the testimony in question "was inadmissible because the provisions of Section 1019, C.C.P., had not been complied with". That section provides that "When in an action for divorce adultery is charged \* \* \* and the person with whom such adultery is alleged to have been committed \* \* \* is named in any of the pleadings, a copy of such pleadings must be personally served on such named person".

In *Klemmer v. Klemmer*, 42 Cal.App. 618, 187 P. 85, the court held that where Section 1019 had not been complied with it was not error to exclude a deposition offered to prove the adultery. The petitioner's argument that, because the Supreme Court in denying a hearing in the *Klemmer* case, "expressly withheld approval of this portion of the opinion, thereby plainly implying a serious doubt as to the sound-



ness of the views expressed", is, of course, without merit.

The recent case of *McClatchy Newspapers v. Superior Court*, 26 Cal.2d 386, 392, 394, 159 P.2d 944, 948, has been cited by petitioner, where the reviewing court held that "Mandamus is the appropriate remedy to secure the enforcement of a litigant's statutory right to take depositions", and that "By refusing to compel a witness to answer proper questions, a trial court may effectively deny a litigant the right to take a deposition". However, as pointed out by respondent, the *McClatchy* case is in no manner similar to the present litigation. In the *McClatchy* case the holding was predicated on the fact that although a ruling on demurrer had eliminated the issues embraced by the deposition this did not prevent such issues from being classed as potential since they might be raised by an amended pleading; hence the witness should have been required to answer the inquiries. In the present case no such situation existed.

It is also argued by respondent that the questions asked the husband "were objectionable in that the answers might tend to subject the defendant to prosecution for a public offense"; that this privilege applies whether the crime involved is a misdemeanor or a felony. Respondent further calls attention to the fact that "Mandamus will not lie to control the discretion of respondent court"; that in passing upon the admissibility of evidence and materiality of questions, discretion of the trial court is involved and should not be controlled by mandamus except where there is a gross abuse of discretion.

[1] It is obvious that the writ of mandate, like other extraordinary writs, is not designed and should not be utilized to unduly control the ordinary activities of trial courts. In matters involving discretion it will not lie to control such discretion "except in those rare instances when under the facts it can be \* \* \* exercised in but one way", as was declared in *Hilmer v. Superior Court*, 220 Cal. 71, 73, 29 P.2d 175, quoted in *Lincoln v. Superior Court*, 22 Cal.2d 304, 313, 139 P.2d 13, 18.

The present case is one not falling within that category.

[2] The record indicates that without complying with Section 1019 of the Code of Civil Procedure, requiring service of pleadings upon the husband's associates in the alleged adulteries, and without making these women parties to the action, the wife's counsel, by way of what is sometimes termed "a fishing expedition", attempted to compel the husband to answer questions concerning the whereabouts of the women. This, upon order to show cause, the trial court refused to sanction. Under the circumstances disclosed by the record and cases governing the use of the writ here employed it cannot be said that petitioner is entitled to the writ.

The petition for a writ of mandate is denied.

WHITE, P. J., and DRAPEAU, J., concur.



97 Cal.App.2d 459

**BERVERDOR, Inc. v. SALYER  
FARMS et al.**  
Civ. 4035.

District Court of Appeal, Fourth District,  
California.

May 10, 1950.

Rehearing Denied June 5, 1950.

Hearing Denied July 6, 1950.

*Berverdor, Inc.*, sued *Salyer Farms*, a partnership, and the members thereof for rent due on a farm lease. From a judgment of the Superior Court of Kings County, *Clark Clement, J.*, for plaintiff in less than the amount sued for, plaintiff and defendants appealed. The District Court of Appeal, *Shephard, J. pro tem*, held that admission in evidence of certain letters between plaintiff's managing agent and defendants parol evidence of conversations between them before signing of lease to show such agent's agreement to adjust rent if it became un-

profitable for defendants to pay the stipulated rental was error.

Judgment reversed and cause remanded.

#### 1. Contracts ⇨175(2)

The statutory rule of evidence that circumstances under which contract was made, including situation of subject thereof and parties thereto, may be shown for proper construction of instrument, is invoked only to dispel doubt on face of contract as to meaning thereof by showing, not that parties meant something other than what they said, but what they meant by what they said. Code Civ.Proc. § 1860.

#### 2. Evidence ⇨397(1)

Generally, terms of written contract cannot be varied by parol evidence.

#### 3. Evidence ⇨442(1)

When parties to contract deliberately put their engagement in writing in terms importing legal obligation, without any uncertainty as to object or extent of engagement, their whole engagement and extent and manner of their undertaking are conclusively presumed to have been reduced to writing.

#### 4. Contracts ⇨25

An agreement that parties will make such a contract in future as they may then agree on amounts to nothing.

#### 5. Evidence ⇨442(3)

In action for rent due under farm lease, which was full and complete on its face, admission in evidence of letters between plaintiff's managing agent and defendants and parol evidence of conversations between them before signing of lease to show that such agent agreed to adjustment of rent, if it became unprofitable for defendants to pay stipulated rental, was erroneous, in absence of proof of fraud, mistake, imperfection, illegality or ambiguity. Civ. Code, § 1625; Code Civ.Proc. § 1856.

#### 6. Estoppel ⇨85

The lessor of farm was not estopped from suing for rent due under lease by lessor's managing agent's agreement with lessees, before lease was signed, to adjust rent if it became unprofitable for lessees to

pay stipulated rent; such representation or assurance being mere promise.

#### 7. Estoppel ⇨85

To furnish basis of estoppel, representation or assurance must relate to some present or past fact or state of things, as distinguished from mere promises or expressions of opinion as to future.

Wingrove & Brown, Meredith Wingrove, Lee G. Brown, Hanford, Berger & Irell, Clinton F. Seccombe, Richard S. Brawerman, Los Angeles, for plaintiff and appellant.

Sidney J. W. Sharp, Herbert M. Braden, Lawrence W. Clawson, Hanford, for defendant and cross-appellants.

SHEPARD, Justice pro tem.

Plaintiff sues for \$11,100 rent on a farm lease, together with interest from due date, costs and attorneys' fees. Trial was had before the court without a jury and judgment was rendered for plaintiff for \$7,479.61, including \$1,000 attorneys' fees and for costs, but without interest. Both plaintiff and defendants have appealed.

About August 7, 1944, plaintiff let to defendants by written lease certain lands in Kings County, near Tulare Lake. This land had in some previous years been irrigated with water from Tulare Lake.

The lease provides for a term of three years from October 1, 1944, at a total rental of \$33,300, payable \$5,500 on October 1 and June 1 each year of the term. It provides that lessee shall pay lessor's expenses, including attorneys' fees, to be fixed by the court in any action to enforce payment of rent due. Other stipulations of the lease relate to farming methods, oil drilling rights, assignments, repair, indemnity, surrender and holding over, and do not directly concern this controversy.

Defendants failed to pay the stipulated rent amounting to \$11,100 for the last year of the term and plaintiff sued to recover that sum, with interest and costs and attorneys' fees.

Defendants' answer admits the execution of the lease but avers that the rental pay-

ments were conditioned upon it being profitable for defendants to pay the rentals referred to, alleges such payments were unprofitable and that the written lease referred to in plaintiff's complaint is only a part of the whole agreement. Then follows a statement of income and expense from the farm operations to show that said payments were actually unprofitable. Failure to pay is admitted, but defendants aver nothing is due. The allegation of the lease provision for attorneys' fees is admitted but the necessity of bringing the action is denied.

Affirmatively, the defendants allege that June 14, 1944, Eugene M. Berger was the agent of plaintiff; that said Berger, acting for plaintiff, agreed to the adjustment of rent "in the event it became unprofitable for the defendants to pay the rental referred to in plaintiff's complaint"; that the lease dated August 7, 1944, was only a part of the agreement between the parties; that payment of the rental for the last year of the term was in fact unprofitable; that defendants are entitled to an adjustment of rent; that defendants had notified plaintiff of these facts and asked adjustment prior to the action commenced.

The answer does not allege in any way that there is a mistake or imperfection of the lease alleged in the complaint nor is the validity of the lease put in dispute. No extrinsic ambiguity or illegality or fraud is alleged. It simply avers that the lease alleged in the complaint is only a part of the total agreement.

At the trial, over the objection of plaintiff, the defendants were allowed to introduce certain letters. The principal one of these was signed by Eugene M. Berger, the managing agent of plaintiff, and read in part as follows:

"\* \* \* June 14, 1944.

"As I told you, if during the term of your lease any conditions take place which will make it commercially unprofitable for you to continue to pay that rental, I shall be very glad to sit down and discuss with you the changed conditions, with a view of helping you out.

"Within the next several days, I shall be glad to have the lease completed for your signature."

On the contention that this letter was a part of the lease agreement and was ambiguous, defendants were permitted to introduce a number of other letters and a large volume of parol evidence, going back several years, to explain the meaning of said quoted letter. This parol evidence included vital conversations with said negotiating agent Berger (who died shortly after execution of the lease) held prior to the signing of the lease. The one upon which greatest reliance is placed by defendants was during a long distance telephone call between Berger and E. C. Salyer at the time the lease (already signed by plaintiff) was received through the mail by Salyer. Salyer called attention to the fact that the lease did not include a provision for adjustment, as referred to in said quoted letter, and Berger replied:

"We've spent enough time on the dam lease—we would like to go ahead—the letter will protect you—we had worked together enough—I will protect you—go on farming and forget about it—sign it and send it back."

It also included evidence that in the year for which rent was not paid (1946-1947) Tulare Lake went dry and water from other sources came too late to make a profitable crop.

There was also admitted evidence concerning cropping customs in the area relating to the amount or share reasonably allocable to the lessor.

Section 1856 of the Code of Civil Procedure provides that:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

"1. Where a mistake or imperfection of the writing is put in issue by the pleadings;



"2. Where the validity of the agreement is the fact in dispute.

"But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties."

Section 1860 of the Code of Civil Procedure provides: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

Section 1625 of the Civil Code provides: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

[1] The proper application of section 1860 of the Code of Civil Procedure is explained in *United Iron Works v. Outer Harbor Dock & Wharf Co.*, 168 Cal. 81, at page 84, 141 P. 917, at page 920, where the court says: "This rule of evidence is invoked and employed only in cases where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other *than* what they said, but by showing what they meant *by* what they said."

In the case of *Cline v. Smith*, 96 Cal.App. 697, 274 P. 761, defendant had entered into a written contract with plaintiffs' principal. At the time the contract was submitted to defendant for his signature defendant objected to the 60-day cancellation clause in the contract. In response to this objection plaintiffs' principal wrote defendant a letter in which he said, in part: "\* \* \* the writer will give you his word of honor that you need have no concern as to the termination of this contract without you are amply and amicably taken care of and I trust that this will allay your mind of any

uneasiness with regard to being disturbed so long as you represent us faithfully as you have in the past. \* \* \*

Speaking of this letter, the court said: "It is contended that this letter and the formal contract must be construed together as one instrument, \* \* \*. It appears from the defendant's testimony that the letter was a part of the negotiations preceding or accompanying the execution of the contract. In the absence of fraud or mistake, it was inadmissible as evidence of the terms of the contract, which were neither uncertain nor ambiguous."

[2] The authorities cited by defendants, such as *Thoroman v. David*, 199 Cal. 386, 249 P. 513; *Harrison v. McCormick*, 89 Cal. 327, 26 P. 830, 23 Am.St.Rep. 469; *Kohl v. Lytle Creek Water & Improvement Co.*, 24 Cal.App.2d 353, 75 P.2d 71, and *Owsley v. Whelan Drug Co.*, 83 Cal.App.2d 454, 189 P.2d 50, do not support defendants' position that this case is properly one of the exceptions to the rule against varying the terms of a written contract by parol evidence.

In *Thoroman v. David*, 199 Cal. 386, 249 P. 513, 514, the court said: "If it imports upon its face to be a complete expression of the whole agreement—that is, [shows] such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, *although the writing contains nothing [whatever] on the particular one to which the parol evidence is directed.*"

[3] In *Harrison v. McCormick*, 89 Cal. 327, 26 P. 830, 831, 23 Am.St.Rep. 469, the court quotes the time honored rule from *Greenleaf on Evidence*: "When parties have deliberately put their engagement in writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively *presumed* that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing."

The letter, even if it be considered a part of the whole agreement, is merely a

promise to negotiate. Its terminology is not ambiguous. Numerous examples of this kind of agreement are to be found in the annals of business wherein one person assumes to rely on the moral integrity of another only to discover that the other's memory or understanding does not respond concerning the event causing dispute. The court cannot make a new agreement for the parties.

[4] In *Dillingham v. Dahlgren*, 52 Cal. App. 322, 198 P. 832, the court said: "An agreement that parties will in the future make such contract as they may then agree upon amounts to nothing."

[5] The lease of August 7, 1944, was, on its face, full and complete and no fraud, mistake, imperfection, illegality or ambiguity was proved. We are of the opinion that the admission of parol evidence and the letters was clearly error and should not have been permitted.

[6] We are unable to agree with the defendants that the rule of estoppel applies in this case.

[7] "The general rule is well settled that in order to furnish the basis of an estoppel, a representation or assurance must relate to some present or past fact or state of things, as distinguished from mere promises or expressions of opinion as to the future." (19 Am.Jur., p. 656.) The cases of *Calistoga National Bank v. Calistoga Vineyard Co.*, 7 Cal.App.2d 65, 46 P.2d 246; *Humboldt Sav. Bank v. McCleverty*, 161 Cal. 285, 119 P. 82; and *Panno v. Russo*, 82 Cal.App.2d 408, 186 P.2d 452, do not vary this rule.

It is true that some cases of promissory estoppel and waiver appear to ameliorate or soften this rule, but we have been cited no case and we have been unable to find any case which in any way aids in the application of that doctrine to the case at bar.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with the views herein expressed. Each party will bear their own costs on this appeal.

GRIFFIN, Acting P. J., and MUSSELL, J., concur.

Hearing denied; CARTER, J., dissenting.

97 Cal.App.2d 569

**WHERRY v. RAMBO.**

Civ. 17520.

District Court of Appeal, Second District,  
Division 3, California.

May 16, 1950.

Action by Charles Wherry against George Rambo. On December 29, 1947, a judgment was entered awarding plaintiff \$2,145 with interest and on July 20, 1949, the then attorney for plaintiff filed with the clerk a satisfaction of the judgment. The plaintiff thereafter, appearing in *propria persona*, filed a motion to vacate the entry. The Superior Court, Los Angeles County, William B. McKesson, J., denied the motion to vacate the entry of satisfaction of the judgment and plaintiff appealed. The District Court of Appeal, Vallée, J., held that since it did not appear from the affidavit of plaintiff that a revocation of the authority of the attorney had been filed prior to a time the satisfaction was filed, attorney was authorized to receive full amount of judgment when tendered by defendant and in absence of a showing to contrary it would be presumed that attorney performed his duty and received full amount of judgment before causing it to be satisfied and statement in plaintiff's affidavit on information and belief that satisfaction was entered in fraud and for purpose of depriving plaintiff of his rights under judgment was hearsay, a conclusion not supported by any facts and would be disregarded.

Order affirmed.

**1. Judgment** ⇨898(2)

A party to the record may have a satisfaction of a judgment entered in fraud of his rights set aside on motion in the action in which the judgment was entered.

**2. Attorney and client** ⇨100

**Evidence** ⇨69

**Judgment** ⇨898(2)

**Pleading** ⇨9, 304

Where revocation of authority of attorney had not been filed, plaintiff's attorney of record had authority to receive full amount of judgment and to acknowledge satisfaction, and in absence of showing to contrary it would be presumed that attorney received full amount of judgment before causing it to be satisfied, and plaintiff's allegations on information and belief that

satisfaction was entered in fraud and for purpose of depriving plaintiff of his rights under judgment was hearsay, a conclusion unsupported by facts which would be disregarded and overruling of motion to vacate satisfaction of judgment was not error. Code Civ.Proc. §§ 283, subds. 1, 2, 473, 675.

Charles Wherry, in pro. per.  
No appearance for respondent.

VALLÉE, Justice.

Appeal from an order denying a motion to vacate an entry of satisfaction of a judgment.

December 29, 1947, a judgment was entered awarding plaintiff \$2,145 with interest. July 20, 1949, the then attorney for plaintiff filed with the clerk a satisfaction of the judgment. It was dated June 30, 1949, signed by plaintiff's attorney, and acknowledged by him on July 1, 1949, before a notary public. It stated that the judgment had been paid, acknowledged full satisfaction, and authorized and directed the clerk to enter full satisfaction of record in the action. July 26, 1949, the clerk made an entry on the judgment acknowledging full satisfaction.

July 30, 1949, plaintiff, appearing in propria persona, filed a notice of motion to vacate the entry. The notice stated that the motion would be made on "the ground that the said Satisfaction of Judgment was entered without said plaintiff's knowledge or consent and against his express wish, desire and instructions to his former counsel herein, Harold J. Sinclair, Esq., and upon the further ground that the same was entered because of surprise and excusable neglect as set forth in Section 473 of the Code of Civil Procedure of the State of California."

In support of the motion, plaintiff filed his affidavit in which he stated: the judgment had not been satisfied by payment or otherwise; prior to a substitution of attorneys on file in the action, he was represented in the action by attorney Harold J. Sinclair (the substitution of attorneys is not in the record, nor does the date it was

filed or who was substituted appear); July 20, 1949, his former attorney (Harold J. Sinclair) signed and caused the satisfaction to be filed without his knowledge or consent and contrary to his desire and wish; he had not received any money or any consideration for the satisfaction, had not agreed to any settlement of the judgment, and had not ratified or approved the entry of the satisfaction; July 5, 1949, he forwarded, by registered mail, to the attorney who signed the satisfaction a letter in which he expressly instructed the attorney "not to settle the within matter" without his permission or consent (a copy of the letter was attached to the affidavit); he had never given any such consent to his attorney, or to any one else; since he discovered the wrongful entry of the satisfaction, he had made many efforts to contact his said former attorney for the purpose of obtaining an explanation "relating to the said satisfaction" but had been unsuccessful; he "has no knowledge or information whatsoever as to the circumstances or conditions under which said satisfaction of judgment was entered or what consideration, if any, was paid by said defendant to plaintiff's said former counsel; that affiant has now been informed and believes and therefore alleges that said satisfaction [of] judgment was entered in fraud and for the purpose of depriving affiant of his rights under said judgment \* \* \*" A copy of a letter dated July 26, 1949, from plaintiff to his attorney was also attached to the affidavit. The letter said that plaintiff had learned that the satisfaction had been filed on July 20th and asked for information as to the amount the attorney had received. No counter-affidavit was filed or counter-showing made in opposition to the motion. The motion was denied. Plaintiff appeals from the order. Respondent has not filed a brief and did not appear for argument.

[1] Plaintiff asserts that the court abused its discretion and committed reversible error in denying the motion. A party to the record may have a satisfaction of a judgment entered in fraud of his rights set aside on motion in the action in which the judgment is entered. *Clark v. John-*



ston, 49 Cal.App. 315, 318, 193 P. 864; *Argue v. Wilson*, 3 Cal.App.2d 645, 646, 40 P.2d 297. Code of Civil Procedure section 283 reads: "An attorney and counselor shall have authority: 1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise; 2. To receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment." Code of Civil Procedure section 675 provides: "Satisfaction of a judgment may be entered \* \* \* upon an acknowledgment of satisfaction filed with the clerk \* \* \* which may recite payment of the judgment in full or the acceptance by the judgment creditor of any lesser sum in full satisfaction thereof, made in the manner of an acknowledgment of a conveyance of real property \* \* \* by the attorney, unless a revocation of his authority is filed."

[2] It did not appear from the affidavit of plaintiff that a revocation of the authority of the attorney had been filed prior to the time the satisfaction was filed on July 20th. Appellant's attorney was, therefore, not only authorized to receive the full amount of the judgment when tendered by the defendant, but it was his duty to do so. *Ely v. Liscomb*, 24 Cal.App. 224, 228, 140 P. 1086; 7 C.J.S., Attorney and Client, § 99, p. 915; 5 Am.Jur. 323, sec. 103. There was no showing that the attorney for appellant accepted or received less than the full amount of the judgment. Appellant said in his affidavit that he did not know what consideration was paid by the defendant to the attorney. By virtue of section 283, the attorney had authority to receive the full amount of the judgment, "and upon the payment thereof, and not otherwise," to acknowledge satisfaction. In the absence of a showing to the contrary, it is presumed that the attorney performed his duty and received the full amount of the judgment before causing it to be satisfied. We cannot assume on the

record that the attorney violated his solemn obligation and satisfied the judgment without collecting the full amount. See *Trope v. Kerns*, 83 Cal. 553, 556, 23 P. 691; *Church v. Church*, 40 Cal.App.2d 701, 705, 105 P.2d 643.

The statement in the affidavit, upon information and belief, that the satisfaction "was entered in fraud and for the purpose of depriving affiant of his rights" under the judgment is hearsay, a conclusion unsupported by any facts, and must be disregarded. *Riviello v. Journeymen Barbers etc. Union*, 88 Cal.App.2d 499, 503, 199 P.2d 400; *Meyer v. Seliggio*, 80 Cal.App.2d 161, 164, 181 P.2d 690.

In view of the fact there was no showing that the attorney received less than the face amount of the judgment before filing the satisfaction, it is unnecessary to consider the authorities cited by appellant with respect to the rule applicable to that state of facts.

The court did not err in denying the motion.

Order affirmed.

SHINN, P. J., and WOOD, J., concur.



97 Cal.App.2d 599

**BACON v. WAHRHAFTIG et al.**

Civ. 4052.

District Court of Appeal, Fourth District,  
California.

May 17, 1950.

Hearing Denied July 13, 1950.

Action by Joseph C. Bacon against Joseph Wahrhaftig and others, for partition of oil land. The Superior Court for Kern County, W. L. Bradshaw, J., rendered judgments of dismissal for certain defendants, and the plaintiff appealed. The District Court of Appeal, Mussell, J., held that defendants whose interests allegedly resulted from a series of leases, conveyances, agreements and

assignments which were pleaded and attached to the complaint as exhibits were necessary and proper parties to the action.

Judgments reversed.

### 1. Partition ⇨14

Ordinarily, if a party seeking partition is shown to be a tenant in common and as such entitled to possession of the land sought to be partitioned, right to bring the action is absolute. Code Civ. Proc. §§ 752-801.

### 2. Partition ⇨83

Partition cannot be had until interests of all parties have been ascertained and settled by a trial. Code Civ. Proc. § 759.

### 3. Partition ⇨55(2)

Plaintiff in a partition action is required to set forth in his complaint the interests of all persons in the property, whether such persons are known or unknown. Code Civ. Proc. § 759.

### 4. Partition ⇨48

In action for partition of oil land, certain defendants whose interests allegedly resulted from a series of leases, conveyances, agreements and assignments were necessary and proper parties. Code Civ. Proc. § 759.

### 5. Action ⇨38(2)

A complaint which primarily alleged a cause of action for partition of oil lands and further sought rescission of leases, quieting of title, damages for breach of leases and for fraud and an accounting, stated one primary right, and did not improperly unite different causes of action. Code Civ. Proc. §§ 752-801.

### 6. Action ⇨38(2)

The fact that a plaintiff may be entitled to several species of relief for the enforcement of a single right does not mean that he has more than one cause of action, and seeking different kinds of relief does not establish different causes.

### 7. Action ⇨1

The "cause of action" is the obligation sought to be enforced.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Cause of Action".

### 8. Equity ⇨39(1)

Court of equity has jurisdiction in an equitable action to hear and determine all issues necessary to do complete justice.

### 9. Pleading ⇨207

Special demurrers should not be sustained when allegations of the complaint are sufficiently clear to apprise defendant of issues which he is to meet.

### 10. Pleading ⇨209

A special demurrer for uncertainty is not intended to reach failure to incorporate sufficient facts in the pleading, but is directed at uncertainty existing in allegations actually made.

### 11. Pleading ⇨204(1)

A demurrer which attacks an entire pleading should be overruled if one of the counts therein is not vulnerable to the objection.

### 12. Pleading ⇨192(2)

A demurrer for uncertainty will not lie where ambiguous facts are presumptively within knowledge of demurring party.

### 13. Pleading ⇨207

Special demurrers should not be sustained if allegations are sufficiently clear to apprise defendant of issues that must be met even if allegations of complaint may not be as clear and as detailed as might be desired.

### 14. Pleading ⇨192(2)

A demurrer for uncertainty will not lie even as to uncertain and ambiguous allegations if such allegations refer to immaterial matters, and in such event they will be treated as surplusage and will be disregarded.

### 15. Pleading ⇨207

Uncertainties and ambiguities of complaint which arose out of pleader's attempt to state legal effect of certain transactions, all of which were evidenced by writings attached to the complaint and were pleaded in their exact language, were not subject to special demurrer.

### 16. Mines and minerals ⇨73

The right of a lessee in an oil and gas lease is a profit a prendre, and is an

incorporeal hereditament or interest in realty.

**17. Partition**  $\Rightarrow$ 55(2)

In action for partition of oil land, right of any lessee in oil and gas lease was required to be set forth in the complaint. Code Civ.Proc. § 753.

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Siemon, Maas & Siemon, Alfred Siemon, Walter L. Maas, Jr., Bennett Siemon, Bakersfield, for appellant.

Matthew Wahrhaftig, McKee, Tasheira & Wahrhaftig, Oakland, and Kendall & Howell, Bakersfield, for respondents Joseph Wahrhaftig, Thomas P. Bacon, Mildred E. Bacon, McAuley Cremorne Mission and Chicago United Mission.

Newby, Holder & Newby, Los Angeles, for respondents Mitchel and others.

Alfred W. Mitchem, Los Angeles and Calvin Conron, Jr., Bakersfield, for respondent Seaboard Oil Co. of Delaware.

Ralph F. Forch, John B. Taylor, Los Angeles, and Calvin Conron, Jr., Bakersfield, for respondent Bandini Petroleum Co.

MUSSELL, Justice.

This is an appeal from judgments of dismissal entered after demurrers sustained and declination of plaintiff to amend. There are two of such judgments or orders and an appeal from each. There were a number of separate appearances and as many demurrers, some of which were sustained on special and one on both general and special grounds.

It is alleged in the complaint (paragraph 1) that the plaintiff is the owner in fee of an undivided 18.13 per cent of Sections 21, 27 and 35, Township 28 South, Range 20 East, M.D.B. & M., in Kern County, California, and that the following named defendants are owners in fee of undivided interests in said land: Robert H. Bacon, 28.04%; Thomas P. Bacon, 23.12%; Ida M. Bacon, 2.91%; Pearl Bacon, 3.833%; Faith Bacon, 3.136%; J. Burris Mitchel and B. Milo Mitchel, 4.166%; Glen H. Mitchel, 4.

167%; Salvation Army, 4.166%; Chicago United Mission, 4.166%; and The McAuley Cremorne Mission, 4.166%; that some of the interests are affected by certain encumbrances therein described. In paragraph 3 it is alleged that the interest of all persons in the property described, so far as known to the plaintiff, and other than as set out in paragraph 1, are such as result from a series of leases, conveyances and assignments. These interests are then described in subsections (a) to (m), inclusive, by reference to oil and gas leases, assignments and agreements, copies of all of which are attached to the complaint as exhibits and made a part thereof. It is then alleged that the interests set forth are the interests of all persons in the property, so far as known to plaintiff.

Paragraph 4 of the complaint alleges that the Mitchels have not subjected their  $\frac{1}{4}$ th interest as to 160 acres in Section 35 to the majority or charity leases; that under the partial assignment of the majority lease and the charity lease from Adams to Mitchels as to the 80 acres in Section 21 and the 80 acres in Section 35, the Mitchels became obligated with the other lessees to perform all lessee obligations as to the whole of said lands; that by the terms of the provisions of the assignment, exhibit "T", Mitchels reserved unto themselves an overriding royalty of  $8\frac{1}{3}\%$  as to 160 acres of land in Section 21; that they released the oil companies from all obligations under the other leases; that by the assignment they released the oil companies from their obligation under the lease to drill successive wells and imposed upon the oil companies added drilling and other requirements as to the 160 acres of land for the Mitchels' sole and exclusive benefit, which added obligations and requirements were independent of all lessee obligations as to the other portions of the land; that on September 10, 1946, the Mitchels and the oil companies entered into an agreement, exhibit "K" to the complaint, and that this agreement was made in disregard of the interests of their co-owners, extended the time of



the oil companies to commence drilling and waived all defaults of the lessees as to all lands except those upon which the Mitchels would get 8½% overriding royalty.

In paragraph 5 it is alleged that the Mitchels received considerations for their releases and assignments other than those which they received when they executed instruments mentioned in the preceding paragraph; that some of such considerations were and are the attempt of the defendants to hold the leasehold rights in the 160 acres in Section 35 until drilling elsewhere proved the property as oil property, all without themselves performing any of the lessees' obligations under the majority lease; that the Mitchels received other consideration for releasing the oil companies from their obligations; that the conditions subsequent to the majority lease and to the charity lease have been destroyed by the activities of the Mitchels and the lessee and Mitchels are permitted to hold all the lands without any drilling requirements; that because of their actions and receipt of these other considerations, the Mitchels have agreed that they would not join with the other co-owners in forfeiting the majority lease; that the oil companies connived and participated in all these arrangements and manipulations for their own advantage; that the arrangements are hostile and adverse to the other co-tenants and a diminution of their estates and rights in the said land; that as a result the majority lease and the charity lease have been nullified and abrogated in respect to substantial rights of plaintiff and other fee owners and have become oppressive and unconscionable; that as a result the consideration for the said leases has failed in part; that the Adams assignment to Mitchels of the majority lease has permitted the Mitchels to so manipulate matters that they can enjoy the leasehold rights without any obligation on their part; that the manipulation of the Mitchels was in violation of their obligation to their co-owners and were carried out and consummated to gain an advantage and were a fraud upon the plaintiff and the other co-owners; that the oil companies connived and participated in the

fraud and did, therefore, obtain an unfair alteration of their contractual obligation.

In paragraph 6 it is alleged that the oil companies have permitted great quantities of wet gas to be blown into the air, all to the damage of the plaintiff and the other co-owners.

In paragraph 7, plaintiff, upon information and belief, alleges that several of the fee owners or lessors have transferred their interests to persons unknown to plaintiff and that such transfers have not been recorded; that the real property involved has not been fully explored for oil; that the title to the property is such that it should be fixed and determined and all quieted except as to the Mitchels; that plaintiff has no plain, speedy or adequate remedy at law, or otherwise, except in partition; that it is impossible to partition the lands in kind and that they be sold and that the value of the rights of the various parties be fixed according to the rules and practices of equity and divided among the parties according to their respective entitlements.

The grounds of special demurrers are that there is a misjoinder of parties defendant; that several causes of action have been improperly united and that the complaint is uncertain in that the exhibits attached to the complaint are inconsistent with the allegations thereof. Various other uncertainties are alleged in connection with the conclusions drawn by the pleader as to the effect of the various leases and agreements executed by the parties. The trial court sustained the demurrer of the Seaboard Oil Company and defendants Mitchel and Bandini Petroleum Company on the ground of misjoinder of causes of action. The demurrer of defendants Thomas P. Bacon, et al. was sustained on general and special grounds. Judgments of dismissal were entered after plaintiff declined to amend.

[1] The action for partition may be brought by one or more of the persons described in section 752 of the Code of Civil Procedure. It is a special proceeding regulated by the provisions of the statute, Code Civ.Proc. secs. 752-801, and ordinarily, if the party seeking partition is shown to be a

tenant in common, and as such entitled to the possession of the land sought to be partitioned, the right is absolute. *Priddel v. Shankie*, 69 Cal.App.2d 319, 325, 159 P.2d 438.

[2-4] In the instant case, plaintiff has alleged facts from which it clearly appears that plaintiff is a cotenant with the other owners of the fee title in the property involved. As such cotenant, plaintiff may be entitled to partition and if so, may be entitled to have his rights, as well as those of defendants having interests in the property, put in issue, tried and determined. No partition can be had until the interests of all the parties have been ascertained and settled by a trial. *Withington v. Collins*, 60 Cal.App.2d 110, 113, 140 P.2d 493, Code Civ.Proc. sec. 759. Plaintiff is required to set forth in his complaint the interests of all persons in the property, whether such persons are known or unknown. This he has done, and has alleged that the interests of certain defendants result from a series of leases, conveyances, agreements and assignments which are pleaded and attached to the complaint as exhibits. We conclude that the defendants are all necessary and proper parties to the action.

[5-8] The objection that several causes of action have been improperly united is not tenable. It is claimed that there is a failure to separately state a cause of action to rescind the leases, to quiet title, for damages for breach of the leases, for fraud and for an accounting. The primary right or cause of action herein is that of partition, *Merlino v. West Coast Macaroni Mfg. Co.*, 90 Cal.App.2d 106, 115, 202 P.2d 748, 754, and as there said: "The fact that a plaintiff may be entitled to several species of relief for the enforcement of a single right does not mean he has more than one cause of action. If the action is brought to enforce a single right violated by defendant, the complaint states but one cause of action regardless of the number or types of relief sought. *Big Boy Drilling Corp. v. Rankin*, 213 Cal. 646, 3 P.2d 13; *Panos v. Great Western Packing Co.*, 21 Cal.2d 636, 134 P.2d 242; *Hellman v. Los Angeles Ry. Corp.*, 135 Cal.App. 627, 27 P.2d 946, 28 P.2d 384." The seeking of different kinds of relief does

not establish different causes of action. *California Trust Co. v. Cohn*, 214 Cal. 619, 629, 7 P.2d 297. The cause of action is simply the obligation sought to be enforced. *Panos v. Great Western Packing Co.*, 21 Cal.2d 636, 638, 134 P.2d 242. This is an equitable action and the court has jurisdiction to hear and determine all issues necessary to do complete justice. *Lent v. H. C. Morris Co.*, 25 Cal.App.2d 305, 307, 77 P.2d 301. In *Sears v. Rule*, 27 Cal.2d 131, 148-149, 163 P.2d 443, 452, the court said: "The action of the trial court, moreover, is in accord with the general rule that a court of equity, having once acquired jurisdiction, will adjust all the differences between the parties arising from the cause of action in order to do complete justice and prevent further litigation, whether or not the particular relief was requested. See *Smith v. Blodget*, 187 Cal. 235, 242, 201 P. 584; *Viera v. Fontes*, 135 Cal. 126, 129, 66 P. 241; *Murphy v. Sheftel*, 121 Cal.App. 533, 541, 9 P.2d 568. It has been held that under this rule the court could properly order an accounting although the complaint did not ask for such relief. *Swan v. Talbot*, 152 Cal. 142, 94 P. 238, 17 L.R.A.,N.S., 1066; see 1 Am.Jur. 306."

The demurrers for uncertainties and ambiguities are not well grounded. Nearly all of the specifications involve assertions or claims that demurrants cannot determine how certain interests are adverse, or how legal results occur. As to most, if not all, of such matters the alleged uncertainties and ambiguities arise out of the pleader's attempt to state the legal effect of certain transactions; but these transactions were all evidenced by writings which are attached to the complaint and pleaded in their exact language.

[9-15] A special demurrer should not be sustained when the allegations of the complaint are sufficiently clear to apprise the defendant of the issues which he is to meet. *Lord v. Garland*, 27 Cal.2d 840, 853, 168 P.2d 5. Such a demurrer for uncertainty is not intended to reach the failure to incorporate sufficient facts in the pleading, but is directed at the uncertainty existing in the allegations actually made. *People v. Lim*, 18 Cal.2d 872, 882, 118 P.2d 472. A

demurrer which attacks an entire pleading should be overruled if one of the counts therein is not vulnerable to the objection. *Lord v. Garland*, supra, 27 Cal.2d page 850, 168 P.2d 5. As was said in *Merlino v. West Coast Macaroni Mfg. Co.*, supra, 90 Cal. App.2d at page 108, 202 P.2d at page 750: "A demurrer for uncertainty will not lie where the ambiguous facts alleged are presumptively within the knowledge of the demurring party. *Corum v. Hartford Acc. & Indem. Co.*, 67 Cal.App.2d 891, 155 P.2d 710; *Swasey v. de L'Etanche*, 17 Cal.App. 2d 713, 62 P.2d 753. A special demurrer should not be sustained if the allegations are sufficiently clear to apprise the defendant of the issues that must be met, even if the allegations of the complaint may not be as clear and as detailed as might be desired. *People v. Lim*, 18 Cal.2d 872, 118 P. 2d 472. Moreover, a demurrer for uncertainty will not lie as to even uncertain and ambiguous allegations, if such allegations refer to immaterial matters. In such event, they will be treated as surplusage and disregarded. *Swasey v. de L'Etanche*, supra; *Aronson v. Bank of America*, 42 Cal.App. 2d 710, 109 P.2d 1001; *Penziner v. West American Finance Co.*, 133 Cal.App. 578, 24 P.2d 501. Tested by these standards, we think it was error to have sustained the demurrer." Applying these rules to the complaint before us, we think it was error to have sustained the demurrers.

[16,17] In the brief filed in behalf of defendants Seaboard Oil Company and Bandini Petroleum Company it is stated that the precise principal question herein involved is whether or not a cotenant of land, in an action against his cotenants for partition thereof, may cause an oil and gas lease on such land, which has been executed by all of such cotenants, to be terminated against the will of the owners of the oil and gas leasehold estate created by such lease. We are not here deciding this precise question. It has been held that the right of a lessee in an oil and gas lease is a profit a prendre, that is an incorporeal hereditament or interest in real property. *La Laguna Ranch Co. v. Dodge*, 18 Cal.2d 132, 135, 114 P.2d 351, 135 A.L.R. 546. This interest is such as is required

to be set forth in plaintiff's complaint. Code Civ.Proc. sec. 753. The rights of the defendant oil companies were properly put in issue and the determination of their contentions is for the trial court in a trial of the action.

Judgments reversed.

GRIFFIN, Acting P. J., and SHEPARD, J. pro tem., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.



97 Cal.App.2d 651

# IN RE GRIFFITH'S ESTATE.

## SECURITY-FIRST NAT. BANK OF LOS ANGELES v. CITY OF LOS ANGELES.

Civ. 17221.

District Court of Appeal, Second District,  
Division 2, California.

May 22, 1950.

Rehearing Denied June 7, 1950.

Hearing Denied July 20, 1950.

The Security-First National Bank of Los Angeles, trustee of testamentary trust of Griffith J. Griffith, deceased, filed a petition for additional fees for extraordinary services rendered in connection with erecting and equipping an observatory, and for attorneys' fees, and the City of Los Angeles (Department of Parks) objected. The Superior Court of Los Angeles County, Raymond McIntosh, J., entered an order allowing the additional fees and the objector appealed. The District Court of Appeal, McComb, J., held that matter of extraordinary fees was not *res judicata*, that petitioner had not waived right to apply for such fees, and that doctrine of laches was not applicable.

Judgment affirmed.

### 1. Trusts §331

Where testamentary trustee did not ask for fees for extraordinary services in any of several annual accounts filed by trustee, but did ask and receive fees for its ordinary services, the matter of extraordinary fees was not *res judicata*, and trustee did not waive right to subsequently apply for



fees for extraordinary services by failing to apply for such fees.

## 2. Trusts ⇨315(3)

Doctrine of laches was not applicable to preclude testamentary trustee from recovering for extraordinary services rendered where question of fees was presented in connection with the filing of an account.

## 3. Appeal and error ⇨989

Where a finding of fact is attacked on ground that there is not substantial evidence to sustain it, power of appellate court begins and ends with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding.

## 4. Trusts ⇨315(3)

Evidence justified awarding testamentary trustee fee of \$30,000 for extraordinary services rendered by trustee in connection with the erecting and equipping of an observatory, which trustee was required to construct and equip under terms of trust.

## 5. Trusts ⇨227

Where testamentary trustee was justified in incurring attorneys' fees in connection with proper administration and execution of trust estate, trustee was entitled to an allowance for reasonable attorneys' fees.

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Ray L. Chesebro, City Attorney, Bourke Jones and Roger Arnebergh, Assistant City Attorneys, Alan G. Campbell, Deputy City Attorney, Los Angeles, for appellant.

Newlin Holley, Sandmeyer & Tackabury, Clyde E. Holley and Hudson B. Cox, Los Angeles, of counsel, for respondent.

McCOMB, Justice.

Objector appeals from an order of the probate court allowing the trustee of a testamentary trust of Griffith J. Griffith, deceased, (1) \$30,000 additional fees for its extraordinary services in connection with the erection and equipping of the Griffith Park Observatory during the period of twenty-one and one-half years before the nineteenth account was filed, and (2) \$3,000 for its attorneys' fees in connection

with the hearing of the trustee's application for extraordinary fees.

*Facts:* During his lifetime Colonel Griffith J. Griffith gave to the people of the City of Los Angeles several hundred acres of scenic land which is now called Griffith Park. Upon his death in July, 1919, his will created a testamentary trust, naming the corporate predecessor of respondent as trustee with directions that \$100,000 of the fund be used for the construction of a Greek Theatre in Griffith Park and the balance be used to construct and equip an observatory and hall of science. His will was admitted to probate on July 11, 1919, and the final decree of distribution entered November 12, 1924.

The estate distributed to the trustee consisted of \$256,431.23 in cash, and real estate appraised at \$204,460.51. The trust fund was not large enough in 1924 to construct the Greek Theatre and the hall of science. Accordingly funds were permitted to accumulate until 1928, when the Greek Theatre was commenced and by arrangement with the park department of the City of Los Angeles additional funds were provided for the construction and equipping of the theatre.

Shortly thereafter it was decided that the observatory and hall of science should center around a planetarium. Various scientists were consulted and the plan progressed to fruition when the observatory was opened to the public on May 14, 1935.

Prior to the order appealed from respondent filed seven reports and current accounts in which the trustee recited generally its management of the trust funds and the work which had been done toward effecting the main objects of the trust. In each of these accounts, the seventh of which was filed January 31, 1934, respondent stated it had made charges in a given amount for its services as trustee up to and including the date which closed the period in question and that the sum stated was a reasonable compensation for its services as trustee for that period. Each account after hearing regularly held was approved.

When the trustee filed its eighth report and account on February 20, 1935, it asked

for approval of the deduction of a fee of \$2,528.97, alleging it was reasonable compensation for its services, and then requested that the matter of extraordinary compensation to it for its services in connection with the building and equipping of Griffith Observatory be reserved for determination at a later date. This account was approved and an order dated March 19, 1935, was entered providing that the account and report "including the compensation charged by the trustee" be settled and approved.

Since the opening of the observatory in 1935, respondent has at various intervals submitted further reports and accounts in which it has accounted for its management of the remaining assets of the trust fund, and in each of these reports through the eighteenth, the trustee charged certain fees for its "ordinary services" and in some of them repeated the prayer which appeared in the eighth account that the matter of its compensation for "extraordinary services" be reserved for determination at a future date.

In the nineteenth report which was filed April 25, 1946, respondent made a lengthy recital about the construction of the Greek Theatre and observatory and asked that its extraordinary fees be fixed in the sum of \$35,000. Over objection the court allowed respondent extraordinary fees in the sum of \$30,000 as additional fees for all the trustee's services in connection with the Griffith Observatory project, and \$3,000 for its attorneys' fees in connection with the hearing of the application for extraordinary fees. From this order the present appeal ensues.

*Questions: First: In view of the fact that respondent did not ask for fees for extraordinary services in any of the first seven accounts filed by it, but did ask and receive fees for its ordinary services, (a) was the matter of extraordinary fees res judicata, (b) had respondent waived its right to apply for such fees, and (c) was respondent barred by laches?*

This question must be answered in the negative. There is a distinction between "ordinary" and "extraordinary" services

for a testamentary trust with respect to the allowance of compensation. (In re Estate of Lopez, 79 Cal.App.2d 399, 403, 179 P.2d 621; In re Estate of Lair, 52 Cal.App.2d 222, 225, 126 P.2d 133; In re Estate of Kruce, 10 Cal.App.2d 426, 430, 51 P.2d 1174.) In the instant case each of the first eighteen accounts dealt with compensation to the trustee only so far as ordinary services were concerned.

[1] (a) Where an annual account deals only with ordinary compensation and there is no application for extraordinary compensation the account is conclusive only as to the matter included therein and is not res judicata so far as a subsequent application for fees for extraordinary services is concerned, even though the application is for fees for extraordinary services rendered prior to the previous accounting. (In re Estate of Adams, 131 Cal. 415, 416, 417, 63 P. 838; Walls v. Walker, 37 Cal. 424, 426, 99 Am.Dec. 290; In re Estate of Evans, 62 Cal.App.2d 249, 257, 144 P.2d 625.) Therefore pursuant to this rule, since in none of the first eighteen accounts did respondent request fees for extraordinary services rendered, the doctrine of res judicata is not here applicable and the judge of the probate court properly considered such question.

(b) By failing to apply in an account current for fees for extraordinary services a trustee does not waive the right to subsequently make application therefor. (Elizalde v. Murphy, 4 Cal.App. 114, 116, 87 P. 245; cf. In re Estate of Dillon, 149 Cal. 683, 685, 686, 87 P. 379; In re Estate of Matthiessen, 23 Cal.App.2d 608, 615, 73 P.2d 1267.) This rule is applicable to the facts of the present case and hence the trial court properly considered respondent's application in the present account.

Such authorities as Estate of Davis, 65 Cal. 309, 4 P. 22, and In re Leavitt, 8 Cal App. 756, 97 P. 916, relied on by objector, are factually distinguishable from the instant case. For example, in Estate of Davis the administrator had expressly renounced his right to a statutory commission prior to his appointment, and In re Leavitt merely held that a successor trustee

tee is not entitled to commissions predicated on the entire value of the trust estate simply because his predecessor renounced his right to compensation.

[2] (c) The doctrine of laches is inapplicable in probate proceedings where the question of a trustee's compensation is presented in connection with the filing of an account current or a final account. (In re Estate of Gillett, 73 Cal.App.2d 588, 600, 166 P.2d 870. Cf. In re Estate of Hume, 179 Cal. 338, 346, 176 P. 681.) Therefore objector's contention on this point is untenable.

In re Estate of Crosby, 55 Cal. 574, relied on by objector, is factually distinguishable from the present case and is not here in point. In re Estate of Crosby, the doctrine was applied as between an estate and a stranger thereto, while in the present case it is being urged that at such time as the trustee makes an accounting of the trust funds he may be either credited or debited in connection with the account.

Second: *Was the probate court's allowance of \$30,000 as compensation for extraordinary services excessive?*

[3] This question must be answered in the negative. Bearing in mind the rule, that when a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact (In re Estate of Isenberg, 63 Cal.App. 2d 214, 217, 146 P.2d 424), the record discloses that Senator Roseberry, manager of the trust department of respondent stated, "Well this is probably one of the most unique and unusual trusts we have had in our institution in the thirty-six or seven years I have been with it. \* \* \* It was a public project in many ways, but its execution was entrusted to the bank." Another witness testified that the decree of distribution called for the construction of an observatory and hall of science, having a twelve inch telescope, a model of the solar system, a coelostat, a celestial globe, a collection of illuminated transparencies of the

sun, planets and stars, and an exhibit showing the evolution of man; that when sufficient money had been accumulated in the trust the trustee appointed a scientist to advise as to carrying out this portion of the decree so that a scientific exhibit having appeal to laymen might be constructed; that as a result it was determined to make the major exhibit a planetarium; at that time only one existed in the United States and it became necessary for the manager of the trust department to negotiate with a representative of the Zeiss Company for the construction of the planetarium; that in 1931, the trustee entered into a contract with architects to draw plans and specifications for the observatory to cost approximately \$450,000; that in the meantime it was necessary to petition the court for instructions and thereafter a contract was made for the construction of the building which was of unique design requiring the trustee to negotiate a large number of changes with the builder, amounting, in fact, to 76 change orders executed and many more requests for changes discussed and rejected; that as it was desired to project motion pictures on the domed ceiling, plans had to be devised for projecting a flat image on a curved surface; that, in addition, the trustee had to select a scientific adviser, and upon the death of the first adviser selected, a successor had to be chosen; that seats of a special design were necessary for the planetarium; and more than 143 other contracts for services, supplies, materials and exhibits were made by the trustee in connection with the construction of the observatory. Finally the record discloses that the major time and attention of several officials of respondent was consumed in connection with the project for a period of approximately five years.

[4] The foregoing testimony together with much other evidence received by the trial judge raised a question of fact for his determination which was sustained by substantial evidence.

Third: *Was the probate court without jurisdiction to allow respondent its reasonable attorneys' fees incurred in connection with the hearing upon objections to its application for extraordinary compensation?*



[5] This question must be answered in the negative. A trustee is entitled to employ counsel and be reimbursed from the funds of the trust for reasonable sums paid for the services of such counsel whenever it is necessary to the proper administration, preservation or execution of the trust. (In re Estate of Duffill, 188 Cal. 536, 555, 206 P. 42; Conley v. Waite, 134 Cal.App. 505, 506, 25 P.2d 496; Day v. First Trust & Savings Bank, 47 Cal.App.2d 470, 480, 118 P.2d 51; In re Moore, 96 Cal. 522, 531, 31 P. 584.) In the instant case respondent was justified in incurring attorneys' fees in connection with the proper administration and execution of the trust estate. Therefore the probate judge did not err in approving respondent's application for reasonable attorneys' fees.

Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, 153 P.2d 714; In re Estate of Marre, 18 Cal.2d 191, 114 P.2d 591; Estate of Fritz, 16 Cal.App.2d 519, 60 P.2d 1008, and In re Estate of Fulton, 23 Cal.App.2d 563, 73 P.2d 664, relied on by objector, are each distinguishable on their facts from those obtaining in the present case, and no useful purpose would be served by pointing out the differences. Therefore we refrain from doing so.

Affirmed.

MOORE, P. J., and WILSON, J., concur.



97 Cal.App.2d 537

PEOPLE v. CURRY et al.

Cr. 2636.

District Court of Appeal, First District,  
Division I, California.

May 16, 1950.

As Corrected May 25, 1950.

Dan Curry and Daniel L. Jones were convicted in the Superior Court, in and for the City and County of San Francisco, Albert

218 P.2d—10½

C. Wollenberg, J., of assault by means of force likely to produce great bodily injury, and of robbery in the first degree, and they appealed. The District Court of Appeal, Bray, J., held that evidence sustained defendants' convictions.

Judgments and order denying motions for new trial affirmed.

#### 1. Criminal law ⇨742(1)

In assault and robbery prosecution, claims that defendants should have been permitted to examine victim before he testified on direct examination, to show that as result of blow inflicted on victim's head on night of robbery there was a sufficient gap in victim's memory to cause him to be incompetent, were matters relating to victim's credibility and not his competency, and were for jury.

#### 2. Witnesses ⇨77

In assault and robbery prosecution, where victim's answers on cross-examination showed he was not incapable of receiving just impressions of the facts or of relating them truly, refusal to permit defendants to examine victim before he testified on direct examination, to show that as result of blow inflicted on victim's head on night of robbery, there was a sufficient gap in victim's memory to cause him to be incompetent, was correct. Code Civ.Proc. § 1880.

#### 3. Witnesses ⇨78

In assault and robbery prosecution, admission of testimony by neurological surgeon who performed surgery on victim's skull the morning immediately following the robbery to show that victim was clear mentally, to refute defendants' contention that victim may have had an amnesia retrograde, which bore directly upon extent of injury received by victim and his mental clearness at time he identified defendants, was not error.

#### 4. Criminal law ⇨429(1)

In assault and robbery prosecution, police records of investigation of officers who allegedly had beaten defendants were not admissible.

#### 5. Witnesses ⇨344(1)

In assault and robbery prosecution, fact of investigation made of police officers who

allegedly had beaten defendants at defendants' request, and physical condition of defendants were admissible for purpose of having jury consider their effect, if any, on credibility of third police officer.

#### 6. Criminal law ☞396(1)

In assault and robbery prosecution, evidence of defendants' physical condition was admissible to refute testimony of officers that defendants bore no evidence of beating.

#### 7. Criminal law ☞1186(4)

In assault and robbery prosecution, refusal to permit defendants to show fact of complaint against police officers who allegedly had beaten them, and to show evidence of beating and not to permit questioning of third officer as to his knowledge of investigation, to show possible prejudice by police officers against defendants, was not prejudicial error, where one defendant was permitted to testify to fact that he was beaten, and a picture was admitted and exhibited to jury showing evidence of alleged beating of one of defendants. Const. art. 6, § 4½.

#### 8. Criminal law ☞1170½(1)

Curtailment of examination on motives or bias of witnesses is not necessarily prejudicial.

#### 9. Assault and battery ☞92

##### Robbery ☞24(1)

Evidence sustained conviction of assault by means of force likely to produce great bodily injury, and of robbery in the first degree.

#### 10. Criminal law ☞1169(1)

In assault and robbery prosecution, where evidence was ample to convict defendants without testimony given by police officers relating to their motivation and bias against defendants because defendants complained of alleged beating by other officers admission of testimony by officers which was merely cumulative that defendants bore no evidence of beating, was not error.

#### 11. Criminal law ☞414

In assault and robbery prosecution, statements made by one defendant to juvenile probation officer were not confessions

and were admissible without foundation of voluntariness being established.

#### 12. Criminal law ☞412(2)

A probation officer has a duty to disclose to the court when he is called as a witness all knowledge he has concerning the case, including that obtained from defendant himself, and communications made by one of defendants to officer who told defendant that if he would be open with officer and explain situation, the officer could help him, was proper. Code Civ. Proc. § 1881, subd. 5; Welfare and Institutions Code, §§ 638, 639.

#### 13. Criminal law ☞1171(1)

In assault and robbery prosecution, where District Attorney had not injected race prejudice issue into case as much as defendants' counsel in his argument to jury, no prejudice resulted of which defendants could complain.

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Gladstein, Andersen, Resner & Sawyer, Lloyd E. McMurray, San Francisco, for appellants.

Fred N. Howser, Attorney General, Clarence A. Linn, Deputy, B. Abbott Goldberg, Deputy, Edmund G. Brown, District Attorney, Frank Brown, Assistant District Attorney, San Francisco, for respondent.

BRAY, Justice.

On charges of (1) assault with a deadly weapon with intent to commit murder and (2) robbery, the jury convicted both defendants of assault by means of force likely to produce great bodily injury, and of robbery in the first degree. Both defendants appealed from the judgments entered on the jury verdicts and from the order denying their motion for a new trial.

Questions Presented.

1. Alleged error in refusal to permit a voir dire examination of prosecuting witness to determine his competency. 2. Alleged error in admitting surgeon's testimony as to an operation. 3. Alleged error in excluding evidence of claimed beating of defendants. 4. Alleged error in admitting testimony of a probation officer as to state-

ments made to him by defendant Jones. 5. Alleged misconduct of the district attorney in allegedly injecting the race issue. Evidence.

Shortly after 10:15 on the evening of March 11, 1949, three men entered a liquor store at 1346 Pacific Avenue, San Francisco, accosted the proprietor, Victor Sambado, asking first for a wine which he did not have, and then saying: "It's a holdup." The men were standing as follows: the first leaning on the counter directly across from Sambado as he stood beside the cash register, the second to the side near two refrigerators, and the third man was at the door. Sambado testified that he had previously seen these men in the store. Sambado raised his hands and told the men to take it easy, take everything he had; he noticed that the second man, later identified as defendant Curry, was turning his gun around, holding it by the barrel; then he looked at the first man, Jones, in order to remember his appearance for identification, and was struck on the head. Sambado's cousin, Mrs. Firpo, heard a noise and came in to see what had happened, observed a man at the cash register; one of the men pointed a gun at her and said, "I will kill you," and then the three ran out. Mrs. Firpo could not identify the men.

While the robbery was in progress, Mr. Chilton and Mr. Gerber parked their car near the store and Mr. Chilton went in. Both Chilton and Gerber noticed a late model light colored Mercury car parked near the store facing west. Chilton entered the store and then observed the robbery in progress, Sambado on the floor behind the counter. The men ran out past him, and he called Gerber, who phoned for the police. Chilton noticed that one of the men was wearing a round flat hat.

About this time Special Officer la Grande had been nearly run down at Pacific and Polk Streets by a light colored Mercury car containing three men. He reported the incident to a police patrol car from which a broadcast was put in for a "cream colored Mercury sedan." Later another description of the car was given to the officers in the patrol car and relayed for broadcasting,

and about the same time Officer Tucker who had gone to Sambado's store in response to the call from Mr. Gerber also had a broadcast made describing the holdup men and the car as a grey Mercury sedan.

The broadcasts were received by Officers Litt and Strange who were then on duty in their patrol car. After the first broadcast they followed and parked behind a grey Mercury car containing three young men, and had some discussion as to whether the occupants were the suspects after the men got out of the car and walked away. The officers drove away and returned when they received the second broadcast describing the suspected car as grey. They searched the car and waited for the absent occupants to return. The search disclosed a .38 calibre revolver without handles under the front seat, the matching handles in the glove compartment, and a tin cash tray on the rear floor. The tray was later identified by Sambado as one he had made himself and had used up to the time of the robbery.

After the search was completed Curry and Jones, two of the three prior occupants of the car returned. Both officers had noticed Curry's "pork-pie" hat. The officers took the defendants across the street into a doorway, after accosting them with drawn guns, and questioned them. Both defendants denied knowledge of the car, although when confronted with various documents found in the car they admitted it was owned by Jones' father. It actually was owned by defendant Jones and his father. The defendants were then searched; about \$93 including fifteen to twenty one dollar bills and some coins were found on Jones, most of the money in a roll in his pocket, and fifteen dollars in his wallet; about \$75 including fifteen to twenty one dollar bills and some coins were found on Curry. Also found in Jones' jacket pocket were five .38 calibre short bullets fitting into the gun without grips. Jones denied that any bullets were taken from his person. The key to the car was found on the sidewalk in the vicinity of the right rear wheel where Jones had been standing.

The defendants were taken to the police station and then to the emergency hospital where Sambado identified them as two of



the men involved, and later again identified them at the Franklin Hospital. At the trial Chilton testified that he thought defendant Curry was the man he saw in the doorway at the time of the holdup, but he was not positive. Jones admitted that the witness Gerber identified the defendants on the night in question. Gerber did not identify them at the trial. Sambado testified that at the time of the holdup he had noticed that Curry had an odd looking gun, which at the trial he identified as similar to the gun without grips.

1. Refusal to Permit Examination as to Sambado's Competency.

[1] The blow which Sambado received on the night of the holdup caused a depressed fracture of the skull over the motor cortex. Defendants contended that as a result of the blow there was a gap in Sambado's memory and that they should have been permitted to examine him before he testified on direct examination to show that this gap was sufficient to cause him to be incompetent as a witness. In their opening brief they say: "Mr. Sambado was undoubtedly sane, able to understand the nature of an oath and to testify clearly all during the course of the trial. But this testimony discloses that there was a hiatus in his recollection of the events of the robbery and assault \* \* \*" They base their claims of this gap on several facts: 1. that Sambado testified that subsequent to the accident his *right* leg became partially paralyzed, whereas Dr. Webb, a neurological surgeon who examined him the morning after the robbery, stated that the injury sustained would only involve the *left* leg. (This does not take in account the fact that another doctor who saw him about the same time testified that he had a clonus, an involuntary muscular action in both legs.) 2. Sambado exhibited a defect in speech—an aphasia—which could have resulted from a retrograde or an hysterical amnesia. This condition Sambado ascribed to an illness. 3. Sambado testified he was struck by a gun butt, but a policeman testified that Chilton (although at the trial he stated that when he first saw Sambado he was lying on the floor) had stated to him the night of the

robbery that Sambado was struck by a bottle, and there were broken bottles on the floor. 4. Sambado described the location of the man who struck him as being four feet away from him, and said that at the moment he was struck his head was up. Defendants argue that it would have been impossible for the man four feet away to hit Sambado on the top of the skull. In making this argument they overlook the fact that he was hit on the *rear* top of the skull. 5. The claim that Sambado filled in alleged memory gaps by "needless and useless" fabrication, in saying that he had seen the defendants twice before in his store and was suspicious of them, and in noticing details of Curry's moustache and yet failing to notice that Curry had grown a beard in jail. Defendants contended that in spite of Dr. Webb's testimony that Sambado showed no signs of retrograde amnesia, Sambado might have had it. It is obvious that all of the matters above set forth go to the witness' credibility rather than to his competency, and were matters for the jury to consider.

Defendants, on cross-examination, went into the matters which bore on the question of the alleged hiatus in memory. Sambado's answers showed "that he was not incapable of receiving just impressions of the facts or of relating them truly." See *People v. Mendez*, 193 Cal. 39, 48, 223 P. 65.

[2] It is conceded that Sambado was not incompetent to testify under the provisions of section 1880 of the Code of Civil Procedure. Defendants have offered no authorities for their contention that they were entitled to a voir dire examination of Sambado. The court's ruling in denying it was correct. See 2 Wigmore, Evidence, 3rd ed., §§ 485, 497 and 654.

2. Testimony Concerning Operation.

[3] The neurological surgeon was asked if the morning immediately following the robbery he performed surgery on Sambado's skull. Defendants demanded that the prosecution make an offer of proof. There was considerable discussion in the absence of the jury, from which it appears that the prosecution wanted to show that the opera-

tion was performed with a local anaesthetic, that it was found that the damage was not a general damage to the brain itself, but only to the portion having to do with motor control of the body, that during the operation Sambado remained conscious and discussed the operation, and was clear mentally, to refute defendants' contention that Sambado may have had an amnesia retrograde and his mind might not have been clear at the time of his identification of the defendants immediately preceding the operation. The court overruled defendants' objection and the surgeon then testified that he performed "surgery," using at first a local anaesthetic and later drug anaesthesia, that Sambado was normal and rational in every way and answered questions reasonably, that the surgeon searched for retrograde amnesia and found no evidence of it. There was no error in permitting this testimony. It bore directly upon the extent of the injury received by Sambado and his mental clearness at the time he identified defendants.

### 3. The Alleged Beating of Defendants.

It was contended by defendants that on Monday following their arrest defendants were taken to the offices of the robbery detail of the inspectors' bureau of the police department and there questioned and beaten. The beating, it was claimed, was done by Police Inspectors Resnik and Wafer, who were witnesses in the case. Defendants demanded of the police department, sending a copy of the demand to the district attorney, that an investigation be made of their beating. Defendants contended that because of their demand for an investigation all police officers were prejudiced against them. Officer Litt was one of the officers who arrested defendants at their parked car and who testified to the objects found in the car and the denial at first by the defendants that they had any connection with the car. It is not claimed that Officer Litt participated in, or was present, at the alleged beating. On cross-examination, defendants were asking Litt as to whether he heard the testimony of Inspectors Resnik and Wafer before the referee of the Juvenile Court. He said he did. Defendants then asked if he heard counsel

ask them if they were the police officers who had beaten defendants. An objection to this question was sustained. Defendants argued that by showing that Officer Litt had learned from the defense questioning of the inspectors that the defendants had claimed the beating and had caused an investigation to be made of their complaint, that such knowledge would prejudice Officer Litt and cause him to color his testimony against the defendants. In other words, defendants were attempting to show knowledge by Litt of the fact of the complaint of defendants and the subsequent investigation, as bearing on the possible bias or prejudice toward defendants. Defendants were entitled to get such fact before the jury for what it was worth. They were not entitled, however, to ask the witness concerning what he had heard of the cross-examination of the witnesses in the Juvenile Court, except in case, upon asking the direct question of him as to whether he had knowledge of the fact, he denied such knowledge. The objection was properly sustained to the question concerning the proceedings in the Juvenile Court. However, defendants then asked the witness if he knew that the defendants had been beaten by police officers. He replied, "How would I know that," and then the court sustained an objection to the question.

When defendant Jones was testifying on direct examination his counsel asked him if he had ever seen the money tray that Sambado had identified as having been on the cash register at the time of the robbery and which was found in defendant's car. He replied, "I seen it at the time I was being beaten by Inspector Reznik and Inspector Murphy [evidently intended Wafer]." The following then occurred:

"Q. When was that? A. The 15th of March.

"Q. Where? A. Up in the Robbery Detail.

"Q. In this building? A. That's right.

"Q. You say, by Inspector Reznik. Do you see him in the courtroom? A. That is him in the brown suit (indicating).

"Q. Sitting beside the District Attorney here? A. Yes.

"Q. You say you were beaten. Will you tell us about that? Mr. Brown [assistant district attorney]: Objected to, Your Honor, as being incompetent, irrelevant and immaterial." The court sustained the objection. Thereupon counsel on both sides went into the judge's chambers, where defendants made an offer to prove that Inspectors Reznik and Wafer had beaten the defendants, that defendants requested of the chief of police an investigation of the beating, that an investigation was made by the district attorney's office, that it was because of defendants' complaint and the ensuing investigation that the charges in this case were filed against defendants, that no charges had been filed until after defendants made the complaint. The court then held that these matters were not relevant to the issues. Defendants' counsel then asked the witness when he was charged with the assault with intent to commit murder. Upon objection being made, the court stated that the charge was a part of the court record. Defendants' counsel then stated that the date was not there. Before the court could rule, he withdrew the question, stating that he did not think it was material. Defendants, of course, were entitled to bring out anything which might indicate bias, hostility or prejudice on the part of any of the witnesses in the case, but it had to be done by proper proceedings. Defendants could have offered the record to show the date of the filing of charges to compare with the date of the alleged beating.

Inspectors Reznik and Wafer were called in rebuttal to testify to admissions and statements made the Monday following the robbery, which were inconsistent with the stories told by defendants on the stand. On cross-examination they both denied beating the defendants. Reznik particularly denied striking defendant Jones in the right eye. They also denied that the next morning defendant Jones had any appearance of bruises, swelling of the right eye, or swellings or any other evidences of having been beaten. At this point Reznik was shown a picture of defendant Jones taken on Wednesday (two days after the alleged beating) concerning which picture defendant Jones had said on the stand, "You will

notice that my eye is almost closed. It was right after I was beaten." Reznik denied that the picture showed any evidence of a closed eye. Reznik was then asked if he had been questioned by any police officer about any claim that he had beaten someone. The court sustained an objection to this question. When Inspector Wafer testified defendants asked him if he helped Reznik beat up Jones on Monday morning. The court sustained an objection to the question, but allowed defendants to ask him if he had ever beaten either of the defendants. He denied that he had, or that Jones ever had any evidences of a beating. Likewise defendants were not permitted to ask him if he was questioned by an investigator concerning the alleged beating.

[4-6] Defendants called one Garety, a member of the district attorney's staff, who apparently had been assigned by the district attorney to investigate defendants' complaints of the beating. He was not permitted to testify concerning an examination of the defendants on the first or second day after the alleged beating. Defendants offered to prove by the witness that they had been beaten and that the marks of the beating were still on them. Attorney McMurray, defense counsel, took the stand and offered to prove the appearance of defendants on the afternoon of the Monday when they claim they were beaten. The court sustained an objection to his testimony. Defendants' counsel then stated that he had present a witness with the records of the investigation, but would not call him if the court were not going to allow the records in evidence. The court stated that the records would not be admitted. The records of the investigation, of course, were not admissible. The fact of the investigation and the physical condition of the defendants were admissible for the purpose of having the jury consider their effect, if any, on the credibility of the testimony of the police officers. The physical condition was admissible to refute the testimony of Officers Reznik and Wafer that defendants bore no evidence of beating.

[7] It was error not to permit defendants to show the fact of complaint against



Officers Reznik and Wafer, and the fact that defendants showed evidences of beating, and not to permit questioning of Officer Litt as to his knowledge of the fact of the investigation. However, under the circumstances of this case the error was not prejudicial under article VI, section 4-1/2 of the Constitution. Defendant Jones was permitted to testify to the fact that he was beaten. A picture which defendant Jones stated showed the evidence of the alleged beating was admitted in evidence and exhibited to the jury. No questions were asked by defense counsel of defendant Curry when he was on the stand as to whether or not he had been beaten, or whether Jones was beaten in his presence. The court did not rule that such questions could not have been asked. Apparently, although counsel constantly referred to the fact that both defendants were beaten, the emphasis was on the alleged beating of defendant Jones. The jury had the photograph before it from which to determine whether it supported defendant Jones' testimony as to the beating.

[8] There can be no question but that the jury understood that defendants claimed to have been beaten by Officers Reznik and Wafer and that defendants were contending that all police officers who testified were motivated by bias against defendants because of complaints of the alleged beating. They undoubtedly weighed those contentions in their deliberations. Curtailment of examination on motives or bias of witnesses is not necessarily prejudicial. See *People v. Stone*, 89 Cal.App.2d 853, 202 P.2d 333; *People v. Ilderton*, 14 Cal.App.2d 647, 58 P.2d 986.

[9,10] There was ample evidence to convict defendant without the testimony given by Inspectors Reznik and Wafer. The identification of defendants by Sambado was positive. In spite of defendants' claim of a hiatus in his memory, Sambado's testimony was clear, distinct and reasonable. The identification of the car, the presence in it of the tray which came from Sambado's store, the gun with the plastic handles removed, which resembled the weapon with which Sambado was hit, and

all the other circumstances in the case, made the testimony of Officers Reznik and Wafer merely cumulative. It is not reasonable to assume that even if the jurors believed that these officers had beaten defendants, such fact would have caused them to disregard the overwhelming evidence of defendants' guilt.

#### 4. Statements to Probation Officers.

Juvenile Probation Officer Elliott was called by the prosecution in its case in chief. On objection by defendants, he was withdrawn and then called in rebuttal. He testified that it was his duty to investigate persons who were brought into the delinquency division; that on March 24 he had a conversation with defendant Jones in the city prison. This conversation was admitted over defendants' objection. He told Jones that "if he would be open with me and explain the situation, the more above-board he would be with me the more I could help him \* \* \*" Jones told him that between the hours of 10 and 11 on the night of the robbery he was at the home of his aunt having come there after he had parked his car at the point where the officers found it. These statements substantially contradicted Jones' testimony that he had parked the car about 9:30, and gone to a gambling club where he remained until about midnight.

Defendants contend that the statements made to Jones were privileged, and confidential. This contention is based upon (1) section 1881, subdivision 5 of the Code of Civil Procedure, and (2) certain sections of the Welfare and Institutions Code.

Section 1881 of the Code of Civil Procedure provides: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person can not be examined as a witness in the following cases: \* \* \*

5. A public officer can not be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."

Section 638 of the Welfare and Institutions Code provides for the probation officer to make an investigation "and keep a record in writing of such investigation. Such

record shall not be open to public inspection nor shall any person be permitted to read such record, or any part thereof, except upon approval of the probation officer or the judge of the juvenile court." Section 639 provides: "The clerk with whom this report is filed shall not make it public, nor permit it to be inspected by any person except the parties mentioned therein, or their attorneys, unless the court before whom the proceeding is pending shall so direct by minute order, for good cause."

Defendants concede that there are no authorities on the subject in California and state that the subject is in considerable confusion outside the state, and that "the cases must be decided on their individual facts." As to the Welfare and Institutions Code sections the reference is to *records* and not communications. Moreover, section 638 does not provide for complete secrecy, for it provides in effect that the *record* may be open to the public and read by any person "upon the approval of the probation officer or the judge of the juvenile court." In *Stroud v. Hansen*, 48 Cal.App.2d 556, 120 P.2d 102, concerning reports of drivers involved in accidents required by section 484 of the Vehicle Code to be made, and prohibited by section 488 from being used as evidence, the court held that statements made by the driver to the officer were admissible, saying 48 Cal.App.2d at page 560, 120 P.2d at page 104: "To make a *statement* privileged and inadmissible it must come within the express terms of the section." (Emphasis added.) Section 1881, subdivision 5, merely limits the disclosure to situations where the public interest would suffer by the disclosure. Actually the public interest would suffer by the failure to disclose statements made to the probation officer which are inconsistent with defendant's later sworn testimony.

As held in *Crosby v. Pacific S. S. Lines*, 9 Cir., 133 F.2d 470, 475, concerning section 1881, the witness is not the one to determine whether the disclosure would injure the public interest. "All reason says that the question is one for the court to determine." 133 F.2d at page 475. In *People v. King*, 122 Cal.App. 50, 10 P.2d 89, cited by defendants, the prosecution

claimed privilege under section 1881, subdivision 5, to prevent defendant from cross-examining a special agent of the National Automobile Theft Bureau concerning the location of a secret number stamped in a hidden place on the body of the car which location was known only to the manufacturer and the National Bureau. While holding that the information concerning these secret numbers is such a communication as to be privileged under the statute, it stated that because the witness had voluntarily testified concerning it in response to questions by the district attorney, defendant was entitled to examine the witness concerning its location. The case is not in point here.

Section 638 of the Welfare and Institutions Code provides for an investigation whenever application is made for the drawing of a petition under the provisions of the Juvenile Court Law. It says: "If, after such investigation it appears to the district attorney or to the probation officer to whom report or complaint has been made that a petition should not be drawn such district attorney or probation officer may refuse to draw such petition."

It is obvious that the examination of the person involved is to determine whether probable cause exists for the drawing of the petition, and necessarily the facts evolved from and the statements made by him, are to be used against him. Statements made to the probation officer by a person accused of a crime upon which, with other matters, the determination of whether he is to be handled by the Juvenile Court or the criminal courts rests, cannot be confidential.

[11] Nor was the statement made to defendant by Elliott to the effect that the more above-board defendant was with him the more Elliott could help him, any inducement which made defendant's statements to him inadmissible. The statements made were not confessions and hence no foundation of voluntariness was required. 8 Cal. Jur. 100; *People v. Ramirez*, 113 Cal.App. 204, 298 P. 60. In *People v. Haney*, 46 Cal. App. 317, 189 P. 338, it was held that the admonition of police officers to a defend-

ant that "the truth would not hurt him, and he better come out and tell it; that they expected him to tell the truth" 46 Cal.App. at pages 322-323, 189 P. at page 340, could not "be construed as an inducement to a confession of guilt." 46 Cal.App. at p. 323, 189 P. at page 340.

[12] There was no relationship between the probation officer and defendant Jones analogous to that of attorney and client. As pointed out by defendants, section 640 of the Welfare and Institutions Code provides that the probation officer shall be present in the Juvenile Court "to represent the interests of each such person when his case is heard, and shall furnish to the court such information and assistance as the court may require" and "before any such ward is recommitted, the probation officer shall inquire into the reasons assigned for such action and shall be present in court to represent the interests of such ward." However, that does not mean that he is to represent him as an attorney or advocate, nor that the probation officer may conceal from the state information obtained from the person in question. The officer's duty is to disclose to the court all knowledge he has concerning the case including that obtained from the person himself. Defendants rely on statements in 8 Wigmore on Evidence, 3rd ed., § 2300a, to the effect that the privilege between attorney and client should be extended to the relationship between the client and non-attorney agents practicing before an administrative agency. The relationship between the probation officer assigned to a case in the Juvenile Court and the person involved in the case is in no wise similar to the relationship between a client and an agent before an administrative body. In *Samish v. Superior Court*, 28 Cal.App.2d 685, 695, 83 P.2d 305, 310, the court said: "Since the protection against privileged communications often leads to a suppression of the truth and to a defeat of justice, the tendency of the courts is toward a strict construction of such statutes. *Dwelly v. McReynolds*, 6 Cal.2d 128, 131, 56 P.2d 1232; 27 Cal.Jur. 44, sec. 30."

##### 5. Action of District Attorney.

[13] Defendants charge the deputy district attorney who prosecuted the case with prejudicial misconduct. In his closing argument defendants' counsel, referring to the arrest of defendants by Officers Litt and Strange, stated: "Well, ladies and gentlemen, I don't know how much you know about race prejudice, or about the sort of treatment that Negro people get when they run up against the law, \* \* \*" At this point the district attorney interrupted and objected to counsel bringing "up the question of race prejudice." After the court stated that it did not think that the question of race prejudice belonged in or had entered the case, the following occurred: "Mr. McMurray [defendants' counsel]: I wonder if you are bearing in mind the remark that the defendant Jones made on cross-examination when asked why he did not tell all to the Officers who had arrested him? You will recall he said, 'Colored boys, or Negro boys, arrested by Officers here, don't know what to expect.' The Court: The defendant Jones made statements as you are quoting it, but there is no evidence of anything on which you can base any statement of actual race prejudice that has entered in this case in any way. Mr. McMurray: I will withdraw my remark, and I will say this: I don't know if you ladies and gentlemen have any appreciation of the fear that the defendant Daniel Jones expressed, the fear that Negro people have when they run afoul of the law in this town, or anywhere else. But if you do have any appreciation of it at all, you will understand why the defendants did not at that time, without knowing what they were up against, without having the faintest idea of what it was all about, explain to the Officers all about what they had been doing; and I think subsequent events proved that they were wise." Evidently desiring to answer these statements of counsel, the district attorney in his closing argument said: "If the Court please, and ladies and gentlemen of the jury, speaking about old sayings with reference to police brutality, I can remember one that has run down through my family for quite some time and that saying, if I can say it without emotion, is the story about the little pickaninny that



was playing with some white boys, and they would not play with him, so he had to go home and his old mother said, 'Little Pickaninny, don't you cry. You stay in your own backyard and play.' And that thing has gone down through my family for years." Then the following occurred: "Mr. McMurray: Your Honor, I don't like to interrupt counsel any more than he likes to interrupt me, but I will assign as misconduct the use of the term 'pickaninny,' which is offensive to all negro people, a term which implies that there is a difference between the whites and negroes and a term which asserts that the whites are sort of—Mr. Brown: If anybody—The Court: I did not write in anything Mr. Brown said thus far—I haven't seen how you could reasonably write into it what you have just offered to explain as Mr. Brown's intention. Let's wait until he finishes. I don't know that thus far he has said anything. He used a term, and perhaps by way of illustration,—Mr. McMurray: I know how they feel. Mr. Brown: If he wants to take that attitude, that's all right as far as I am concerned. My feelings as far as this particular phrase is concerned, is one that is outstanding. And it is an expression of my views, and I think I am involved in the case because I am putting in the evidence before this court and jury. The Court: You see, I don't think that it is entirely fair to write anything into what Mr. Brown said. Mr. McMurray: If he had used the word 'nigger'—The Court: He didn't. Now just a minute. He did not use such a term. Why are you saying anything of the kind? Mr. McMurray: I don't say he used it. The Court: I am not going to allow that term. I have never allowed it in this courtroom, and from your lips it is offensive to me, because of what you said about Mr. Brown. You have no right to talk that way. I resent it. Are you trying to write something in this case that is not in it at all? Mr. McMurray: No, I am not, your Honor. The Court: Then let's forget the incident and see what Mr. Brown does, and I think thus far Mr. Brown has conducted himself properly. Proceed, Mr. Brown. Mr. Brown: What my family thinks is only important with regard to the evidence that

I put on in this case, and I assure you, ladies and gentlemen, that it is not my intent through the witnesses I have produced here, in one iota, to appeal to any prejudice which any of you might have, which I don't think you do have, because you answered the questions at the start of the case that you did not have any prejudice in that regard, and it has no place in this case."

Just how the district attorney intended to apply the "pickaninny" story is not clear, but it is obvious from a reading of the entire incident that no prejudice resulted to the defendants. As far as the district attorney had proceeded he had not injected the race prejudice issue nearly as much as had defendants' counsel in his argument to the jury, and in his use of the word "nigger" in the discussion concerning the statement of the district attorney.

Judgments and order affirmed.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.



97 Cal.App.2d 521

**STANLEY v. ROBERT S. ODELL &  
CO. et al.**

**PACIFIC STATES SAVINGS & LOAN  
CO. v. STANLEY.**  
Civ. 14146.

District Court of Appeal, First District,  
Division 1, California.

May 16, 1950.

Rehearing Denied June 15, 1950.

Hearing Denied July 13, 1950.

Action for money had and received by Joseph T. Stanley against Robert S. Odell & Co. and others. The Pacific States Savings & Loan Company cross-complained against Stanley and one Miller, agent of Stanley, to recover possession and to quiet its title to certain investment certificates. The Superior Court, in and for the City and County of San Francisco, Herbert O. Kaufman, J., en-

tered judgment against Stanley on his complaint and decided in favor of Stanley on the issues presented by the cross-complaint and quieted his title to the certificates and from those portions of the judgment, Robert S. Odell & Co., Robert S. Odell, State Guaranty Corporation and Pacific States Auxiliary Corporation as well as Pacific States Savings & Loan Company appealed. The District Court of Appeals, Peters, J., held that since the first four named were not parties to the cross-complaint they had no right to appeal on portions of the judgment disposing of the issues solely presented by the cross-complaint and their appeals would be dismissed, and that evidence sustained trial court's finding that appeal was taken for delay and that there was inadequate consideration to support the Pacific State's claim to quiet its title to the certificates

The appeals of Robert S. Odell, Robert S. Odell & Co., State Guaranty Corporation, Pacific States Auxiliary Corporation dismissed.

On appeal of Pacific States Savings & Loan Company, judgment affirmed.

#### 1. Appeal and error ⇨148

Where no appeal was taken by defendants from portion of judgment disposing of plaintiff's complaint, defendants, who were not parties to cross-complaint, had no right to appeal from portions of judgment disposing of issues presented solely by cross-complaint and their appeals would be dismissed.

#### 2. Building and loan associations ⇨42(4)

Where, while property of building and loan company was in hands of commissioner for liquidation purposes, an officer attempted to impede orderly liquidation by raising price of property after commissioner and court had approved a fixed price as provided by law, and officer induced purchaser to buy investment certificates to be offered to company in return for quitclaim deeds to properties, which were not required, and for promise to discontinue litigation, tactics violated public policy, and corporation, acting through officer, would not be permitted to enforce any rights at law or in equity to certificates.

#### 3. Contracts ⇨138(1)

##### Specific performance ⇨55

Courts will not compel parties to perform contracts which have for their object

performance of acts against sound public policy either by decreeing specific performance or awarding damages for breach.

#### 4. Contracts ⇨138(1)

Ordinarily, parties to a contract, void because contrary to public policy, will be left where they are, when they come to court for relief.

#### 5. Building and loan associations ⇨42(4)

Where purchaser's bid for certain property of building and loan company, which was in hands of commissioner for liquidation, was approved by commissioner and court, but officer of company induced purchaser to buy investment certificates and deliver them to company in return for quitclaim deeds to property, which were not required, and for promise to dismiss litigation, but acting on behalf of company, commissioner renounced any claim to certificates, disclaimer was a disclaimer by company to same extent as a formal disclaimer by board of directors and company had no interest in certificates.

#### 6. Contracts ⇨187(5)

The mere execution of a contract between two parties for the benefit of a third as a donee beneficiary, does not give third party any right to enforce such an agreement after third party has rejected any rights under contract made for his benefit.

#### 7. Building and loan associations ⇨42(6)

Where court approved purchaser's bid for certain property of building and loan company in hands of commissioner for purpose of liquidation, but officer of company thereafter induced purchaser to buy investment certificates and agree to tender them to company, in return for quitclaim deeds to property, which were not required, and for agreement to discontinue litigation, if commissioner was a third party donee beneficiary, his disclaimer of any interest in the certificates terminated any right he had thereunder, and all rights of future assignees.

#### 8. Contracts ⇨21

Where an offer has been rejected it cannot be accepted later by either the offeree or his assignee.

**9 Building and loan associations**  **42(16)**

In cross action by building and loan association to quiet title to investment certificates allegedly purchased for its benefit by parties who purchased certain of the company's property, while company was in hands of commissioner for liquidation, evidence sustained finding that quitclaim deeds allegedly given in consideration of certificates were of no value and that dismissal of company's appeal contesting sale of property after approval of price by court was no consideration. Gen. Laws Act 986, § 13.16.

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Raymond B. Haizlip, San Francisco, for appellants.

Lawrence Livingston, H. W. S. Leeker, Jesse Feldman, Dudley Harkleroad, San Francisco, for respondent.

PETERS, Presiding Justice.

[1] Joseph T. Stanley brought an action for \$10,000 for money had and received against Robert S. Odell and Company, Robert S. Odell, Pacific States Savings and Loan Company, State Guaranty Corporation, Pacific States Auxiliary Corporation, Frank C. Mortimer and Frank C. Mortimer as Building and Loan Commissioner. Pacific States Savings and Loan Company cross-complained against Stanley and one Miller, agent of Stanley, to recover possession and to quiet its title to \$10,000 in Pacific States investment certificates. Stanley claimed these certificates as his own. Mortimer, individually and as commissioner, was dismissed as a defendant. Miller, who had physical possession of the certificates, deposited them in court and was dismissed as a cross-defendant. The trial court held against Stanley on his complaint, and no appeal is taken from that portion of the judgment. The trial court decided in favor of Stanley on the issues presented by the cross-complaint and quieted his title to the certificates. From these portions of the judgment Robert S. Odell and Company, Robert S. Odell, State Guaranty Corporation and Pacific States Auxiliary Corporation, as well as Pacific States

Savings and Loan Company appeal. The first four named were not parties to the cross-complaint. They were in the case solely as defendants named in the money had and received action filed by Stanley. The issues presented in that action were decided in their favor, and no appeal is taken from that portion of the judgment. Not being parties to the cross-complaint, they have no right to appeal from the portions of the judgment disposing of the issues solely presented by the cross-complaint. Pacific States Savings and Loan Company and Stanley, so far as the issues presented by the pleadings are concerned, are the sole claimants to the certificates. This being so, the purported appeals by Robert S. Odell and Company, Robert S. Odell, State Guaranty Corporation and Pacific States Auxiliary Corporation must be dismissed.

This case presents another facet in the litigation resulting from the seizure by the Building and Loan Commissioner of the assets and properties of Pacific States on March 4, 1939. Pacific States, as permitted by law, resisted the seizure. Its validity was upheld by the trial court and by the California Supreme Court, the date of the Supreme Court decision being January 31, 1945. *Pacific States Savings & Loan Co. v. Hise*, 25 Cal.2d 822, 155 P.2d 809, 158 A.L.R. 955. While this case was pending and still undecided, and thereafter, the Commissioner, pursuant to his statutory power to liquidate, took bids on various properties owned by Pacific States, and, where he thought the bid was adequate, sought court approval of the proposed sale. Odell, who was the moving and controlling spirit in all of the corporations above named, appeared in one of his various capacities at such court hearings, and, whenever he believed the bid to be too low, would protest the confirmation and challenge the validity of the proposed sale on constitutional grounds. He would then appeal from the order of confirmation. The present controversy grew out of just such a transaction.

Stanley had been engaged in the furniture business at 719 Mission Street, San



Francisco, for over twenty years. His lease on those premises expired on December 1, 1944, and he knew that he would have to move from those premises on that date as early as July of that year. He made arrangements to rent the premises at 725 Mission Street, but the best deal he could get at that location was a month-to-month tenancy. He was most anxious to secure a permanent location in the immediate neighborhood. The only building available for his purposes was 739 Mission Street, then owned by Pacific States.

Miller, a real estate broker, interested Stanley in the property at 739 Mission Street. On October 26, 1944, Stanley made a bid, in open court, of \$86,500 cash for this property. This bid was withdrawn when the court announced that it would not accept bids on the property on that date. At that hearing Odell told Livingston, Stanley's attorney, that: "Before we let you get away with that and get that property at any such price we'll keep you in court for five years." Livingston repeated this conversation to his client. Thereafter, Stanley submitted a formal bid to the Commissioner of \$85,000, and, after the Commissioner sought but was unable to secure a higher bid, the Commissioner, on November 20, 1944, accepted that bid and petitioned the court for approval of the sale. The trial court had had its own appraisals of the Pacific States properties made, and on the date here involved had two appraisals of the Mission Street property, one for \$90,000 and one for \$100,000. The trial judge refused to accept the \$85,000 bid, and stated that he would not approve a sale at less than \$95,000, the average of the two appraisals. Stanley thereupon, in open court, bid \$95,000 cash for the property, which bid the court approved. The court, thereupon, made its order authorizing the Commissioner to sell the property to Stanley at the bid price. Gardiner Johnson, attorney for Pacific States, and for some of the other defendants named in the complaint, orally objected to the sale, placing his objections entirely on constitutional grounds. No objection that a higher bid was available, or that the proper procedure had not been followed, was made.

At this time—November 20, 1944—the Hise case was still undecided by the Supreme Court, the District Court of Appeal by a divided court had reversed the order of seizure, and, although the Supreme Court had granted a hearing, the validity of the seizure was still in doubt.

After the court order authorizing the sale had been made, and on the same day, the Commissioner and Stanley executed a deposit receipt, which was, in effect, a contract of sale. The document acknowledged receipt of 10% of the purchase price, and provided for the opening of an escrow. The escrow was to last 30 to 60 days and would then be terminated if the seller was unable to convey insurable title within that time, and within any extensions that might be granted by the buyer. While this escrow was still open, and on January 5, 1945, Pacific States appealed from the court order authorizing the sale. Because of this appeal, Stanley agreed with the Commissioner that the escrow would remain open pending the determination of the appeal and for 30 days thereafter if the appeal were determined in the Commissioner's favor.

This appeal was one of 62 such appeals filed by Pacific States. None of these appeals was ever completed by Pacific States by the filing of the transcripts or by paying the filing fees. In the instant case, Livingston, on behalf of Stanley, had the transcripts prepared. The attorney for Pacific States failed to file any brief in this case or in any of the other 61 cases. Livingston tried to expedite the appeal and wrote to the appellate court objecting to any further extensions, but no brief was filed. Finally, in September of 1945, the attorney-general, on behalf of the Commissioner, moved to dismiss all of the appeals on the ground that the appeals were frivolous, in that all constitutional questions had been decided adversely to Pacific States in the Hise case, and only such questions were presented on the appeals. The appellate court denied the motion to dismiss on the ground that it could not determine whether the appeals were frivolous without examining the records, which were not yet be-

fore it. Pacific States was relieved of its default "on condition that all transcripts on appeal be filed herein without further delay." *Pacific States Savings & Loan Co. v. Mortimer*, 70 Cal.App.2d 811, 816, 161 P.2d 684, 687. The transcripts were never filed, nor were the filing fees paid. The appeal in the Stanley case involving the Mission Street property was voluntarily dismissed on September 12, 1945, under circumstances to be discussed later. In the instant case the trial court found that the appeal was taken for delay and that such dismissal was of no value to Stanley.

After the Commissioner, on November 20, 1944, had entered into the contract to sell the Mission Street Property to Stanley for \$95,000, he received from one Callan an offer to purchase for \$107,000. The Callan offer, by its terms, expired January 15, 1945, and on the 16th the Commissioner returned the deposit made by Callan, for the reason that he had been advised that the existing agreement with Stanley could not be set aside except with Stanley's consent.

As already pointed out, in November, 1944, Stanley knew that he had to get out of 719 Mission Street on December 1, 1944, and that his tenancy at 725 Mission Street was simply a month-to-month tenancy. He was most anxious to remodel and to move into 739 Mission Street. When the appeal was filed challenging his contract with the Commissioner, title insurance could not be secured. Faced with this situation, Stanley negotiated a lease with the Commissioner of 739 Mission Street for a two-year period commencing July 1, 1945. The Commissioner had been advised that two years was the longest he could lease such properties. Thus, the Commissioner attempted to cooperate with Stanley so that he would be able to continue in business pending the appeal. Stanley took possession of the premises in July of 1945, and, after some rather extensive remodeling, opened for business at 739 Mission Street in September of 1945.

Early in 1945, Stanley had a conversation with one Raffeto, salesman-manager in charge of the Pacific States properties held

by the Commissioner, but whose salary was apparently paid by Pacific States, Stanley asking Raffeto what he had to do to get title to the property. Raffeto told Stanley about the Callan bid and also told him, erroneously, that the Commissioner was not bound by his agreement with Stanley and might re-petition the court. Raffeto therefore told Stanley, "Now, if you can meet this price maybe you can get quitclaim deeds from Odell, I don't know."

Also during these early months of 1945, Stanley frequently consulted with his agent Miller. During these conferences Miller, whose good faith is not questioned, gave Stanley some unsound and incorrect advice. Among other things, Miller told Stanley that he had to have a quitclaim deed from Odell before he could get title insurance. Miller told this to Stanley even though the Commissioner's office had told him that Stanley was entitled to title insurance without a quitclaim. The fact was that, prior to January 31, 1945, when the Hise case was decided, the title companies required quitclaims before issuing title insurance because the very question involved in that action was the validity of the Commissioner's possession. But after that case was decided, some of the title companies at least no longer required quitclaims from Pacific States as a condition to issuing title insurance.

Under these circumstances, Stanley asked Miller to arrange a conference with Odell to see if a deal could be worked out. Such conferences were held in June, July and August of 1945. Stanley failed to consult his attorney about these conferences and failed to tell him anything about what occurred. At one of these conferences Odell told Stanley that he could not possibly let him have the property unless Stanley agreed to pay another \$10,000, and he further told Stanley that he, Odell, would keep Stanley in court for five years if necessary before he would agree to a \$95,000 sale. He told Stanley: "You have an expensive attorney. It will cost you \$10,000 anyway. You might just as well pay it to me." Finally, Stanley authorized Miller to find out just what Odell wanted. Odell told



Miller that: "You will have to buy \$10,-000 worth of [investment] certificates [in Pacific States], turn them into the Pacific States Savings and Loan Company, and I will give you quitclaim deeds and dismiss my court action." Odell also told Miller that these certificates would have to be bought from the Robert S. Odell and Company. Stanley agreed to the proposition, and wrote out a check for \$10,000 to Robert S. Odell and Company and delivered it to Miller. Miller gave the check to Odell, who gave Miller \$10,000 in certificates and quitclaim deeds. All of this occurred on August 10, 1945, and took place without the knowledge of Stanley's attorney.

Odell had orally instructed Miller to deliver the \$10,000 in certificates to the Commissioner to be added to the \$95,000 purchase price. Miller promised to do this and kept his word. He immediately took the certificates to Colonel F. M. Smith, Deputy Building and Loan Commissioner in charge of the liquidation of Pacific States. Colonel Smith refused to accept the certificates. He testified that he refused them on the grounds that he thought the certificates tendered were subject to a lien, were under the supervision of the sheriff, and because he thought the price bid was a fair one, that the court had authorized the sale at \$95,000, and he did not feel that the Commissioner had any right to any sum in excess of \$95,000 without orders from the court.

Miller immediately reported the incident to Odell who told him to keep the certificates until he received further instructions. Odell made no demand for a return of the quitclaim deeds, and, in fact, a short time later his attorney prepared and delivered to Stanley a dismissal of the pending appeal. This dismissal was filed with the appellate court on September 12, 1945, together with a stipulation that the remittitur could issue forthwith.

In September, 1945, Odell called Miller and told him that he wanted to make a formal tender of the certificates to the Commissioner, and instructed Miller to get in touch with Johnson, Odell's attorney. This, Miller did, and Johnson gave him a

letter to be signed by Stanley and addressed to the Commissioner. This letter is dated September 13, 1945, and was signed by Stanley. Miller and Johnson then presented this letter, together with another of the same date signed by Johnson, to the Commissioner, formally tendering the certificates to him and explaining the purpose of the tender. The Stanley letter, after briefly reviewing the facts relating to the sale, and after stating that quitclaim deeds from State Guaranty and Pacific States had already been deposited in escrow, contains the following pertinent paragraph: "In order to obtain the quitclaim deeds from Pacific States Savings and Loan Company and State Guaranty Corporation the purchaser, Joseph T. Stanley, agreed to deposit in addition to the sum of \$95,000.00 net cash an additional amount to be made up of \$10,000.00 original face value of Pacific States Savings and Loan Company certificates. It was agreed with the officers of Pacific States and State Guaranty Corporation that the full amount of the certificates would be delivered to you at the time the sale was consummated as additional consideration for the purchase, it being understood that the entire amount would be retained by you for the benefit of the investors in Pacific States." The letter then made a formal tender of the certificates and requested a receipt for them.

The Johnson letter first states that Johnson had seen the Stanley letter and then continued as follows:

"This is to inform you that Pacific States Savings and Loan Company and State Guaranty Corporation are in agreement with the statements contained in that letter. The condition of the delivery of the quitclaim deeds from Pacific States and State Guaranty Corporation was that \$10,-000.00 original face value of Pacific States certificates would be delivered to you in addition to the sum of \$95,000.00 net cash, and the full amount thereof to be retained by you for the benefit of the investors in Pacific States.

"So that you may be fully informed there was never any understanding that any por-



tion of the certificates referred to would be retained by Pacific States, State Guaranty Corporation or any officer or director of either corporation.

"This letter is to serve as a demand that you proceed to accept this additional amount which is for the benefit of the investors in Pacific States. Should you refuse to do so action will be taken to enforce liability against you personally for any loss that may be incurred."

Both letters were delivered by Johnson and Miller to Colonel Smith, the certificates were again tendered, and the Colonel refused to accept the tender, telling Johnson and Miller that he had been advised by the attorney-general's office that he had no legal right to take the certificates. Without objection from Odell or his counsel, Miller retained physical possession of the certificates until the time of trial, when he deposited them with the court and was dismissed as a party.

On April 2, 1946, Stanley sold the building involved to a third party for \$117,000, and leased back a portion of it for his business. He testified that the amount received—\$117,000—just about equalled the purchase price—\$95,000—plus what he had spent for improvements.

Another date that must be mentioned is April 22, 1946—the date the Commissioner transferred back to Pacific States all of the assets of the company remaining in his hands.

The trial court first determined that Stanley should not recover on his claim and delivery action, and then found the facts substantially as above set forth. It found that the contract whereby Stanley agreed to tender the certificates to the Commissioner was made with Odell; that the appeal taken by Pacific States in reference to this sale "was taken for purposes of delay"; that Pacific States never was and is not now the owner of the certificates; that the certificates belong to Stanley, and that he is the owner thereof. The court expressly found that the "quitclaim deeds were of no value and that the dismissal of said appeal was no consideration and that said deeds and said dismissal were so in-

adequate as consideration that they did not and do not justify depriving [Stanley] \* \* \* of any interest in said certificates."

The basic question to be determined on this appeal is, who owned the certificates after the Commissioner rejected the tender—Pacific States or Stanley? The parties differ widely as to the legal nature of the transaction, and the results that follow therefrom. They disagree over who were the contracting parties, what rights Pacific States and its officers had during the period of seizure, and over practically every important finding of the trial court.

[2] Whatever the precise nature of the legal relations of the parties may have been, the actual fact is that while the Commissioner was lawfully in possession of the assets of Pacific States and had title thereto, and after the validity of his possession and title had been determined, and while the Commissioner, pursuant to his statutory duty was liquidating that company, Odell, claiming to act on behalf of Pacific States or one of the related companies, was purporting to act for that company and attempting to delay or prevent liquidation. Odell was deliberately trying to impede the orderly liquidation of Pacific States by raising the price of property after the Commissioner and the Court had approved a fixed price as provided by law. Odell assumed to deal with purchasers and proposed purchasers as if he were authorized to make the liquidating transactions, or as if he were entitled to participate in the negotiations. The statute under which the Commissioner was proceeding contemplates that when a building and loan association has been properly seized (and that had been judicially determined here by January 31, 1945), and the Commissioner proceeds to liquidate under court supervision, the Commissioner, for purposes of liquidation is the corporation and exercises, for that purpose, the place of the officers and board of directors of the seized company. While the old management may challenge the seizure and has power to challenge sales as inadequate, once the Court and Commissioner have approved a sale, the old management has

no legal power to interfere with the completion of that sale, except perhaps to urge that a higher bid was made or the proper procedure was not followed—contentions not made as to the present sale. The actions of Odell in the present case can only be interpreted as an attempt by him to circumvent the statute which authorizes the Commissioner to regulate, manage and liquidate associations which he has been forced to take over because of the improper or unlawful actions of the old management. Action such as was taken by Odell in the instant case would necessarily tend to discourage bidders from making fair offers for the liquidated property, because such bidders would know that, although their bid was accepted by the Commissioner and by the Court, they would either be held up for further amounts by the old management, or they would be harassed for years in the courts. It seems too clear to require further comment that such tactics, as a matter of law, violated fundamental principles of public policy. Pacific States, acting through Odell, should not be permitted to enforce any rights at law or in equity, based upon such a fundamental violation of public policy.

[3, 4] Title to the certificates when this action was commenced was in Stanley. The "courts will not compel parties to perform contracts which have for their object the performance of acts against sound public policy either by decreeing specific performance or awarding damages for breach." *Haruko Takeuchi v. Schmuck*, 206 Cal. 782, 786, 276 P. 345, 346. "Ordinarily, the parties to a contract, void because contrary to public policy will be left where they are, when they come to the court for relief." *Brooks v. Brooks*, 63 Cal.App.2d 671, 676, 147 P.2d 417.

These principles are elementary. On this ground alone the judgment appealed from could be affirmed. But it is not necessary to base our conclusion on this ground alone. Even if this public policy argument be disregarded, the same result follows. The trial court found that the contract involved was between Stanley and Odell. The Pacific States was not one of

the contracting parties. The record supports this finding. The only other finding possible under the evidence would have been that Robert S. Odell and Company, since the certificates were purchased from it, was a contracting party. But that company is not involved on this appeal. The litigants before the Court are Stanley and Pacific States. Neither Odell, nor any other company named in the complaint except Pacific States, has claimed, or in this proceeding can claim, the certificates. They are not parties to this appeal. Stanley paid \$10,000 for \$10,000 worth of certificates. Stanley agreed to tender delivery of such certificates to Pacific States. At that time Pacific States was in liquidation, so that, for purposes of liquidation, the Commissioner represented Pacific States. Acting on behalf of Pacific States, the Commissioner renounced any claim to the certificates. At that time the Commissioner was legally entitled to manage and control Pacific States. His disclaimer was a disclaimer by Pacific States to the same extent as a formal disclaimer by the board of directors of a non-seized company would have been. Thus, the legal situation is relatively simple. Before the Court are two parties—Stanley and Pacific States. Stanley has title to \$10,000 worth of certificates, and has paid \$10,000 for them. The other party—Pacific States—has formally and legally disclaimed any interest in the certificates. Under such circumstances, it necessarily follows that Pacific States has no interest in the certificates.

It cannot be logically contended that Stanley did not perform his contract with Odell. The contract between Stanley and Odell or Odell Company was simply that Stanley would pay \$10,000 for \$10,000 worth of certificates, Odell would deliver quitclaims and a dismissal, and Stanley would tender the certificates to the Commissioner. There was no agreement, express or implied, that the transaction would be rescinded if the Commissioner failed to accept the certificates. This is demonstrated by what the parties did, and by the realities of the situation. Stanley purchased the certificates on August 10, 1945, and on



the same day Odell delivered to Stanley the quitclaim deeds. The Commissioner refused to accept the certificates that day and this fact was immediately communicated to Odell, who told Miller to keep the certificates until he received further instructions. After the rejection by the Commissioner, and after Odell knew of the rejection, on September 12, 1945, Pacific States dismissed the pending appeal. On September 13, 1945, Miller, acting for Stanley and on instructions of the attorney for Odell and Pacific States, made a formal tender of the certificates to the Commissioner, and the attorney for Pacific States and Odell threatened the Commissioner with legal proceedings if he refused the tender. This demonstrates to a certainty that the transaction between Odell and Stanley was not conditioned on the acceptance of the certificates by the Commissioner, otherwise why would the dismissal of the appeal have been furnished when Odell knew that the Commissioner had refused to accept the certificates, and why would he have furnished the quitclaim deeds before he had received his *quid pro quo*? The only reasonable interpretation of the evidence is that Odell, or the companies he represented, had already received their profit by selling Stanley investment certificates at their face value. While there is no evidence as to how much Odell and Company, or any other connected company paid for the certificates, we know from the other litigation involving this company that many such certificates were purchased by Odell, or the companies he represents, at fifty to sixty cents on the dollar. See, *Zottarelli v. Pacific States Sav. & Loan Co.*, 94 Cal.App.2d 480, 211 P.2d 23. It must be remembered that Pacific States does not wish to rescind by tendering back \$10,000 to Stanley, but simply wants Odell and Company to keep the \$10,000 and to quiet its title to the certificates. Under the circumstances, such relief cannot be granted.

Pacific States analyzes the legal situation quite differently. It contends that Stanley was a debtor of Pacific States, and that as a debtor he tendered the certificates to the creditor, the Commissioner. Based on these erroneous premises it urges that when

a debtor tenders property to a creditor and signifies his intention of passing title, title passes to the creditor, and the debtor thereafter holds the property as bailee for the creditor. This being so, the argument continues, when the Commissioner in 1946 assigned all the property he then owned of Pacific States back to that company, title to the certificates passed. If the premises were sound, the conclusion would be correct, § 1502, Civ.Code; *Lamott v. Butler*, 18 Cal. 32, but the trouble with the argument is that it is based on erroneous premises. The contract was between Odell and Stanley. Pacific States was not a party. Stanley owed Pacific States a total of \$95,000 and no more. Pacific States was not a creditor of Stanley's as to the obligation involved on the present transaction. In apparent recognition of this logical and practical difficulty, Pacific States argues that the Commissioner was a third party beneficiary of the contract between Stanley and Odell, was therefore a party to the contract, and, as such, could either have sued Stanley on his promise to Odell, or could have assigned his rights to an assignee. Pacific States claims to be such an assignee, and claims the right to sue on the contract as long as the Stanley-Odell contract remains unrescinded.

[5,6] If the Commissioner was a third party beneficiary of the Stanley-Odell agreement, he was a donee beneficiary, as no obligation in reference to the certificates existed between Stanley and the Commissioner. The mere execution of a contract between A and B for the benefit of C as a donee beneficiary, does not give C any right to enforce such an agreement after C has rejected any rights under the contract made for his benefit. If the Commissioner was a third party donee beneficiary, his disclaimer terminated any rights he may have had thereunder. This elementary principle is stated as follows in the Restatement of Contracts, § 137: "A donee beneficiary or a creditor beneficiary who has not previously assented to the promise for his benefit, may, in a reasonable time after learning of its existence and terms, render the duty to himself inoperative from the



beginning by disclaimer, unless such action is a fraud on creditors." In "Comment: a" under this section it is stated: "The beneficiary, however, even though he change his mind after disclaiming, will have no right of his own." In the California annotations to § 137 appears the following: "Proposition stated seems sufficient without citation of authority. That the recipient of a gift may disclaim and refuse to receive it is elementary. Since, in California, the promise to the promisee is deemed a mere offer to the beneficiary, it seems clear that he may affirmatively reject such offer by disclaimer, as well as by mere failure to accept."

[7] As already pointed out, when the Commissioner refused to accept the certificates he was acting, so far as liquidation is concerned, as the officer in full charge of such liquidation with full power to represent Pacific States. As Commissioner, he disclaimed any rights of Pacific States to the certificates. The rejection of an offer kills the offer. California, as pointed out above, regards the promise made to perform for the benefit of a donee beneficiary as an offer to him. Where an offer has been rejected it cannot be accepted later by either the offeree or his assignee. 1 Williston on Contracts (Rev.Ed.), p. 144, § 51; *Niles v. Hancock*, 140 Cal. 157, 73 P. 840. Thus, if Pacific States is correct in its analysis that the Commissioner was a third party beneficiary of the Stanley-Odell contract, his disclaimer terminated his rights, and all rights of future assignees.

Stanley points out that the facts probably do not disclose a third party beneficiary situation at all, but that what is probably involved is that the Commissioner was the beneficiary of a trust created by the Stanley-Odell agreement. Under this theory, either Odell (or Odell and Company) or Stanley was the settlor. If Stanley owned the certificates and promised to deliver them to the Commissioner, the disclaimer by the Commissioner necessarily terminated any rights of the Commissioner and title remained in Stanley. This seems elementary. The principle is thus stated in section 36d of the Restatement of Trusts: "If the

owner of property [Stanley] declares himself trustee and the beneficiary [the Commissioner] disclaims, the owner [Stanley] thereupon holds the property free of trust."

On the other hand, if Odell or Odell and Company was the settlor and Stanley was the trustee, the same result follows. Section 423 of the Restatement of Trusts reads as follows: "Where the owner of property [assumed to be Odell or Odell and Company] transfers it upon a trust which fails, and he receives from the transferee [Stanley] consideration for the transfer as an agreed exchange, there is no resulting trust, and the transferee holds the property free of trust." See, also, 3 Scott on Trusts, p. 2205, § 423; 2 Bogert on Trusts and Trustees, § 418, p. 1276.

Thus it appears that whether this case be approached from the standpoint of public policy, or from an analysis of the legal relations of the parties, an affirmance is compelled. Legally, the two facts that Stanley paid full value for the certificates, and that the Commissioner legally and properly disclaimed any right to the certificates prohibit any recovery by Pacific States.

[8] Pacific States complains of the finding that the quitclaim deeds were of no value, and that the dismissal of the appeal was no consideration. The finding is in accordance with the true facts. While Odell was successful in convincing Stanley that he needed the deeds and the dismissal, such was not the true fact. This case is an equitable one. The trial court, in such an action, is required to determine the true value of the deeds and dismissal—not their assumed value. Odell received full value for the certificates—\$10,000 for \$10,000 in certificates. It must be remembered that during liquidation, title to the property was not in Pacific States, Odell, or Odell and Company, but in the Commissioner. The Building & Loan Association Act, Deering's Gen. Laws, Act 986, § 13.16, gives the Commissioner power, on court order "to sell, convey or transfer real or personal property," and power to execute the necessary deeds. The same section specifically provides that "any deed \* \* \* or other

instrument executed pursuant to the authority hereby given shall be valid and effectual for all purposes as though the same had been executed by the officers of such association by authority of its board of directors." While the Hise case was pending, no title company would issue title insurance without a quitclaim from Pacific States. But there is substantial evidence that after that case had been decided (January 31, 1945), such deeds were not required as a condition of title insurance. Although Odell convinced Stanley that the deeds were necessary, this, in actual fact, was not true.

[9] Nor was the dismissal of the appeal of any real value to Stanley. The trial court found that the dismissal and quitclaims "were so inadequate as consideration that they did not and do not justify depriving plaintiff \* \* \* of any interest in said certificates." There can be no doubt that when the appeal was taken from the order authorizing the sale, it was taken in good faith. At that time (January 5, 1949), Pacific States was contesting the validity of the seizure. If the seizure were upset, then pending sales by the Commissioner would be upset. The objections to the sale made in open court were not that a higher bid was available, or that the proper procedure had not been followed, but that Pacific States was being deprived of its property without due process. Once the Supreme Court had determined the Hise case (which it did on January 31, 1945), the constitutional arguments were all disposed of. The tactics thereafter employed by Pacific States in the appeal from the order authorizing the sale of the Mission Street property for \$95,000, and in the other 61 appeals in similar cases, support the finding that such appeals were taken simply for delay. The evidence shows threats by Odell to keep the case in court for five years. Not one brief was ever filed by Pacific States in the appellate court on these cases, nor was one transcript ever filed there in any of the appeals. The dismissal of groundless litigation is, of course, no consideration. The trial court was certainly justified in finding that the

appeal was taken for delay and was inadequate consideration to support Pacific States' claim to quiet its title to the certificates.

The other contentions of Pacific States are so insubstantial as not to require further comment.

The appeals of Robert S. Odell, Robert S. Odell and Company, State Guaranty Corporation, Pacific States Auxiliary Corporation are dismissed. On the appeal of Pacific States Savings and Loan Company, the judgment is affirmed.

BRAY, J., and SCHOTTKY, Justice pro tem., concur.

Hearing denied; SCHAUER, J., dissenting.



97 Cal.App.2d 630

PEOPLE v. DARNELL et al.

Cr. 735.

District Court of Appeal, Fourth District,  
California.

May 19, 1950.

John S. Darnell, Lincoln J. Moless and Garvey Fulton were convicted in the Superior Court of San Diego County, John A. Hewicker, J., of conspiracy to commit grand theft, and they appealed. The District Court of Appeal, Mussell, J., held that evidence supported the conviction.

Judgments affirmed.

#### 1. Conspiracy ☞47

Evidence supported conviction of conspiracy to commit the crime of grand theft.

#### 2. Criminal law ☞369(2), 371(12), 372(1)

Evidence of other acts of a similar nature may be admitted, when not too remote, to prove a material fact or where they tend to show motive, scheme, plan, or system, and such similar acts may be either before or after perpetration of the crime charged.

#### 3. Criminal law ☞371(1), 372(6)

In prosecution for conspiracy to commit crime of grand theft, evidence of other

acts of a similar nature allegedly committed after perpetration of crime charged was properly admitted for purpose of showing a continuous practice of same nature after the acts on which the crime was charged and as having a definite bearing on defendants' intent as well as showing that they had a definite plan or system.

#### 4. Conspiracy § 38

Where evidence is sufficient to show that defendants conspired to commit a crime and engaged in overt acts leading to its commission, fact that they failed to accomplish object of their intrigue is no defense to charge of conspiracy.

#### 5. Conspiracy § 48

Finding that overt acts were committed by defendants pursuant to conspiracy to commit grand theft was not inconsistent with finding that defendants were not guilty of grand theft.

#### 6. Judgment § 751

The doctrine of "res judicata" applies as to any matters in issue which the verdict determines.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Res Judicata".

#### 7. Witnesses § 379(9)

In prosecution for conspiracy and grand theft, evidence of questions asked two of the defendants and their answers thereto at preliminary examination was admissible for purposes of impeachment.

#### 8. Criminal law § 1186(4)

Witnesses § 337(3, 5)

In prosecution for conspiracy and grand theft, questions asked one of defendants as to how many times he had been in trouble and as to how many times he had testified in court under oath, though improper, did not constitute prejudicial error. Const. art. 6, § 4½.

#### 9. Criminal law § 1186(4)

Where evidence clearly supported conviction of conspiracy to permit grand theft, and it clearly appeared that jury in all probability would have rendered a verdict of guilty even in absence of any dereliction on district attorney's part in asking im-

proper questions of one of the defendants, a reversal was not justified. Const. art. 6, § 4½.

#### 10. Criminal law § 1186(4)

Under Constitution, reviewing courts are not permitted, where matters prejudicial in their character appear in the record, to reverse such judgments unless from the entire record it appears that there has been a miscarriage of justice. Const. art. 6, § 4½.

Earl C. Broady, Los Angeles, for appellants.

Fred N. Howser, Attorney General, Howard S. Goldin, Deputy Attorney General, for respondent.

MUSSELL, Justice.

Defendants, with one Karl Johnson, were charged with the crime of conspiracy to commit grand theft on May 7, 1949, and in a second count of the information with the crime of theft of \$357, the personal property of Winston W. Gay. A jury trial resulted in the acquittal of Johnson as to both counts, the conviction of the other defendants of conspiracy as charged in the first count of the information and in an acquittal as to the charge of grand theft. Defendants appeal from the verdicts and judgments on the grounds that the evidence was insufficient to justify the judgments and that the trial court committed prejudicial and reversible error in the admission of evidence.

The facts, briefly, are as follows: Winston W. Gay, 74 years old, a caretaker for the Bethel Baptist Church, on May 7, 1949, went to a bank in San Diego where he cashed two checks for \$34 each and also withdrew \$100 to apply on a pledge to his church. Upon leaving the bank, he walked to the corner of Fifth and E Streets, where defendant Darnell stopped him and said "Pardon me", and in broken English informed Gay that he (Darnell) was a Jamaican and had just arrived in San Diego on a British vessel; that he had met a woman to whom he had given a \$50 bill to buy some liquor and that the



woman had absconded with his money. Darnell, who was dressed in a zippered coverall suit, exhibited a roll of money, on the outside of which was a \$100 bill. Gay stated that it was dangerous to disclose such a roll and Darnell replied that his real money was in his pants. At this time, defendant Moless walked up. Darnell touched him on the shoulder and related the same story that he had told Gay. Darnell again exhibited his money and Moless and Gay warned him to more careful. At the suggestion of Moless, the three men moved to a grocery store nearby. At this place Darnell remarked that where he came from, colored people couldn't go into public places, especially banks. Both Moless and Gay asserted that colored men could go into banks and Gay declared that he had just come from one himself. Darnell insisted that such couldn't be done. At about this time Fulton joined the group. Thereafter the discussion continued about colored men going into banks and Fulton asked if Darnell would wager \$500 that such couldn't be done. Darnell accepted the wager and placed \$500 in a handkerchief. The four men walked back to the bank to show Darnell that he had been misled into the belief that colored men couldn't go into banks and keep money in them. Upon arriving at the bank, Moless and Gay went to a window where Gay presented his pass book and withdrew \$180 from his account to make a partial payment on a street assessment. At the same time Moless obtained a package of pennies at the next bank window. Gay and Moless then joined Darnell and Fulton and the group walked south on Sixth Street, where they stopped near a store.

Moless then produced an envelope and suggested that the men cooperate to try to take care of Darnell, who was too careless with all his money. Moless then suggested that the money be put in the envelope, that it be addressed to Gay at his residence and that it be registered and mailed. Gay addressed the envelope as agreed and wrote his name on it with an indelible pencil, giving his address as 707 South 30th Street.

Gay had suggested that Darnell leave his money with the captain of his boat or at his hotel but Darnell said he would not leave it in those places but would leave it with Gay and would come for it when he was ready to leave town. Gay agreed to keep his money for him.

Gay placed approximately \$357 of his own money in the envelope and when Darnell was ready to place his money in it, Moless told him not to open his clothing on a public street but to step around the corner and remove his money. Darnell did step around the corner and when he returned, Gay could see something visible in the envelope. The group then started walking toward Fifth and E Streets, with Darnell holding the envelope in his hand. They turned toward the post office and a block away from it Moless declared that he had an urgent call to make. The rest of the group then walked toward a telephone on the corner, at which there was a mail box. Darnell walked up to the box, pulled down the drop and released the envelope, over the protests of Gay. Darnell then "started to cry and rave" and said that he was going to get an axe to open up the box and get his money out. Darnell then proceeded rapidly north, accompanied by Fulton. Meanwhile, Moless turned to Gay and asked for his continued cooperation to save Darnell and his money. Moless declared that he would go ahead and would take care of the other two but that he would return in an hour and that they would meet at the same place. Moless then walked away and Gay contacted a traffic officer, to whom he told his story.

Gay did not receive his money or any part thereof through the mail.

Witnesses were called who saw a Buick car in the vicinity with more than one colored man in it, but were unable to identify the defendants. The same Buick car was stopped by officers of the United States Border Patrol service at about 2:00 o'clock of the same afternoon near Dana Point. Darnell, Moless, Johnson and Fulton were removed from the car and about \$450 in cash was taken from them, which

sum included one \$100 bill and a roll of pennies.

The defendants were taken to jail and there questioned by police officers. Darnell at first maintained that he, Fulton and Moless had engaged in a crap game by a building adjacent to a parking lot in San Diego, where he had parked his automobile on May 7th, and that Fulton had won all the money. Moless and Fulton also told a story that Fulton had won money shooting dice in a parking lot in a game which had included Darnell, Moless, Fulton and Gay. Moless admitted having gone to the bank with Gay to obtain a roll of pennies for use in the dice game. In a second conversation with the officers, Darnell stated that there had been no crap game; that the scheme had been discussed for a few minutes in the parking lot in San Diego; that Moless had procured an envelope which he had given to Darnell; that Darnell had placed his own money in the envelope; that Gay had placed his money in the envelope and that the envelope had been given back to Moless who had slipped it to Fulton. Out of town, Fulton had opened the envelope and had given Darnell \$38 out of it as his cut.

Evidence of another offense of a similar nature involving the defendant Darnell was admitted. This offense was alleged to have taken place about October, 1949, and the testimony indicated that defendant Johnson had contacted the complaining witness, Mr. Needholm, after the latter had come out of a bank in Los Angeles, at which time Johnson had stated that he was a Jamaican who had just come to Los Angeles; that he was looking for a woman. Darnell had then come up and joined in the conversation, ostensibly as a stranger to Johnson. As in the instant case, the same approach about the rights of colored men in banks had been used to induce Needholm to make a withdrawal and Darnell had accompanied Needholm to the bank, just as Moless had accompanied Gay in the case at bar.

Evidence was also introduced showing that one Amos C. Millings, on November 23, 1949, in Oakland, had been contacted by Moless, who used the identical approach

outlined in the Gay transaction, namely, the story of a Jamaican, speaking broken English, who had just come off the boat and was looking for a woman. A colored man had joined Moless and Millings and a conversation followed wherein the Jamaican insisted that a Negro was unable to have a bank account, and, whereas in the Gay transaction an envelope was used, in the Millings case a paper sack was utilized, but the nature of the transactions substantially were the same.

The final similar offense involved a student named Samuel Lawrence Cotton and took place on or about October 19, 1949, in Los Angeles. In this case a gun was used and Fulton told the same story as related to Gay by Darnell in San Diego on May 7, 1949, namely, that he had just gotten off a boat; that he had money and had given \$50 for liquor to a woman who had vanished through the side door of a bar. After Darnell had joined them, a discussion followed about the rights of a colored man to do banking.

[1-3] The evidence seems to us to be sufficient to establish the offense of conspiracy to commit the crime of grand theft. The objection that the evidence of the commission of similar offenses was inadmissible is without merit. Evidence of other acts of a similar nature may be admitted, when not too remote, to prove a material fact or where they tend to show motive, scheme, plan or system. *People v. Henderson*, 79 Cal.App.2d 94, 119, 179 P.2d 406; *People v. Poo On*, 49 Cal.App. 219, 223, 192 P. 1090; *People v. Bernstein*, 88 Cal.App.2d 522, 525, 199 P.2d 22. Such similar acts may be either before or after the perpetration of the crime charged. *People v. Weir*, 30 Cal.App. 766, 767, 159 P. 442; *People v. Talbot*, 220 Cal. 3, 17, 18, 28 P.2d 1057. In the instant case, the evidence of acts of a similar nature show a continuous practice of the same nature after the acts on which the convictions resulted and had a definite bearing on the intent of the defendants, as well as showing that they had a definite plan or system.

[4,5] The defendants contend that since they were found not guilty of the crime



of grand theft, they could not be convicted of a criminal conspiracy to commit that offense. This contention is untenable. *People v. Klinkenberg*, 90 Cal.App.2d 608, 635, 204 P.2d 47, 613. As was said in *People v. Gordon*, 71 Cal.App.2d 606, 628, 163 P.2d 110, 125: "Conspiracy is a distinct offense of which the parties may be guilty even though they have been convicted of the substantive crime. *People v. Martin*, 114 Cal.App. 392, 396; 300 P. 130. The purpose of evidence in a conspiracy case is to establish an illicit concord of the participants. (*People v. Stevens*, 78 Cal. App. 395, 408, 248 P. 696), and the conspiracy is established when it is shown that the defendants entertained a mutual design to commit the offense designated as the aim of the conspirators, followed by an overt act in pursuance of such design. The secret agreement of defendants having been proved by White and the numerous overt acts in furtherance of their conspiracy having been attested by the victims of their unlawful scheme, the verdict has substantial support. *People v. George*, 74 Cal.App. 440, 452, 241 P. 97."

In the instant case the evidence is sufficient to show that the defendants conspired to commit a crime and engaged in overt acts leading to its commission and the fact that they failed to accomplish the object of their intrigue is no defense. *People v. George*, 74 Cal.App. 440, 454, et seq., 241 P. 97; *People v. Klinkenberg*, supra, 90 Cal.App. at page 635, 204 P.2d 47, 613.

The overt acts charged in the information before us are not specific crimes charged in the second count of the information. They are, in brief, that the defendants, pursuant to the objects and purposes of the conspiracy, carried on a conversation with the complaining witness at Fifth and E Streets in San Diego on May 7, 1949, and did on the same date engage in a second conversation with the complaining witness at Sixth and Broadway in said city; that to carry out the objects and purposes of the said conspiracy, they were on the same date in a Buick automobile near San Clemente, County of Orange and in the same automobile in a parking lot at 845 Seventh Avenue in San Diego.

The finding that these overt acts were committed is not inconsistent with the finding that the defendants were not guilty of grand theft. This distinction is pointed out in *re Johnston*, 3 Cal.2d 32, at page 35, 43 P.2d 541. In *People v. Clement*, 97 Cal.App. 238, 241, 275 P. 511, the appellant was acquitted of the direct charge of robbery and was found guilty of conspiracy to commit robbery. The court there said that the robbery need not have been fully accomplished by the appellant in order to warrant his conviction of conspiracy. As was said in *People v. George*, 74 Cal.App. 440, 453, 241 P. 97, 102: "If, then, an indictment correctly charges an unlawful combination and agreement as actually made, and, in addition, describes *any act* by any one of the parties to the unlawful agreement, as an act intended to be relied on to show the agreement in operation, it is sufficient, although, upon the face of the indictment, it does not appear in what manner the act described would tend to effect the object of the conspiracy."

[6] In the instant case the defendants were tried on two separate counts; each count being considered as a separate and distinct offense. The doctrine of *res judicata* applies as to any matters in issue which the verdict determines. *People v. Beltran*, 94 Cal.App.2d 197, 210 P.2d 238.

[7] Defendants claim error in the admission of evidence of questions asked defendant Darnell and his answers thereto at the preliminary examination. These questions were asked for the purpose of impeachment. Defendant Fulton's attention was likewise directed to his testimony taken at the preliminary examination for purposes of impeachment. We conclude that the evidence was admissible.

[8] One of the officers who had questioned defendant Fulton testified, as a part of the conversation he had with Fulton, that Fulton stated he had been in trouble in Oakland but that it was "mistaken identity". This statement was one of many made in the conversation related by the officer. Although the prosecution was permitted to ask defendant Fulton the following questions: "How many times have



you testified in court under oath?" and "How many times have you been a witness?" Fulton answered that he had been a witness in a court room but once in his life but that had not occurred recently. Such questions, although improper, do not constitute prejudicial error.

[9, 10] Since the evidence clearly supports the conviction in the instant case, a reversal is not justified when it clearly appears that the jury in all probability would have rendered a verdict of guilty even in the absence of any dereliction on the part of the district attorney in asking the

questions complained of. Under section 4½ of Article VI of the Constitution of the State of California reviewing courts are not permitted, where matters prejudicial in their character appear in the record, to reverse such judgments unless from the entire record it appears that there has been a miscarriage of justice. *People v. Green*, 96 Cal.App.2d 283, 215 P.2d 127.

Judgments affirmed.

GRIFFIN, Acting P. J., and SHEPARD, Justice pro tem., concur.



35 Cal.2d 444

DEAN v. KUCHEL.

Sac. 6106.

Supreme Court of California, in Bank.

May 18, 1950.

Rehearing Denied June 16, 1950.

James S. Dean, as Director of the Department of Finance, applied for a writ of mandate to Thomas H. Kuchel, as Controller of the state. The Supreme Court, Carter, J., held that an instrument whereby the state let certain realty to a partnership, which leased the property and a building to be erected thereon by the partnership to the state, was a lease, not a subterfuge to evade the state's constitutional debt limitation, and conformed to the statutory authorization of the state finance director to let realty belonging to the state by an instrument requiring lessee to construct buildings on the demised premises for the state's use during the term of the lease and providing that title thereto shall vest in the state at the expiration of such term.

Peremptory writ of mandate granted.

Edmonds, J., dissented.

1. States ⇐117

A lease to state, executed in good faith and creating no immediate indebtedness for aggregate rental installments provided for, but confining lessee's liability to each installment as it falls due, does not violate constitutional limitation of state's indebtedness, but if instrument creates full liability on its execution, or its designation as lease is subterfuge and it is actually a conditional sale contract, wherein rentals provided for are installment payments on purchase price for aggregate amount of which immediate and present indebtedness exceeding constitutional limitation arises, contract is void. Const. art. 16, § 1.

2. States ⇐117

An instrument, whereby state let certain realty to partnership for 35 years and partnership agreed to lease property, with building to be erected thereon by partnership, to state at monthly rental of \$3,325 for 25 years, on expiration of which title to realty and building should vest in state, if all covenants were performed, was a lease, not a subterfuge to evade constitutional limitation of state's indebtedness to \$300,-

000. Government Code, § 13114; Const. art. 16, § 1.

3. States ⇐89

An instrument whereby state let certain realty to partnership for 35 years and partnership leased property, with building to be erected thereon by it, to state for 25 years, was not invalid as not conforming to statutory authorization of state finance director to let realty of state by instrument requiring lessee to construct buildings on demised premises for state's use during lease term and providing that title to such buildings shall vest in state at expiration of such term. Government Code, § 13114.

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Fred N. Howser, Attorney General, E. G. Benard, Assistant Attorney General, and Leonard M. Friedman, Deputy Attorney General, for petitioner.

Ralph I. McCarthy, Los Angeles, and J. D. Lear, Sacramento, for respondent.

CARTER, Justice.

The controversy here presented involves the validity of a transaction between the state and Pacific-Southwestern Company, a partnership. In 1949 the Legislature passed a statute reading: "Notwithstanding any [any] other provision of law, the Director of Finance, with the consent of any state agency having jurisdiction thereof, is hereby authorized and empowered to let to any person, firm or corporation, for a term not to exceed forty years any real property which belongs to the State, regardless of whether such property was acquired under any law specifying that such property was to be devoted to any particular use or purpose. Any instrument by which such property is let as aforesaid shall require the lessee therein to construct on the demised premises a building or buildings for the use of the State during the term thereof, shall provide that title to such building shall vest in the State at the expiration of said term and shall contain such other terms and conditions as the Director of Finance may deem to be in the best interest of the State

"This section shall remain in effect until the ninety-first day after final adjourn-



ment of the 1951 Regular Session of the Legislature." Government Code, sec. 13114 as added by Stats. 1949, ch. 1089. In January of this year, pursuant to that statute, the state and company executed an instrument by which the state, being the owner of certain real property, "let" and "hired" that property to the company for a term of 35 years for the sum of \$1, called a ground lease. The company agreed to erect immediately on the property an office building in accordance with specified plans and specifications, the building to be completed within 325 days. It is stated that the company "leases to the State and the State hires from the Company" the property together with the building to be erected thereon for a term of 25 years at a monthly "rental" of \$3,325 payable on or before the tenth day following the last day of each lease month; that is referred to as the building lease. The "rental" is paid "for and in consideration of the use and occupancy of the said real property, buildings and other improvements which the State receives and in consideration of the continued quiet use and enjoyment thereof as provided in Article 16 hereof, during each month for which said monthly rental is to be paid." The state is given the option on the expiration of 15 years and on 60 days' notice to terminate the agreement if at the time of the termination certain amounts have been paid to the company according to a specified schedule. Provisions are made in regard to taxes and insurance, the payment of some of which by the company makes the "net" rental less. Upon the expiration of the 25-year building lease, all covenants having been performed, the 35-year ground lease ends and "all right title and interest in and to said real property and in and to all buildings situated thereon shall vest in the State." In any event and regardless of performance by the state, at the end of the 35-year ground lease, all rights of the company to the buildings and land shall "vest absolutely in the State."

It is urged that the instrument violates the constitutional provision reading in part: "The Legislature shall not, in any manner create any debt or debts, liability or liabilities, which shall, singly or in the ag-

gregate with any previous debts or liabilities, exceed the sum of three hundred thousand dollars, except" and then follow certain exceptions and provision for approval by the voters. Cal.Const. art. XVI, sec. 1.

[1] The latest authoritative ruling upon whether obligations incurred under instruments similar to the one here involved violate the debt limitation in the Constitution was made in *City of Los Angeles v. Offner*, 19 Cal.2d 483, 122 P.2d 14, 145 A. L.R. 1358, which was concerned with the debt limitation on municipal corporations and other local government agencies. Cal. Const. art. XI, sec. 18. It is conceded that the same principles apply to both constitutional provisions. There a contractor agreed to build an incinerator on city owned land which the city leased to him for ten years at a rental of \$1 per month, and he leased to the city the land and incinerator to be erected thereon for nine years and nine months, at a specified monthly rental. The city was given an option to buy the incinerator at various intervals during the term of the lease at a minimum price fixed by a schedule. If the city elected to exercise its option the purchase price was to be fixed by appraisers but not less than the minimums. Title to the incinerator was to remain in the contractor and if the option was not exercised it could be removed. This court stated the law to be: "It has been held generally in the numerous cases that have come before this court involving leases and agreements containing options to purchase that if the lease or other agreement is entered into in good faith and creates no immediate indebtedness for the aggregate installments therein provided for but, on the contrary, confines liability to each installment as it falls due and each year's payment is for the consideration actually furnished that year, no violence is done to the constitutional provision. *McBean v. City of Fresno*, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794, 53 Am.St.Rep. 191; *Smilie v. Fresno County*, 112 Cal. 311, 44 P. 556; *Higgins v. San Diego Water Co.*, 118 Cal. 524, 553, 45 P. 824, 50 P. 670; *Doland v. Clark*, 143 Cal. 176, 180, 181, 76 P. 958; *Krenwinkle v. City of Los Angeles*, 4 Cal.2d 611, 613, 51 P.2d 1098. If, however,

the instrument creates a full and complete liability upon its execution, or if its designation as a 'lease' is a subterfuge and it is actually a conditional sales contract in which the 'rentals' are installment payments on the purchase price for the aggregate of which an immediate and present indebtedness or liability exceeding the constitutional limitation arises against the public entity, the contract is void. *Chester v. Carmichael*, 187 Cal. 287, 201 P. 925; *In re City and County of San Francisco*, 195 Cal. 426, 233 P. 965; *Mahoney v. City and County of San Francisco*, 201 Cal. 248, 257 P. 49; *Garrett v. Swanton*, 216 Cal. 220, 13 P.2d 725.

[2] "The rule as applied to each of these situations is well stated in *Garrett v. Swanton*, supra, 216 Cal. at page 226, 13 P. 2d 725, at page 728, as follows: 'The law is well settled in this state that installment contracts of any kind, where the installment payments are to be made over a period of years and are to be paid out of the ordinary revenue and income of a city, *where each installment is not in payment of the consideration furnished that year*, and the total amount of said installments, when coupled with the other expenditures, exceeds the yearly income, are violative of the constitutional provision in question unless approved by a popular vote. This is so whether the contract be denominated a mortgage, lease, or conditional sale. \* \* \* It is true that under the doctrine enunciated in *McBean v. City of Fresno*, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794, 53 Am.St.Rep. 191 \* \* \* contracts for the furnishing of property in the future have been upheld, but only where no liability or indebtedness came into existence until the consideration was actually furnished. In other words, such contracts are valid where each year's installment is within the city's income, and where each year's payment is for the consideration actually furnished that year.'" [19 Cal.2d 483, 122 P.2d 16] No useful purpose would be served by reviewing other cases on the subject. We find no logical distinction between the *Offner* case and the one at bar. It is true that there was an option to pur-

chase in the former rather than a vesting of title at the end of the term in the instant case, but as far as liability is concerned, the state under the instrument here is in a better position, for it gets title without the payment of anything other than the rental. The essence of the *Offner* rule is that the payments are for a month to month use of the building. Here it is clearly stated that the rentals are for that purpose. There is no substantial or logical difference between the option to purchase in the *Offner* case and the vesting of title at the end of the term in this case. True, the city was not bound to execute the option and thus pay the purchase price, but it was required to pay the rentals. Here the rentals also must be paid but the state need not pay any more. We are satisfied therefore that the instant transaction qualifies as a lease for the purpose of the debt limitation.

[3] It is argued that the instrument does not conform to the authorization stated in section 13114 of the Government Code, quoted supra, in that thereunder the lessee of the state land must erect buildings for the use of the state "during the term thereof" and the buildings must vest in the state at the end of "said term"; that the lease, the term of which is referred to, is the ground lease; that here the buildings are to be erected for the use of the state during the term of the building lease rather than the ground lease; and that during the ten year period from the end of the 25-year building lease to the end of the 35-year ground lease the building is for the use of the company rather than the state. We cannot agree. Under the lease the state is to have the use of the building during the 25-year period and own it absolutely at the end of that time if it pays the rent. Manifestly it will thus have it for all time including the next ten years after the first 25 years. It then belongs to the state. The only situation under the lease in which the company could get control of the building would be in the event the state defaulted and the company elected to terminate the building lease, and in any event the company's interests are terminated at the end of 35 years. The main purpose of the



section is to permit a leasing of state property for 40 years. As a limitation on that authority the lease must provide that the lessee shall erect buildings thereon for the state's use, that is, the state is not to lose the use of the property by the lease. That purpose is served in the instant case and it is not to be supposed that provisions cannot be made for the effect of a breach of the lease by the state. On the contrary, the last clause in the first paragraph of the section declares that the lease shall contain such other terms and conditions as the director may deem to be in the best interests of the state. It may well be that no builder could be obtained or a higher price would be asked to the state's detriment if some measure of protection were not granted in case of default by the state. The state may prevent the occurrence of the contingency which would oust it from possession by performing under the lease.

It is ordered that a peremptory writ of mandate issue as prayed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

In my opinion, even the most liberal construction of the contract which this court is asked to approve shows that the transaction is a subterfuge and therefore void within the rule applied in *City of Los Angeles v. Offner*, 19 Cal.2d 483, 122 P.2d 14, 145 A.L.R. 1358. As stated by the Chief Justice in that case: "If \* \* \* the instrument creates a full and complete liability upon its execution, or if its designation as a 'lease' is a subterfuge and it is actually a conditional sales contract in which the 'rentals' are installment payments on the purchase price for the aggregate of which an immediate and present indebtedness or liability exceeding the constitutional limitation arises against the public entity, the contract is void." 19 Cal.2d page 486, 122 P.2d page 16.

The contract which the state has made with Pacific-Southwestern Company includes an agreement termed a "ground

lease" and another which is designated "building lease". The state for \$1 "leases" land to the company for 35 years, subject to prior termination upon certain conditions. The company agrees to construct upon the land shops and buildings designed by the state for its use in accordance with certain plans and specifications made a part of the contract. These buildings are to be of reinforced concrete and steel construction and to have a reasonable life expectancy of at least 75 years.

The company "leases" the land and buildings to the state for a tentative term of 25 years to commence when the buildings are ready for occupancy. The state agrees to pay a "monthly rental" or fixed charge of \$2,500 for 300 months, plus a monthly tentative charge of approximately \$825 to cover taxes and insurance premiums. At the expiration of the building lease, the ground lease terminates, and *the improvements to be erected vest absolutely in the state forthwith and without further payment or consideration*. Thus upon paying nothing more than 300 "monthly rentals", the state will acquire full title to the buildings. Of significance in this connection is the fact that the state has the right to erect additional buildings, or wings to the buildings constructed by the company, *in which the company shall have " \* \* \* no interest whatsoever"*.

After 15 years, the state may elect to accelerate the payment of the balance of its "rental" obligation, whereupon both "leases" terminate and the realty and improvements vest in the state *forthwith and without further payment*. And although the state should default in its "rentals", upon recovery by the company of its "leasehold value (defined as " \* \* \* the value at the particular time of the then future payments of rental at \$2,500 per month \* \* \*)", the state *without further payment* acquires full title to the premises, including improvements. The amount which the state must pay if it exercises its option under the acceleration clause coincidentally is almost exactly the total of the remaining rental that the company would otherwise receive calculated by amortizing the



remaining monthly installments of \$2,500 each.

Regardless of whether the state is in default, in any event all right and title to the land and buildings " \* \* \* shall vest absolutely in the State \* \* \*" on January 31, 1985, the date of the expiration of the "ground lease". However, the state is not relieved from liability for any unpaid balance of its obligation to the company. In the event of destruction of the improvements, the state is obligated to pay for the cost of repairs or reconstruction in excess of proceeds of insurance, if any. And the state must pay all taxes and assessments, all premiums on insurance, maintain the premises in good repair, and provide all services and utilities.

Under any construction other than one tortured from the terms "lease" and "rental", the terms of the agreement unmistakably show that it is an installment purchase contract which violates the provisions of Article XVI, Section 1, of the State Constitution. By the Constitution, the people have prohibited the state from incurring any liability in excess of \$300,000 which has not been approved by the electorate. Of course the buildings which the state desires may be purchased through a bond issue, in the manner provided by law. The total "rental" for the building exceeds the forbidden amount, and the company in fact retains title to the "demised" premises for security purposes only. Such a reservation is the outstanding characteristic of a contract of conditional sale. *San Diego County v. Davis*, 1 Cal.2d 145, 147, 33 P.2d 827; see 22 Cal.Jur. 1098.

Other conditions unmistakably bring the contract within this category. The "lessor" under no circumstances whatsoever may receive and retain any amount except the 300 consecutive monthly installments of \$2,500, or their amortized equivalent. The company takes no risk whatever. The state must pay the additional cost of construction and all expenses or losses which may result from its default or partial or total destruction of the buildings. Under no circumstances may the company treat its

title in the premises as anything other than one for security. Also, the entire consideration from the company, if not delivered at the time the agreement was signed, is to be provided in the 325 day period allowed to erect the buildings and turn over possession of them to the state. The remainder of the 300 consecutive payments are for something previously delivered by the "lessor".

Indicating that the state has all of the ordinary incidents of an owner rather than a lessee is the fact that it must pay every conceivable charge or expense for which an owner would be liable, including all taxes and assessments levied on the premises, the cost of contesting any disputed tax or assessment, insurance premiums on the full insurable value of the improvements, the premium of a title policy in favor of the company, the premium on the company's faithful performance bond, and all service and utility charges. In the ordinary lease, the lessor has the election, upon default of the lessee, to terminate the lease completely. However, the agreement here provides that although the lessor may "terminate" the lease, it must transfer to the state all of the company's right, title and interest in the premises, including improvements, when it receives the amount of the monthly payments and certain expenses.

The real nature and effect of the contract in this case is the same as that of the agreement which was struck down in *Mahoney v. City and County of San Francisco*, 201 Cal. 248, 264, 257 P. 49, 56. In holding that transaction void, the court left *McBean v. City of Fresno*, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794, 53 Am.St.Rep. 191, the leading case in which a lease agreement was approved, as very limited authority for such a decision. It said: "The *McBean Case* was, no doubt, written under the urge of the necessities of the situation, and this court has since been careful not to extend the rule beyond the facts therein stated, and has, as a matter of fact, distinguished that case from subsequent cases, thereby giving effect to the constitutional provisions."

Later California cases construing "lease" contracts of this type have also held that where the purpose of the agreement is to permit the political subdivision (of the state) to acquire ownership of the "demised" premises and the "rentals" are in effect payments on the purchase price, the formal language of the contract will be disregarded. If in fact the "lease" agreement constitutes an installment purchase creating debts or liabilities in excess of the constitutional limit, the contract is invalid. *City of Los Angeles v. Offner*, 19 Cal.2d 483, 122 P.2d 14, 145 A.L.R. 1358; *Krenwinkle v. City of Los Angeles*, 4 Cal.2d 611, 51 P.2d 1098; *Mahoney v. City and County of San Francisco*, 201 Cal. 248, 257 P.2d 49; *In re City and County of San Francisco*, 195 Cal. 426, 233 P. 965.

The contract considered in *City of Los Angeles v. Offner*, supra, differs from the present one in the essential particular that there the parties provided for an option under which the leased property could be purchased by the city for additional consideration apart from the monthly rental. Title to the incinerator, the subject of the contract, did not automatically vest when all rental payments were completed. There remained the requirement that additional consideration be paid by the city prior to its acquisition of title. The court now dismisses this basic difference with the observation that "\* \* \*" as far as liability is concerned, the state under the instrument here is in a better position, for it gets title without the payment of anything other than the rental." But that is one of the very reasons why the contract is invalid. Since the 300 monthly payments of "rental" are the only amounts which the state must pay under the contract, clearly the transaction is designed as a subterfuge to evade the constitutional limitation, and the payments are nothing more than installments upon the purchase price of the buildings to be constructed.

A provision requiring the payment of a stated consideration upon the exercise of an option to acquire title was also a factor relied upon in construing other public contracts. *Krenwinkle v. City of Los An-*

*geles*, 4 Cal.2d 611, 51 P.2d 1098, is such a case. There the agreement included an option to purchase entirely unrelated to the amount of the rental installments. The court observed: "The purchase price does not decrease with the amount of rent paid; neither can the rentals paid be applied on the option price." Supra, 4 Cal.2d at page 613, 51 P.2d at page 1099.

In *Mahoney v. City and County of San Francisco*, 201 Cal. 248, 257 P. 49, the decision rested upon the fact that the ultimate purpose was for the city to acquire ownership of the property and that the "rentals" were established at an amount which would repay the cost of the property plus interest. The contract sued upon in that case and held void provided for an "option to purchase", but the so-called option was available to the city for no additional consideration. In *re City and County of San Francisco*, 195 Cal. 426, 233 P. 965, concerned a "lease" which was held to be in substance a contract of sale. There again the court stressed the fact that the ultimate purpose of the agreement was to permit the city to acquire ownership of the "demised" premises and characterized the contract as within the constitutional limitation.

The rule plainly stated and applied in these decisions is that in contracts of this type an option to purchase must be something sold for a consideration other than the so-called "rentals". The contract now before the court does not include or even purport to contain an option to purchase and *a fortiori* it is but a disguised installment sale agreement.

Petitioner heavily relies upon *Vandegrift v. Riley*, 84 Cal.Dec. 533, 16 P.2d 734. That decision is no authority whatsoever, because the court granted a rehearing and thereafter the proceeding was dismissed.

The California cases are in conformity with the weight of authority in other jurisdictions. These decisions hold that a "lease" contract which provides for acquisition of property by the state in consideration of the payment of nothing further than the "rentals" specified in the contract violates a constitutional debt limit provision. *American-LaFrance* and *Foamite*

Corp. v. City of Phoenix, 47 Ariz. 133, 54 P.2d 258; Billings v. Bankers' Bond Co., 199 Ky. 490, 251 S.W. 643; Reynolds v. City of Waterville, 92 Me. 292, 42 A. 553; Sager v. City of Stanberry, 336 Mo. 213, 78 S.W.2d 431; Earles v. Wells, 94 Wis. 285, 68 N.W. 964, 59 Am.St.Rep. 886; see Hive-ly v. School City of Nappanee, 202 Ind. 28, 169 N.E. 51, 171 N.E. 381, 71 A.L.R. 1318; City of Los Angeles v. Offner, 19 Cal.2d 483, 122 P.2d 14, 145 A.L.R. 1362.

Indicative of petitioner's realization that the transaction which the state is endeavoring to have validated is in reality an installment purchase contract is the fact that, in effect, the director of finance urges this court to excuse conformity with the Constitution upon the grounds of expediency. For example, he asserts that there is an acute need for facilities in Los Angeles for the California Highway Patrol, and that the state objects to renting buildings. Rental, it is said, " \* \* \* buys nothing of permanent physical benefit". He states that while the required premises could be provided by tax increases or by a bond issue, " \* \* \* practical difficulties of an obvious nature prevent resort to such measures." Statements of this kind merely present objections to the constitutional provision reserving to the people the determination as to the advisability of incurring an obligation such as the one here challenged. But the constitutional limitation should not be swept aside because "practical difficulties" may result from adherence to it.

In addition to these reasons, I would also deny relief in this proceeding upon grounds of public policy. The court here approves an expenditure of approximately \$500,000, and upholds an important statute relating to contracts of the kind here challenged, in a suit between two officers of the state. As I pointed out in City and County of San Francisco v. Linares, 16 Cal.2d 441, 448, 106 P.2d 369, I am strongly opposed to the procedure by which a question of great public interest is conclusively decided in such an action. See also City of Grass Valley v. Walkinshaw, 34 Cal.2d 595, 212 P.2d 894; City of Whittier v. Dixon, 24 Cal.2d 664, 151 P.2d 5, 153 A.L.R. 956, and cases cited.

Although the Controller has genuinely contested the validity of the agreement made by the state, litigation in which the taxpayers, the real parties in interest, are unrepresented, should not be encouraged.

Rehearing denied; SHENK, EDMONDS, and SPENCE, JJ., dissenting.



35 Cal.2d 487

PEOPLE v. AVERY.

Cr. 5064.

Supreme Court of California, in Bank.

May 26, 1950.

Herman Avery was convicted in the Superior Court for San Diego County, William A. Glenn, J., of murder in the first degree, and he appealed. The Supreme Court, Shenk, J., held that the evidence supported the conviction.

Judgment affirmed.

#### 1. Criminal law ☞680(1)

Although order of proof in a criminal case rests in sound discretion of the trial court, an abuse of that discretion can result from practice of allowing district attorney to withhold part of his case in chief and offer it after defense has closed. Pen. Code. §§ 1093, subd. 4, 1094.

#### 2. Criminal law ☞1168(2)

Where prosecution withheld testimony of police officer that defendant had confessed homicide in sheriff's office, and introduced it only as rebuttal evidence, but defendant was thereafter permitted to take the stand in answer to the testimony, and testimony involved matters within defendant's own personal knowledge, permitting prosecuting attorney to withhold the testimony was not ground for reversal. Pen. Code, §§ 1093, subd. 4, 1094.

#### 3. Criminal law ☞683(1)

Where witness testified as part of prosecution's case-in-chief that he gave



accused some shotgun shells, and accused denied this when he testified on his own behalf, testimony of a second witness called by the prosecution in rebuttal that second witness had heard accused ask first witness for the shells was admissible as additional evidence upon point put in dispute by accused's testimony. Pen.Code, §§ 1093, subd. 4, 1094.

#### 4. Criminal law Ⓒ453

The testimony of a witness that he heard accused ask another for shotgun shells, although witness could not positively identify accused as the man who made the request, was not incompetent and uncertainty of recollection or lack of positiveness about identity went to weight of the evidence. Code Civ.Proc. § 1845.

#### 5. Criminal law Ⓒ656(1)

In murder prosecution, statement of judge in commenting on witness' testimony, to the effect that witness said he thought defendant was the person who was the subject of his testimony, was not objectionable as not based on the record.

#### 6. Criminal law Ⓒ448(7)

Where witness testified that an expert would require a high power magnifying glass to detect differences in firing pin marks on shotgun shells, and that witness himself could not detect differences because he was not an expert, court properly rejected witness' testimony as to whether firing pin marks were similar on ground that jurors could make the same visible observation as could the witness.

#### 7. Criminal law Ⓒ656(8)

Where defense was trying to show that there was an obvious visual difference in firing pin marks on shot gun shells, and witness testified that he could not discern any differences without a microscope, and court thereafter remarked that it was obvious that witness could not tell without a microscope whether the marks were different or not, remark was not improper as an opinion that there were no obvious visual differences.

#### 8. Criminal law Ⓒ1035(3)

Where court's remark in explaining a ruling refusing to let a witness testify

was not objected to at trial, remark could not be urged on appeal as a ground for reversal.

#### 9. Homicide Ⓒ169(2)

In murder prosecution, refusal to admit evidence of use of shotgun in vicinity of scene of homicide to explain existence of such shells near the body was not erroneous in view of slight materiality of the evidence.

#### 10. Criminal law Ⓒ1170½(1)

In murder prosecution, where husband of a witness testified that he had heard defendant admit the crime to the witness who had been a friend of the defendant, and court thereafter allowed defense to establish that the husband knew the witness' former husband, and court permitted other inquiry into possible bias of the husband, sustaining objection to question as to how long husband had known witness' former husband asked for purpose of showing possible bias and animosity, if error, was not prejudicial.

#### 11. Criminal law Ⓒ730(1)

Where prosecuting attorney in his summation commented on objections made by defendant when certain questions were asked of a witness, but court instructed jury to disregard remarks concerning defendant's objection to the evidence, prosecuting attorney's conduct was not prejudicial.

#### 12. Homicide Ⓒ253(1)

Evidence supported conviction of first-degree murder.

#### 13. Criminal law Ⓒ1165(1)

Where defendant stood convicted of first-degree murder upon evidence produced at a trial, and evidence supported the conviction, defendant could not complain on appeal that police failed to follow all logical points of investigation thus denying him due process of law.

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Morey S. Levenson and Byron F. Lindsay, San Diego, for appellant.

Fred N. Howser, Attorney General, Walter L. Bowers, Assistant Attorney General, and Frank Richards, Deputy Attorney General, for respondent.

SHENK, Justice.

This is an appeal from a judgment following the conviction of the defendant of first-degree murder and imposing the death penalty.

Defendant Herman Avery was charged by information with the murder of two persons—his wife, Catherine Neal Avery, and his mother-in-law, Estella Neal. The trial court appointed counsel for him. He pleaded not guilty and was tried before a jury. The jury found him guilty of murder in the first degree on both charges and without the recommendation of a life sentence. No motion for new trial was made. Judgment of death was imposed. This court appointed counsel to represent the defendant for the purposes of the appeal.

The case against Avery consists of circumstantial evidence and his own admissions. The prosecution produced evidence of the following: Avery's wife had separated from him and had started divorce proceedings. Avery was on parole from a former conviction. He had been directed by his parole officer to observe the order of the court in the divorce proceedings not to visit his wife. His wife resided with her mother at an isolated place in the country known as Neal Ranch in Harbison Canyon, San Diego county. On the morning of April 11, 1949, the women were found dead at Neal Ranch; they had died from shotgun wounds. The women had been last seen alive about 7:45 p. m. the preceding evening. On that evening Avery had procured some twelve-gauge shotgun shells and at about 8:20 p. m. had gone to the vicinity of Neal Ranch in a taxicab. A shotgun was kept on the ranch. In the early morning of April 11, 1949,—about 12:30 a. m.—Avery visited a woman friend in Los Angeles and told her and her companion that he had killed his wife and his mother-in-law with the shotgun kept on the ranch. He said he had gone to the ranch four days before and had hidden the gun; that he had returned the previous evening, obtained the gun, and shot the women. Later that morning Avery was driving his mother-in-law's automobile—an automobile that was kept on

the Neal ranch. He accidentally ran the car off the road. A California Highway Patrolman, responding to notice of the accident, found a loaded twelve-gauge shotgun in the car and five unused twelve-gauge shells. After his arrest Avery voluntarily told a captain in the sheriff's office that he had killed the two women. Three empty twelve-gauge shells were found near the bodies. Ballistic tests identified one cartridge as having been fired from the shotgun found in the car. Tests for the other two shells were inconclusive. The shotgun shells found near the bodies, in the car and in the shotgun were of the same brands that Avery had procured the night before the women were found dead.

At the trial Avery testified that he had visited his wife on the evening of April 10th because she had requested him to do so; that he found the two bodies when he arrived; and that he fled the scene in his mother-in-law's car rather than report to the police because he had violated his parole in being there and felt he was in a suspicious position. He denied that he had told his friend in Los Angeles, or her companion, or the officer that he had killed the women. He denied obtaining shotgun shells. He testified that he and his wife were on amicable relations; that his wife was divorcing him as part of a pre-arranged agreement that she could do so if his criminal record became embarrassing to her; that he was on friendly terms with his mother-in-law; and that he had never had violent arguments with either his wife or mother-in-law. The jury resolved the conflict in the evidence in favor of the prosecution.

On the appeal it is contended that the trial court erred in its ruling that Captain A. B. Mason's testimony was proper rebuttal evidence. Mason testified in rebuttal for the people that Avery had confessed to him in the sheriff's office. It is argued that the prosecution intentionally withheld this testimony from its case in chief in order to produce it on rebuttal and surprise the defendant after he had testified. It is asserted that the law prohibits such tactical maneuvering in a criminal trial.

[1,2] The practice of allowing the district attorney to withhold a part of his case in chief and to offer it after the defense had closed was properly condemned in *People v. Rodriguez*, 58 Cal.App. 2d 415, at page 419, 136 P.2d 626. While the order of proof rests in the sound discretion of the trial court, Penal Code sections 1093, subd. 4, 1094, an abuse of that discretion might well result from such practice. However, in this case Avery was permitted to take the stand in answer to the testimony claimed to have been erroneously admitted out of order and the testimony involved matters within his own personal knowledge. Under these circumstances it cannot be said that the ruling put him to such disadvantage as to require a reversal.

[3] It is urged that the testimony of Ray Bolton on behalf of the people was also improper rebuttal evidence. In the prosecution's case-in-chief Mr. Sutton testified that he gave Avery some shotgun shells. Avery denied this when he testified on his own behalf. Bolton, called in rebuttal, testified that he heard Avery ask Sutton for the shells. Although his testimony might properly have been part of the prosecution's case in chief, it was allowable as additional evidence upon a point put into dispute by Avery's testimony. See 6 Wigmore on Evidence, 3d Ed., p. 516.

[4] As a further argument it is contended that Bolton's testimony should have been excluded as being incompetent since he stated that he could not positively identify Avery as the man who asked Sutton for the shells. Bolton testified that he observed the incident about which he testified. His testimony, therefore, was not incompetent under section 1845 of the Code of Civil Procedure. The uncertainty of his recollection or his lack of positiveness about the identity of the persons involved went to the weight and not to the competency of this evidence. *People v. Rolfe*, 61 Cal. 540; *People v. Harris*, 87 Cal.App. 2d 818, 824, 198 P.2d 60.

[5] Prejudicial misconduct is charged against the trial court when the judge said

(in commenting on the admissibility of Bolton's testimony): "He [Bolton] says he thinks [the person he saw] is the defendant." It is argued that the record does not show that Bolton said he thought Avery was the man. The following transcript of the record sufficiently answers the contention:

"Q. Do you know this gentleman [Avery] standing up? A. No, sir.

"Q. Have you ever seen him before? A. I think I have.

"Q. And do you remember where and when you saw him? A. I know where. It was on a Sunday afternoon."

[6] Error is assigned on the court's refusal to let Mr. Frye testify as an expert on behalf of the defendant on the question whether the firing-pin marks upon some shotgun shells were similar. The evidence was rejected on the ground that the jurors could make the same visual observation of the marks as could the witness. Frye testified that an expert would require a high-powered magnifying glass to detect differences in the marks and that he himself could not detect differences because he was not an expert. The ruling was correct.

[7,8] Later, in explaining the ruling on the firing-pin marks, the court said: "\* \* \* it was obvious he [Frye] could not tell without a microscope whether they [the marks] were different or not." The court's remark is assigned as misconduct. The argument is that the defense was trying to show that there was an obvious visual difference in the marks and that the court improperly expressed an opinion that there were no obvious visual differences. Inasmuch as Frye testified that he could not discern any differences without a microscope, the remark was not improper. Moreover it was not objected to at the trial and may not now be urged as a ground for reversal. *People v. MacDonald*, 167 Cal. 545, 140 P. 256; *People v. Bryant*, 101 Cal.App. 84, 281 P. 404; see *People v. Mendez*, 193 Cal. 39, 48, 223 P. 65.

[9] The court's refusal to admit evidence of the use of shotguns in the vicinity of Neal Ranch is assigned as error. This



evidence was offered to explain the existence of shotgun shells near the bodies. In view of the slight materiality of such evidence the exclusion does not appear to be erroneous.

[10] Mr. Anderson testified for the people that he heard Avery admit the crime to Mrs. Fisher, a friend of Avery. There was evidence that the witness Anderson had married Mrs. Fisher between the date of the homicide and the trial and that Mrs. Fisher's divorced husband was one of Avery's best friends. On cross-examination counsel for the defendant asked Anderson about Mrs. Fisher's former husband. One question was: "How long have you known him?" An objection to the question was sustained. This ruling is assigned as error on the ground that the inquiry was proper to show possible bias and animosity toward the husband that would be reflected against Avery, the husband's friend. Assuming that the objection should have been overruled, no prejudice is shown. The court allowed the defense to establish that Anderson knew the husband, and other inquiry into the possible bias of Anderson was permitted.

[11] The prosecuting attorney in his summation commented: "When I go up to ask Mr. Anderson about a statement [concerning the alleged admission] that he had given prior to the time he had been down here [at the trial], that was vigorously objected to." This is assigned as misconduct as tending to indicate what Anderson's testimony would have been and as implying that the defense was seeking to foreclose unfavorable evidence. At the end of the summation, however, the court instructed the jury to disregard the remarks of the prosecuting attorney concerning the defense's objections to evidence. In view of this admonition the conduct complained of cannot be said to have prejudiced the defendant. See *People v. Ong Git*, 23 Cal. App. 148, 157, 137 P. 283.

Finally, it is contended that the evidence is insufficient to support a verdict of conviction; and that in any event it is insufficient to support a verdict of first-degree murder. It is also argued that the evidence produced against the defendant was the re-

sult of "a scandalously incomplete and inefficient investigation" by the police who failed "to follow down all logical points of investigation" thus denying the accused "due process of law."

[12, 13] The foregoing statement of the facts summarized from the record sufficiently supports the verdict of murder. The fact that the defendant procured the shotgun shells the night before the women were found dead and that he used a shotgun that he had hidden four days earlier is proof of the premeditation required for first-degree murder. The defendant is in no position to complain that the prior investigation conducted by the police was inadequate, since he stands convicted upon evidence produced at the trial. *People v. Tuthill*, 31 Cal.2d 92, 187 P.2d 16.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



25 Cal.2d 474

ORNALES v. WIGGER et al.

L. A. 21336.

Supreme Court of California, in Bank.

May 23, 1950.

Rehearing Denied June 22, 1950.

Louise Ornales sued Myrtle E. Wigger and another for injuries sustained when struck by defendants' automobile. A judgment for the defendants was entered by the Superior Court, Los Angeles County, Harry R. Archbald, J., and the plaintiff appealed. The Supreme Court, Carter, J., held that instruction given by trial court on effect of a violation of the statute requiring motorist to yield right of way to pedestrian at crosswalk did not constitute prejudicial error.

Judgment affirmed.

Prior opinion 210 P.2d 848.

**1. Negligence ⇨6, 121(1)**

Violation of statute or ordinance is presumptive evidence of negligence, which should be deemed conclusive if not excused by other evidence, including all surrounding circumstances, but must be treated as negligence per se until justification or excuse therefor appears.

**2. Negligence ⇨6**

The fact which will excuse violation of statute, otherwise constituting negligence per se, is one resulting from causes or things beyond control of person charged with such violation.

**3. Appeal and error ⇨216(2)**

Ordinarily, before an appellant may complain of lack of an instruction, he must have made a request that charge be made more specific, or ask for qualifying instructions, but appellant may complain, in absence of such request, where instruction given erroneously states the applicable law and prejudice is suffered thereby.

**4. Trial ⇨255(1)**

Trial court may not of its own motion give special instructions in absence of a request therefor by counsel.

**5. Automobiles ⇨242(3)**

In pedestrian's action against motorist for injuries sustained in collision at cross-walk in rain, evidence as to the atmospheric condition at time of the accident, together with fact that plaintiff was dressed in dark clothing and was carrying a black parasol, could be considered by jury as evidence to rebut presumption of negligence arising from defendant's violation of statute requiring motorist to yield right of way to pedestrian at cross-walk. Vehicle Code, § 560(a).

**6. Automobiles ⇨246(49)**

In pedestrian's action against motorist for injuries sustained in collision at cross-walk in rain, that portion of instruction relating to violation of statute requiring motorist to yield right of way to pedestrian at cross-walk which permitted jury to determine whether defendant's violation of statute was excusable or justifiable was authorized under the evidence.

**7. Trial ⇨244(4)**

In pedestrian's action against motorist for injuries sustained in collision at cross-walk in rain, instructions regarding contributory negligence were not objectionable as "over instructing" on contributory negligence.

**8. Appeal and error ⇨216(1)**

Plaintiff could not complain on appeal of trial court's failure to instruct jury properly on meaning and effect of certain impeaching evidence, in absence of showing that plaintiff made a request for such instruction to trial court.

**9. Automobiles ⇨245(6)**

In pedestrian's action against motorist for injuries sustained in collision at cross-walk in rain, evidence presented questions for jury as to whether defendant was guilty of negligence in violating statute requiring motorist to yield right of way to pedestrian on cross-walk and as to whether plaintiff was contributorily negligent. Vehicle Code, § 560(a).

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Marcus, Rabwin & Nash and Robert M. Newell, Los Angeles, for appellant.

Bauder, Gilbert, Thompson, Kelly & Veatch and Patrick H. Ford, Los Angeles, for respondents.

**CARTER, Justice.**

Plaintiff sued for damages for personal injuries sustained by her as the result of an accident which occurred at about 6:30 p. m. on December 24, 1946, at the intersection of Main and Workman Streets in the city of Los Angeles. Main Street from north to south, is 50 feet wide and has streetcar tracks on either side of the single center line. Workman Street intersects with Main, runs east and west and is 35 feet in width. At night, the intersection is illuminated by a double street light at the northwest corner, and single street lights on the southeast and southwest corners. There are marked crosswalks at the intersection for pedestrian use.

It was raining on the night of the accident, and plaintiff, Louise Ornales, who was dressed in black and who was carrying an

umbrella, was proceeding toward a grocery store on the northwest corner of the intersection. At the time there was little or no vehicular traffic on Main Street, and Mrs. Ornales was walking approximately in the center of the northerly marked crosswalk and was about three-fourths of the way across the street when the accident occurred. Mrs. Ornales testified that she looked in both directions before she started to cross the street and that she looked again just after she crossed the center line. She had taken two or three additional steps when she was struck by, or walked into, an automobile driven by defendant, Myrtle E. Wigger. Mrs. Wigger, accompanied by her husband, was driving a 1931 Ford sedan in a southerly direction on Main Street at a speed of about fifteen or twenty miles an hour. The lights of the car were on low beam. At the time of the accident the car was about half way between the streetcar tracks west of the center line and the western curb of Main Street. The defendant, Mrs. Wigger, testified that she did not see Mrs. Ornales prior to the accident and that all she had seen was a black parasol going by the lefthand window of the car and that she had heard a scream. After the accident, Mrs. Ornales was lying in the marked crosswalk close to its southern boundary. Mr. and Mrs. Wigger and a neighbor boy carried the injured woman to the porch of a nearby house where the Wiggers unsuccessfully tried to obtain an ambulance by telephone. Finally, the Wiggers drove Mrs. Ornales to the General Hospital where it was ascertained that she had received a fracture of the skull, a two-inch cut on her right temple, severe bruises on her right elbow and knee, and other injuries.

During the trial before a jury, plaintiff's motion for a directed verdict was denied. The jury returned a verdict for defendant, and plaintiff then made a motion for judgment notwithstanding the verdict and for a new trial, both of which were denied by the court. Plaintiff's appeal is based on the following contentions: (1) That the instruction given by the court on the effect of a violation of section 506(a) of the Vehicle Code was prejudicial error; and (2) that the court over-instructed the jury with re-

spect to contributory negligence; and (3) that the trial court's failure to instruct the jury properly on the meaning and effect of certain impeaching evidence was prejudicial error.

Section 560(a) of the Vehicle Code provides that "The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter." (No exception is here involved.)

The instruction given by the trial court is as follows:

"Even though you may find in this case from a preponderance of the evidence that one of the parties violated one or more sections of the Vehicle Code of the State of California, you are instructed that the proof of such violation raises only a rebuttable presumption that he or she was negligent, and that such presumption is not conclusive and may be overcome by other evidence showing that under all of the circumstances surrounding the event the conduct in question was excusable, justifiable and such as might reasonably be expected from a person of ordinary prudence. In this connection you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes not of his own intended making induce him without moral fault to do otherwise.

"You are further instructed that a violation of law is of no consequence in this action unless it was the proximate cause of, or contributed in some degree as the proximate cause of, injuries found by you to have been suffered by the plaintiff."

It is plaintiff's contention that there was no evidence in the record to justify the portion of the instruction which permitted the jury to determine that defendant's violation of the Code section was excusable or justifiable under the holding of the majority in *Satterlee v. Orange Glenn School District*, 29 Cal.2d 581, 177 P.2d 279. It is plaintiff's position that the jury should have been instructed that defendant was negligent as a matter of law.



[1,2] In the Satterlee case it was held that "An act which is performed in violation of an ordinance or statute is presumptively an act of negligence, but the presumption is not conclusive and may be rebutted by showing that the act was justifiable or excusable under the circumstances. Until so rebutted, it is conclusive. [Citing cases.] However, the fact which will excuse the violation of a statute has been defined by the court as one resulting 'from causes or things beyond the control of the person charged with the violation.' [Citing cases.]" *Satterlee v. Glenn School District*, supra, 29 Cal.2d page 589, 177 P.2d page 283. And, 29 Cal.2d on page 590, 177 P.2d on page 284: "In the application of this rule each violation of a statutory requirement must be considered in connection with the surrounding circumstances. Ordinarily, the excuse relied upon by the violator presents a question of fact for the jury's determination. As stated in *Scalf v. Eicher*, supra, 11 Cal.App.2d [44] at page 54, 53 P.2d [368] at page 373: 'Whether or not a violation of a statute or ordinance proximately contributed to an accident and whether the violation was excusable or justifiable are questions of fact except in a case where "the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury."'"

[3] A search of the record reveals that the only instruction requested by the plaintiff with reference to section 560(a) of the Vehicle Code was the section itself. This was given, as requested, by the trial court. Ordinarily, before an appellant may complain of the lack of an instruction, he must have made a request that the charge be made more specific, or ask for qualifying instructions. This general rule is apparently qualified by the rule that an appellant may complain, in the absence of such request, where the instruction given erroneously states the applicable law and prejudice is suffered thereby. *Lane v. Pacific Greyhound Lines*, 26 Cal.2d 575, 587, 160 P.2d 21; *Tabata v. Murane*, 24 Cal.2d 221, 148 P.2d 605; *Colgrove v. Lompoc, etc., Club*, 51 Cal.App.2d 18, 124 P.2d 128. The in-

struction given differs very slightly from Instruction 149 (BAJI) which reads as follows: "Conduct which is in violation of (applicable code section) just read to you constitutes negligence per se. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he (or) (she) was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise." This instruction (149, BAJI) was approved by this court in *Combs v. Los Angeles Railway Corp.*, 29 Cal.2d 606, 610, 177 P.2d 293. In the instant case an instruction was given defining a presumption: "A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted the jury is bound to find in accordance with the presumption."

[4] Undoubtedly the instruction given on the effect of a violation of a statute should have been qualified by an instruction on the type of evidence necessary to rebut the presumption of negligence. In the Satterlee case it is said that "\* \* \* the fact which will excuse the violation of a statute has been defined by the court as one resulting 'from causes or things beyond the control of the person charged with the violation.'" The trial court need not of its own motion give special instructions in the absence of a request therefor by counsel. *Comstock v. Morse*, 107 Cal.App. 71, 290 P. 108; *Crooks v. White*, 107 Cal.App. 304, 290 P. 497; *Sherman v. Kirkpatrick*, 83 Cal.App. 307, 256 P. 570. In *Baldrige v. Cunningham*, 31 Cal.App.2d 128, 132, 87 P. 2d 369, 371, where the violation of certain provisions of the Vehicle Code was in-

volved, it was said "If defendant Cunningham desired a further elaboration upon the instruction relative to the *quantum* of evidence necessary to establish justification or excuse, and thereby rebut the presumption of negligence arising from a violation of the California Vehicle Code, it was her duty to propose the further instruction which she desired and request the court to give it. This she did not do. *Maus v. Scavenger Protective Ass'n*, 2 Cal.App.2d 624, 629, 39 P.2d 209." See also, *James v. Myers*, 68 Cal.App.2d 23, 156 P.2d 69 and the cases there cited.

[5, 6] Plaintiff, however, requested no qualifying instruction as to the type of evidence necessary to rebut the presumption of negligence. Defendant maintains that "if there was any error in submitting the issue of negligence to the jury, plaintiff invited the error by requesting other instructions on the same issue, and is not in a position to complain thereof." It appears from the record that plaintiff invited the court to submit the issue of negligence to the jury in some fifteen separate instructions, ten of which were given. As we have previously pointed out, none of these instructions touched on the effect of the violation of such a statute as the one under consideration, or upon the type of evidence necessary to excuse the violation of such a statute.

Defendant testified that she did not see plaintiff, that when she was entering Workman Street "I saw a parasol go up like that at my window, at the left, and heard a woman scream and I looked; I didn't see anybody so I knew there was nothing in front of me and I was already in the cross street so I was going to stop \* \* \*." The record shows that the wind was blowing on the night of the accident and that it was raining. This atmospheric condition, together with the fact that plaintiff was dressed in dark clothing and was carrying a black parasol or umbrella could be considered by the jury as evidence to rebut the presumption of negligence arising from defendant's violation of the statute. Certainly, the weather, the darkness and plaintiff's attire were all matters beyond the control of defendant. It was held in the *Satterlee* case

that "the issue as to whether the circumstances were such as to excuse violation" should be left to the trier of the fact. It would seem that, under the circumstances of this case, the instruction correctly stated the law. *Mathers v. Riverside County*, 22 Cal.2d 781, 141 P.2d 419; *Fennessey v. Pacific Gas & Elec. Co.*, 20 Cal.2d 141, 124 P.2d 51; *Johnson v. Griffith*, 19 Cal.2d 176, 120 P.2d 6; *Fietz v. Hubbard*, 59 Cal.App. 2d 124, 138 P.2d 315; *Prescott v. City of Orange*, 56 Cal.App.2d 144, 132 P.2d 523; *Finney v. Wierman*, 52 Cal.App.2d 282, 126 P.2d 143; *Henslee v. Fox*, 25 Cal.App.2d 286, 77 P.2d 307; *Rath v. Bankston*, 101 Cal.App. 274, 281 P. 1081.

[7] Plaintiff cites no authority for her contention that the jury was over-instructed on the issue of contributory negligence. The same point has been raised in other cases where it was held that reversible error was not shown since the instructions did not state the law incorrectly. *Muskin v. Gerun*, 46 Cal.App.2d 404, 116 P.2d 105; *O'Brien v. Edens*, 125 Cal.App. 100, 13 P.2d 754; *In re Estate of Keithley*, 134 Cal. 9, 66 P. 5. The record shows that there is evidence which warranted an instruction on contributory negligence. Mrs. Wigger, the defendant, testified that the plaintiff's breath was very strong of liquor. Although this was denied by plaintiff, Mr. Trujillo testified to the same effect. Mrs. Wigger also testified that Mrs. Ornales had said "Well, it is no more your fault than mine, I didn't see you. I had the parasol down in front of me coming across the street." This was emphatically denied by the plaintiff. Mr. Wigger testified that the next day he noticed that the stem of the rear view mirror, which was fastened on the front frame of the left door of the car, was bent. From this evidence it could be inferred that plaintiff walked into the side of defendant's car and received her injuries in that way.

[8] The neighbor boy, Hector Barrere, plaintiff's witness, testified that he was about 50 feet from the scene of the accident when he heard a bump; that he walked to the intersection and helped Mr. Wigger carry the injured woman to the porch of a house nearby. He testified that the owners of the house, a Mr. and Mrs.

Trujillo, were there. Defendant's attorney asked the witness (Barrere) if he had talked with Mrs. Trujillo. "A. No, I didn't talk to her but I know her good; I didn't talk to her. Q. \* \* \* Did you tell Mrs. Trujillo that Mrs. Ornales walked into the side of a car?" This was objected to as hearsay and defendant's attorney stated that he was laying a foundation for impeachment. At this point, counsel approached the bench and a conference was had outside the hearing of the jury. The court then stated that "I am admitting this for the purpose of impeachment if it is so." Plaintiff contends that at the conference before the bench, she requested that the jury be instructed that the evidence was merely for the purpose of impeachment and that it could not be used for probative purposes. Mrs. Trujillo testified that Hector had told her that Mrs. Ornales walked into the side of defendant's car. During this testimony, plaintiff's attorney asked the court to instruct the jury that the evidence was admissible only for the purpose of impeaching plaintiff's witness, Hector Barrere. Mr. Newell (plaintiff's attorney): "I want to be sure it (impeachment purposes) is understood by the jury. The Court: That is true." There is nothing in the record, other than the testimony cited, to show that plaintiff's attorney requested, and was refused, such an instruction. It would seem, again, that before an appellant may complain of such lack of instruction, he must show that he made such request. (See cases cited supra.)

[9] The evidence in this case is in direct conflict, with the exception of the fact that Mrs. Ornales was lying in the marked crosswalk at the intersection of the two streets after the accident. Under the well established rule the resolution of such conflict is for the trier of the fact.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, SCHAUER and SPENCE, JJ., concur.

TRAYNOR, Justice (concurring).

My views with respect to the instruction approved in this case are set forth in a con-

ccurring opinion in *Satterlee v. Orange Glenn School District*, 29 Cal.2d 581, 593-601, 177 P.2d 279, and in a dissenting opinion in *Combs v. Los Angeles Railway Corporation*, 29 Cal.2d 606, 613-615, 177 P.2d 293. These views remain unchanged, but since the trial court must instruct the jury in conformity with the majority opinions in those cases, I concur in the judgment.



35 Cal.2d 494

**LESSER & SON v. SEYMOUR et al.**

L. A. 20942.

Supreme Court of California, in Bank.

May 29, 1950.

Rehearing Denied June 26, 1950.

Action by Lesser & Son, a copartnership composed of Louis Lesser and others, against Sam Seymour and others, for dissolution of a partnership, for an accounting and for appointment of a receiver. The Superior Court for Riverside County, Russell A. Waite, J., made an order of sale of partnership assets, and the defendants appealed. The Supreme Court, Carter, J., held that the sale disclosed no abuse of discretion.

Order affirmed.

Prior opinion 212 P.2d 554.

#### 1. Receivers ⇐135

A court in an equity proceeding has power to change manner of sale of property in its custody by a receiver appointed by it from that previously prescribed by it in the order directing the sale, and may make the sale itself although prior order calls for it to be made by receiver.

#### 2. Receivers ⇐98

In a receivership proceeding, main function of the court is to manage or dispose of the estate in best manner possible and for best interest of parties concerned.

#### 3. Receivers ⇐110

A receiver is a mere agent, and property in his hands is really under control and continuous supervision of the court.



**4. Judgment** ⇨855(1)

Court may change mode or procedure in executing its decrees although decree specifies a particular method, and time for performance specified in a decree may be extended.

**5. Judgment** ⇨301

When a decree or judgment reserves jurisdiction to change or modify mere procedural provisions as distinguished from material adjudication of substantial issues, it is not an abuse of discretion for court to extend time limit.

**6. Partnership** ⇨340

Where partnership receiver was ordered to sell assets subject to confirmation, but order provided that if property was not sold by a certain day property should be sold as under execution, and after hearings and after date specified a group of partners submitted a high bid, and court found that partnership was being operated at substantial loss, that bid was reasonable and fair, and that continued operation of the partnership was speculative, court could properly order sale to the partners and include an account receivable not mentioned in the first order for sale.

**7. Partnership** ⇨340

In action for dissolution of partnership and sale of assets, where receiver was appointed and group of partners submitted high bid, court could properly order sale at a specified price and provide that purchasers could be credited with money lent by them to the receiver and the estate during receivership, with payments made by them to creditors of receivership estate to whom receiver was indebted, with payments made by them to creditors of the partnership, and with all liens and encumbrances on the assets.

**8. Receivers** ⇨136

It is not improper to allow credits to purchaser of receivership estate on purchase price for sums owed to him by receivership estate.

**9. Partnership** ⇨340

In action for dissolution of partnership and sale of assets, where receiver was appointed and assets were sold, payments

made by purchasers to creditors for items shown only on books of partnership and receiver were not improper because such claims had not been presented or filed.

**10. Partnership** ⇨340

Where partnership assets in custody of a receiver are sold, method of payment by a purchaser and distribution can be set aside only on showing of abuse of discretion.

**11. Partnership** ⇨340

In action for dissolution of partnership and sale of assets, where receiver was appointed, permitting purchasers to credit on the price any sums not necessary for payment of obligations and liabilities of the receivership estate and all obligations and liabilities of the partnership, not including capital of other partners, was not an abuse of discretion.

**12. Partnership** ⇨336(3)

In action for dissolution of partnership and sale of assets, evidence sustained finding that there was a loss in operations of the partnership.

**13. Partnership** ⇨336(3)

In action for dissolution of partnership and sale of assets, where a receiver was appointed, evidence supported a finding that continued operation of the property under a receiver was a losing proposition and that plaintiffs as partners were the only ones who advanced any funds to keep operations moving.

**14. Partnership** ⇨340

In action for dissolution of partnership and sale of assets, evidence sustained finding that plaintiffs' bid was reasonable market value of the property.

**15. Partnership** ⇨340

In proceeding for sale of partnership assets, court has a wide discretion in accepting a bid and confirming a judicial sale, and court is not guilty of abuse in absence of fraud, unfairness or oppression.

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Overton, Lyman, Plumb, Prince & Vermille and Carl J. Schuck, Los Angeles, for appellants.

Knights, Gitelson & Ashton, Los Angeles, Thompson & Colegate, Riverside, and Alfred Gitelson, Los Angeles, for respondents.

CARTER, Justice.

A partnership, called Lesser & Son, and its members, plaintiffs, entered into a partnership with the Seymours, defendants, for the purchase, operation and sale of certain real and personal property. Difficulties having arisen, plaintiffs commenced an action to dissolve and terminate the partnership, praying for an accounting and that a receiver be appointed to preserve the partnership assets. Audi Bryant was appointed receiver with full powers as such to manage, operate and control all of the partnership assets and business, the court stating that it reserved jurisdiction to instruct the receiver and increase his powers. The receiver took possession of the property and proceeded to operate the business. Thereafter, in December 1947, plaintiffs moved for an order directing the receiver to sell the property in the manner prescribed by law for execution sales on the ground that the expense of operating the property was great and insufficient funds were available therefor; that great loss and depreciation would result if the property were not sold. The court made its order on December 15, 1947, directing the receiver to sell the real property of the partnership and personal property situated on or used in connection with it. It was provided therein that if, prior to June 2, 1948, the receiver or any of the parties "procure" an offer for the property or any part thereof, the receiver is to file with the court a petition for confirmation; that if the parties receive an offer, they shall notify the receiver, and if it be the highest offer thus far received by the receiver, confirmation shall be asked by the receiver; that upon the hearing of any petition for confirmation, any party (to the action) may be a purchaser thereat and at such hearing any person may raise the offer under consideration; all sales are subject to confirmation by the court; offers must be accompanied by a 5% deposit. Then it recites: "In the event that the \* \* \*

property or any part or portion thereof shall not be sold in the manner as above set forth prior to the 2nd day of June, 1948, the Receiver \* \* \* is now hereby ordered to sell said receivership property or the unsold portion thereof in the manner and upon the notice prescribed by law for the sale of such property under execution. Such sale shall not be final until confirmed by this court upon a petition for confirmation by the Receiver herein."

Audi Bryant resigned as receiver and F. L. Conaway was appointed in his place, on January 22, 1948, for all the assets of the partnership. The order of appointment recites that the court reserves jurisdiction to instruct the receiver and to increase his powers; and Conaway is invested with all the rights and duties conferred by the order of sale heretofore mentioned.

Pursuant to the order of sale and on February 2, 1948, Conaway having received on December 24, 1947, an offer from Anita Short to buy the property (with exceptions hereafter noted) for \$450,000, filed a petition for confirmation. Defendants filed objection to the sale making various claims: that the sale was not for the best interests, that notices of the sale had not been given, that it was not a propitious time for the sale as the grapes had no foliage, and that the bid was too low. Plaintiffs countered those objections by pointing out that the operation of the property was a losing proposition and they had to advance money to keep it going but defendants would not supply an equivalent sum.

The confirmation came on for hearing from time to time (March 5, 13 and 25; April 13; May 10; and June 2, 3, and 5), and finally on July 8, 1948 (entered nunc pro tunc as of June 2, 1948), findings of fact and conclusions of law, and order of confirmation were filed by the court. Therein it recited the above mentioned events; that the court offered all the partnership property for sale in open court, notice having been duly and regularly given; that plaintiffs were the highest and best bidders offering \$518,065.20, and their bid was accepted. It found that the foregoing events had transpired; that the op-

eration of the property by the receivers had resulted in substantial loss (particularized); that plaintiffs had loaned money to the receiver to keep the operations afloat but defendants had advanced none; that the affairs of the partnership in receivership were in a sad state and getting worse; that the parties had diligently tried to find a purchaser for the property and it was listed with many real estate brokers; that advertisements were made by the receiver for the sale of the property in newspapers with national circulation and brokers were advised, and wide publicity and due and regular notice had been given that the court would receive bids on March 25, 1948; that on said date plaintiffs were the only bidders and offered \$478,301.04, which was amended to \$518,065.20, and that this included all assets; that such bid was fair and reasonable and it was for the best interest to accept it; that said bid as amended be accepted and the property sold to them for that sum; that prior to the making of that bid, plaintiffs offered \$539,541.64, to be adjusted upward or downward depending on the liabilities of the partnership, including the partners' capital investment, but in response to defendants' objection to a bid on such a formula which would result in a variable price figure, it was withdrawn by plaintiffs and the aforementioned unconditional and firm bid was accepted.

Defendants assert that the order of sale of December 15, 1947, required that the sale take place by June 2, 1948, and if it did not, the property should be sold in the manner of an execution sale; and as plaintiff's final firm bid was not made or accepted until June 5, 1948, it did not come within the terms of the order of sale and thus the court had no jurisdiction to confirm it. That is to say, they claim that the order of sale and each part thereof was beyond the power of the court to modify and that the sale by the court after June 2, 1948, was in effect a modification, for after that date the sale should have been as an execution sale.

[1,2] We are satisfied that a court in an equity proceeding has the power to change the manner of sale of property in

its custody by a receiver appointed by it from that previously prescribed by it in the order directing the sale, and in that connection may make the sale itself although the prior order called for it to be made by the receiver. In effect, the directions in the order of sale with regard to the manner in which it should be made, are merely instructions to the receiver—his procedural directions. They do not go to the substantive rights of the parties. Of course they are binding upon the receiver, and while, for some purposes, they may be final, yet the main function of the court is to manage or dispose of the estate in the best manner possible and for the best interest of the parties concerned. To effectually perform that duty necessarily requires some flexibility and continuity of jurisdiction in giving instructions to the receiver as to the manner in which the property should be sold to meet exigencies as they may arise.

[3] The foregoing comments follow from the principles applicable to judicial and receivership sales in equity proceedings. The receiver is a mere agent and the property in his hands is really under the control and continuous supervision of the court. *Title Ins. & Trust Co. v. Calif. Development Co.*, 159 Cal. 484, 492, 114 P. 838; *Free Gold Mining Co. v. Spiers*, 135 Cal. 130, 67 P. 61; *In re Moore*, 88 Cal. 1, 25 P. 915; *Baumann v. Bedford*, 18 Cal.2d 366, 115 P.2d 437.

[4,5] In analogous situations it has been held that the court may change the mode or procedure in executing its decrees although the decree specifies a particular method. The time for performance specified in the decree may be extended. *Gibson v. River Farms Co. of California*, 49 Cal.App.2d 278, 121 P.2d 504. There is a clear distinction between material adjudicated portions of a judgment or decree, and mere procedural matters incident to the determined issues, which are incorporated as the proposed means of fulfilling the judgment. It has been held in California that when a decree or judgment reserves jurisdiction to change or modify mere procedural provisions, as distinguished from material adjudications of



substantial issues, it is not an abuse of discretion for the court to extend the time limit. *Gibson v. River Farms Co.*, supra; *Leslie v. Federal Finance Co. Inc.*, 14 Cal. 2d 73, 81, 92 P.2d 906; *Los Angeles Auto Tractor Co. v. Superior Court*, 94 Cal.App. 433, 271 P. 363; *Tyler v. Shea*, 4 N.D. 377, 61 N.W. 468, 50 Am.St.Rep. 660; 15 R.C.L. 678, sec. 129; 34 C.J., p. 232, §§ 451, 452, 49 C.J.S., Judgments, § 238.

[6] In *Los Angeles Auto Tractor Co. v. Superior Court*, supra, the time for making a designated payment was extended five successive times. It was held that these orders did not constitute a material change in substantial adjudicated portions of the judgment, but that they merely applied to procedural matters intended to accomplish the enforcement of the judgment and constituted a valid exercise of jurisdiction retained by the court. This case appears to be determinative of the issue on appeal in the present action.

In the cited cases, although it appears that the court reserved jurisdiction in its decree, it would seem that the principles and compelling necessities of a case like we have here require the reservation of such power without stating it in the decree. See also, *Bechtel v. Wier*, 152 Cal. 443, 93 P. 75, 15 L.R.A.,N.S., 549; *In re Receivership of Great Western Beet Sugar Co.*, 22 Idaho 328, 125 P. 799, 43 L.R.A., N.S., 671; *Hercules Glue Co., Ltd. v. Littooy*, 45 Cal.App.2d 42, 113 P.2d 490.

The cases, *Fish v. Fish*, 216 Cal. 14, 13 P.2d 375, and *Leeper v. Superior Court*, 62 Cal.App. 736, 217 P. 811, are distinguishable, for they were concerned with whether an order for a sale of property by a receiver was final and thus appealable. It was not a question of the method of the sale or who should conduct it. In the instant case, the property was to be sold in any event; the only alternative was the time and method of the sale. While the court in making the sale assumed it was proceeding pursuant to the order of sale (and in a general sense it was), yet it in effect adopted and followed a different method, that is, a sale by itself rather than the receiver and at a time extending beyond the date (June 2, 1948) specified

in the order of sale, and further sold all of the assets of the partnership, rather than those described in the order of sale which did not include an account receivable in the sum of \$21,376.44.

In connection with the inclusion in the sale of the last mentioned item, defendants urge that such was not proper because it exceeded the scope of the order of sale. That was not an alteration of the order of sale. It would not be doubted that the court could order a portion of the property sold by the receiver and by subsequent order direct that the balance be sold. Here, assuming the sale made and proceedings involved therein were in effect also an authorization to make a small addition to the property to be sold which resulted in embracing all of the property, and as the court was conducting the sale and advertisement, notice and publicity were given therefor, we see no reason to question its propriety. Defendants were present and actively participated in the hearings in which all the assets were to be sold and made no objection thereto.

Defendants concede that the findings accurately describe what transpired when they state, as above mentioned, that, pursuant to defendants' objections, the \$539,-541.64 bid of plaintiffs was not accepted for it was not certain but was to fluctuate up or down to equal no more or less than the liabilities of the partnership; that plaintiffs bid \$518,065.20 (which was accepted) "unqualifiedly without contingency or adjustment". They object, however, to the final order in the sale proceedings which provides that plaintiffs in paying the price may have credited thereon: (1) money lent by plaintiffs to the receiver and receivership estate during the course of receivership; (2) payments made by plaintiffs to creditors of the receivership estate to whom the receiver is indebted; (3) payments made by plaintiffs to creditors of the partnership; (4) any sums *not necessary* for payment of the obligations and liabilities of the receivership estate and all obligations and liabilities of the partnership, not including any capital of defendants; (5) all liens and encumbrances on the assets.

[7,8] Certainly defendants cannot object to items 1, 2, 3 and 5 on the ground that plaintiffs' bid was for the amount stated over and above all moneys it had advanced and all liabilities of the receivership and partnership. There is nothing to indicate that the bid was so made or indicated. On the contrary, one of the purposes of the sale was to discharge obligations. The allowance of credits for those liabilities would not in any way cut the bid price—make it a variable amount. If, when all of such liabilities had been paid or credited, the price had not been consumed, the balance would be payable to the receiver. It is not improper to allow credits to the purchaser on the purchase price for sums owed to him by the receivership estate for it would be idle to pay the money to the receiver and have him pay it back to the purchaser. See, *Owen v. Cohen*, 10 Cal.2d 147, 119 P.2d 713.

[9] Nor can it be said that such credits were improper because the partnership and receivership creditors' claims had not been presented or filed. The creditors in those items are only those shown on the *books of the partnership and receiver*. It could hardly be doubted that such creditors must be paid, for the books of the *debtor* show the debts to be due them.

[10,11] Credit (4), however, is in a different category. It in effect provides that plaintiffs, as purchaser, need not pay any more than the liabilities of the partnership and receivership estate even if they are less than the amount bid. There is an exception, however; namely, the capital investment of defendants, if any. Such investment comes out before the credit mentioned in item (4) and of course plaintiffs would be entitled to any part of the purchase price remaining after the debts were paid for their capital investment. This does not make the bid non-uniform or unfixed in amount, but merely provides a method for application and distribution of the proceeds of the sale. The court had the power and duty to provide for equitable distribution thereof. A similar method of distribution—by partial credits rather than wholly by cash—when one of the partners was the successful bid-

der, was approved in *Owen v. Cohen*, supra, 19 Cal.2d at pages 154, 155, 119 P.2d at page 713. It was there held that the adoption of the method of payment and distribution could be set aside only on a showing of abuse of discretion. Here the provision is shown to relate only to the mechanics of distribution. The bid was not thereby affected or open to the criticism that, contrary to the court's findings, it was not "firm and unqualified", but was a "formula" bid subject to qualifications and adjustments. A different method—such as payment and distribution entirely in cash—would not have affected the end result. The method adopted was therefore not inappropriate under the circumstances, and the court did not abuse its discretion in so providing.

[12-15] Defendants assert that some of the findings made in the order confirming sale are not supported by the evidence, namely, that the partnership had operated at a loss, that plaintiffs' bid was the reasonable market value of the property, that no other bid was received, that continued operation of the property was speculative, and that the only source for borrowing funds for operations was from plaintiffs. Most of those findings are not of particular importance inasmuch as the court had previously ordered a sale of the property as above shown, which took into consideration the necessity therefor, together with the factors embraced in such a determination. Defendants do not attack that determination but, on the contrary, dwell upon it at length as being a final and conclusive adjudication by the court. Moreover, defendants' attack on the finding that there was loss in the operations of the partnership is really aimed at the credibility of the accountant for the partnership and receiver and his method of accounting. The court accepted that witness' evidence and was justified in so doing. The evidence is also sufficient to show that the operation of the property by the receivers was a losing proposition and plaintiffs were the only ones who advanced any funds to keep the operations rolling. Defendants advanced nothing. The only reference made by defendants to other sources

from which funds could be obtained was that the California Fruit Exchange advanced \$40,000 on the 1946 grape crop, and \$25,000 on the 1947 crop, all prior to appointment of a receiver. On the question of the reasonable market value of the property, it is true that there was evidence placing it at \$1,000,000, but the court did not have to accept that and unsuccessful endeavors had been made to sell the property. There was a bid by a Mr. Wiseman for \$130,000, all liabilities to be assumed, but it fell through as the parties could not get together on the precise terms of the transaction. There is wide discretion in the court in accepting a bid and confirming a judicial sale, and there was no fraud, unfairness or oppression in the sale. See *Jones v. Sierra Verdugo Water Co.*, 63 Cal.App. 254, 218 P. 454. It, therefore, cannot be said that there was an abuse of discretion.

The order is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



35 Cal.2d 482

**GOGUE v. MacDONALD.**

Sac. 6099.

Supreme Court of California, in Bank.

May 26, 1950.

Orlie Gogue sued Eugene W. MacDonald for alleged wrongful arrest and detention. The Superior Court, Humboldt County, Delos A. Mace, J., entered judgment dismissing the action after a general demurrer to the complaint had been sustained and plaintiff refused to amend and plaintiff appealed. The Supreme Court, Shenk, J., held that where defendant allegedly reported to magistrate that plaintiff had removed himself and his belongings from defendant's cottage with-

out paying rent due and justice of the peace prepared a criminal complaint and issued a warrant of arrest based on alleged violation of a penal statute but defendant took no active part in the arrest and there was no showing of any bad faith, defendant was not liable for wrongful arrest and detention, even though the facts stated to the magistrate did not constitute a public offense.

Judgment affirmed.

For prior opinion see 211 P.2d 885.

### 1. False imprisonment ⇨2

Unlawful interference with the personal liberty of another affords a civil right of action for the recovery of damages.

### 2. Malicious prosecution ⇨5, 16

"Malicious prosecution" is the pursuit of another by means of criminal proceedings under lawful process but with malice and without probable cause for which civil liability may result but recovery therefor is justified only upon allegation and proof of both essential elements of malice and want of probable cause.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Malicious Prosecution".

### 3. False Imprisonment ⇨15(1)

Where defendant allegedly reported to magistrate that plaintiff had removed himself and his belongings from defendant's cottage without paying rent due and justice of the peace prepared a criminal complaint and issued a warrant of arrest based on an alleged violation of a penal statute but defendant took no active part in plaintiff's arrest and there was no showing of bad faith, defendant was not liable for wrongful arrest and detention, even though facts stated to magistrate did not constitute a public offense. Pen.Code, §§ 236, 537.

Harry W. Falk, Eureka, for appellant.  
Hill & Hill and W. G. Watson, Jr., Eureka, for respondent.

SHENK, Presiding Justice.

This is an appeal from a judgment dismissing the action after a general demurren



to the complaint had been sustained and the plaintiff refused to amend. The complaint shows the following facts:

On June 22, 1948, the defendant went before a justice of the peace at Fortuna, California, and complained that the plaintiff had removed himself and his belongings from the defendant's cottage without paying rent due in the sum of \$95.00. The justice of the peace prepared a criminal complaint and issued a warrant of arrest based on an alleged violation of section 537 of the Penal Code. The plaintiff was arrested by the sheriff. He was unable to furnish bail and was detained in the county jail. He was subsequently released on his own recognizance. Thereafter the charge was dismissed. Since section 537 refers to removal of belongings without payment of rent for certain furnished accommodations, the facts alleged in the complaint did not constitute the designated or any penal offense.

The plaintiff sought damages for alleged wrongful arrest and detention. The question is whether the court correctly concluded that the complaint herein did not state a cause of action. There is no allegation of bad faith, such as wilful falsity or malice, in the defendant's statement of the facts to the justice of the peace. The truth of the facts so stated and the absence of bad faith in stating them must therefore be assumed.

[1, 2] The Penal Code, section 236, defines false imprisonment as the unlawful violation of the personal liberty of another. Unlawful interference with the personal liberty of another affords a civil right of action for the recovery of damages. Malicious prosecution is the pursuit of another by means of criminal proceedings under lawful process, but with malice and without probable cause. Civil liability may result but recovery is justified only upon allegation and proof of both essential elements, namely, malice and want of probable cause. Whether a person is liable in damages when he merely has appeared before the appropriate public official and in good faith stated the facts upon which a warrant of arrest for a criminal offense was mistakenly issued, does not seem to

have been resolved by the decisions in this state.

In the early case of *Hahn v. Schmidt*, 64 Cal. 284, 30 P. 818, an action for malicious prosecution, the court with citation of cases adopted the English rule that in the absence of bad faith one who merely originates a suit by stating his case to a public officer, and the case stated does not amount to a criminal offense, is not liable.

In *Krause v. Spiegel*, 94 Cal. 370, 29 P. 707, 15 L.R.A. 707, 28 Am.St.Rep. 137, the complaint alleged falsity and malice in a prosecution by the defendant who had caused the plaintiff's arrest and imprisonment on a charge of slander. The court refused to apply the rule stated in *Hahn v. Schmidt* as a basis for malicious prosecution where the charge did not specify a crime—slander not being a punishable offense. In considering on demurrer the bar of the statute of limitations, it was held that a cause of action for malicious prosecution was not alleged, and that the statute barred the cause for false imprisonment which was stated to be the basis for recovery had the action been brought in time. Cf. *Dusy v. Helm*, 59 Cal. 188; *Fkumoto v. Marsh*, 130 Cal. 66, 62 P. 303, 509, 80 Am.St.Rep. 73; *Nelson v. Kellogg*, 162 Cal. 621, 123 P. 115, Ann.Cas.1913D, 759; *Neves v. Costa*, 5 Cal.App. 111, 89 P. 860, stating the rule of liability applicable in cases of civil arrest; also *People v. Agnew*, 16 Cal.2d 655, 107 P.2d 601, involving citizen's arrest.

In *Miller v. Fano*, 134 Cal. 103, 66 P. 183, it was held that giving facts of identity in good faith to the officer arresting an innocent person did not create liability in an action for false imprisonment.

The court in *Harrington v. Tibbet*, 143 Cal. 78, 76 P. 816, followed the distinction recognized in *Hahn v. Schmidt* between one who in good faith states the facts to the magistrate and one who, as there alleged, maliciously made false statements to him. It was said that the failure of the stated facts to constitute a public offense should not relieve a defendant acting in bad faith from liability in a malicious prosecution action. The *Harrington* decision was cited in *Cochran v. Bones*, 1 Cal.

App. 729, 82 P. 970, a malicious prosecution case, where it was held that the defendant could not claim the protection of an otherwise truthful statement when he concealed facts which, had they been disclosed, would have shown that no crime had been committed. See also *Donati v. Righetti*, 9 Cal.App. 45, 48, 97 P. 1128.

There is language in *Stubbs v. Abercrombie*, 42 Cal.App. 170, 183 P. 458, to the effect that if the facts stated to the district attorney in good faith and without malice did not constitute a public offense there would be no liability on the part of the complainant.

*Howe v. Owsley*, 123 Cal.App. 550, 11 P.2d 663, involved the arrest of the plaintiff by legal process on a charge of violation of section 537 of the Penal Code. Similar facts—defrauding the defendant of \$15.00 rental of an unfurnished house—were stated to a justice of the peace in Humboldt county and were insufficient to constitute the offense charged. A new trial was granted after judgment on a verdict of \$8,000—awarded on the theory of malicious prosecution. Noting the distinction in *Hahn v. Schmidt* and *Harrington v. Tibbet*, it was held that malicious prosecution did not lie in the absence of malice. The court quoted an excerpt from *Ross v. Hixon*, 46 Kan. 550, 26 P. 955, 12 L.R.A. 760, 26 Am.St.Rep. 129, said to be supported by numerous authorities, to the effect that no action could be maintained against a person who did no more than correctly relate the facts which the magistrate erroneously regarded as constituting a public offense. The court affirmed the order granting a new trial but, referring to the dictum in *Krause v. Spiegel*, refrained from expressing an opinion as to whether the complaint could be amended to allege false imprisonment.

[3] The foregoing review of decisions in this state indicates that in the present case there can be no recovery for malicious prosecution in the absence of allegation and proof of malice in making the insufficient criminal charge. Cases in other jurisdictions support the rule of recovery in malicious prosecution when that element is present. *George v. Williams*, 26

Ariz. 91, 222 P. 410; *Bell v. Keepers*, 37 Kan. 64, 14 P. 542; *Barker v. Stetson*, 7 Gray 53, 73 Mass. 53, 66 Am.Dec. 457; *Finn v. Frink*, 84 Me. 261, 24 A. 851, 30 Am.St.Rep. 348; *Rush v. Buckley*, 100 Me. 322, 61 A. 774, 70 L.R.A. 464, 4 Am. Cas. 318; *Tillman v. Beard*, 121 Mich. 475, 80 N.W. 248, 46 L.R.A. 215; *Nelson v. Hill*, 30 N.M. 288, 232 P. 526; *Beuthner v. Ellinger*, 90 Wis. 439, 63 N.W. 756; 38 Cor.Jur. 389; 22 Am.Jur. 376. Although there is no case directly in point, the consistent tenor of judicial declaration in this state (with the possible exception of the dictum in *Krause v. Spiegel*), is in accord with a rule of non-recovery in such cases on the theory of false imprisonment (see 12 Cal.Jur. p. 434, sec. 6). The English rule of non-recovery in actions for false imprisonment or malicious prosecution in the absence of the essential element of malice, has been adopted in the United States by the weight of authority. *Barker v. Stetson*, supra, 7 Gray 53, 73 Mass. 53, 66 Am.Dec. 457; *Langford v. Boston & A. R. Co.*, 1887, 144 Mass. 431, 11 N.E. 697; *Doty v. Hurd*, 124 Mich. 671, 83 N.W. 632; *Gifford v. Wiggins*, 1892, 50 Minn. 401, 52 N.W. 904, 18 L.R.A. 356; *Utz v. Mayes*, Mo.App., 1925, 267 S.W. 59; *Nelson v. Hill*, 1924, 30 N.M. 288, 232 P. 526, supra; *Von Latham v. Libby*, 38 Barb., N.Y., 339; *Smith v. Clark*, 37 Utah 116, 106 P. 653, 26 L.R.A., N.S., 953, Ann.Cas.1912B, 1366; *Teal v. Fissel*, C.C., 1886, 28 F. 351; 25 Cor.Jur. 480; 22 Am.Jur. 375; *Gifford v. Wiggins*, 50 Minn. 401, 52 N.W. 904, 18 L.R.A. 356; Ann.Cas.1912B, 1373; Ann.Cas.1918A, 492.

At page 480 of 25 Corpus Juris, citing numerous cases, it is stated that according to the weight of authority the defendant is protected where he does nothing more than lay the facts before the magistrate even though they are insufficient to show that a public offense has been committed. The rule is said to flow from the injustice of holding the defendant guilty of any tort if he merely makes an honest statement of the facts to a magistrate leaving to him such action as he may deem proper. See, also, 35 C.J.S., False Im-

prisonment, § 28. (22 Am.Jur. at p. 375.) It was declared in *Teal v. Fissel*, C.C., 28 F. 351, supra, that to hold the complainant on account of the justice's mistake would not only be grossly unjust but would also be highly injurious to the public interest. It is also noted in *Prosser on Torts* at pages 74-75 (citing *Salmond, Law of Torts*, 8th Ed. 1934, 378), that the policy in support of the prevailing rule is to accord to a person the privilege of making reasonable efforts to bring his case properly before the court; that consequently false imprisonment will not lie where he has attempted to comply with the legal requirements and fails to do so through no fault of his own; but that he is liable in malicious prosecution for misuse for an improper purpose of legal process.

It follows that where, as here, the defendant reports the facts to the magistrate, takes no active part in the arrest but leaves the matter to the public officials and no bad faith appears, he is not liable merely because the facts he has stated to the magistrate do not constitute a public offense.

The trial court properly ruled that the allegations of the complaint afforded no basis for recovery against the defendant.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



97 Cal.App.2d 821

PEOPLE v. WEATHERS.

Cr. 2173.

District Court of Appeal, Third District,  
California.

May 29, 1950.

Jesse Weathers was convicted in the Superior Court of Sacramento County, T. Coughlin, J., of burglary in the second degree, and from judgment of conviction and from order denying motion for new trial, the defendant appealed. The District Court

of Appeal, Third District, Peek, J., held that appeal from order was required to be dismissed, that evidence was sufficient to sustain conviction, that testimony of prosecuting witnesses was not rendered inherently improbable, that minor discrepancies in testimony of one of the state's witnesses, did not render his testimony untrustworthy, that evidence was sufficient to sustain finding that defendant was person seen in burglarized cafe, and that alleged fact that police investigation of burglary was conducted in an unscientific manner did not require reversal of conviction.

Judgment affirmed and appeal from order denying motion for new trial dismissed.

#### 1. Criminal law ⇨1124(1)

Where record did not disclose that a motion for new trial was made or denied, appeal by defendant from such purported order denying motion for new trial was required to be dismissed.

#### 2. Burglary ⇨41(3,4)

Evidence was sufficient to establish entry by defendant into cafe and his intent to commit larceny therein, and hence sufficient to sustain his conviction of burglary in the second degree.

#### 3. Criminal law ⇨1159(2)

In burglary prosecution, testimony of defendant's witness that defendant was at witness' home at time when burglary was committed, did not render the testimony of prosecution's witnesses inherently improbable.

#### 4. Criminal law ⇨1159(2, 4)

The weight to be given the testimony of witnesses, whether in support of an alibi or otherwise, and their credibility, present questions for determination of jury, which is binding on the District Court of Appeal on appeal.

#### 5. Burglary ⇨41(1)

Fact that there were minor discrepancies in testimony of witness of the state in burglary prosecution as to whether or not juke box from which defendant was allegedly attempting to remove money, had been moved, did not prevent jury from considering and weighing the testimony of such witness, and did not make state's evidence insufficient to sustain a conviction.



**6. Burglary** Ⓒ45

In prosecution for burglary of cafe, evidence that defendant was the person seen in the cafe, was sufficient to take question to jury whether defendant was the person seen in the cafe.

**7. Criminal law** Ⓒ1159(2)

Where evidence sustained verdict of jury finding defendant guilty of burglary in second degree, alleged fact that police investigation of burglary was conducted in an unscientific manner so that the real perpetrator was allegedly not discovered, did not require that verdict be set aside.

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Jessie Weathers, in pro. per.

Fred N. Howser, Attorney General,  
Gail A. Strader, Deputy Attorney General, for respondent.

PEEK, Justice.

[1] Defendant appearing in his own behalf has appealed from the judgment sentencing him to imprisonment for the term prescribed by law, which was entered following the verdict of a jury finding him guilty of burglary in the second degree. While the notice of appeal states that the appeal is from the order denying appellant's motion for a new trial as well as from the judgment, the record does not disclose that a motion for a new trial was made or denied, and therefore the appeal from such purported order must be dismissed.

In seeking a reversal of his conviction defendant raises numerous arguments, however, it appears that his attack upon the judgment is predicated essentially upon the alleged insufficiency of the evidence generally.

The record shows that at approximately 6:00 o'clock a.m. on February 29, 1949, Governor C. Joe, a bartender at the New Bank Cafe in Sacramento, arrived at said cafe to commence his daily shift. Upon hearing noises at the rear of the place he looked through a window in the door and observed a person inside the cafe. In response to his telephone call officers Alexander and Bryam arrived within a few

minutes. Both of the officers testified that the man they saw inside of the cafe was the defendant and that they observed him "working" on a juke box with a pinch bar. While officer Bryam went to the rear of the cafe through an adjoining shoe shine shop officer Alexander and the bartender entered the front of the cafe. As they did so, the appellant ran to the rear. He was apprehended by officer Alexander when his leg became caught in a hole in a partition of the building through which he was attempting to escape into the adjoining shoe shine shop. In the meantime officer Bryam apprehended the defendant's accomplice in the rear adjoining store room where he had been hiding. Appellant was then permitted to proceed through the hole in the partition into the shoe shine shop where officer Bryam was holding the accomplice. Keeping his prisoners covered with his gun, Bryam backed out of the room. Just as they reached the doorway defendant knocked the officer off balance by pushing his companion against him. Defendant then broke and ran, and while the police officer fired several shots he effected his escape. He was apprehended several months later in Oakland.

[2] The foregoing evidence, viewed in the light most favorable to the respondent, is more than sufficient to establish appellant's entry and his intent to commit larceny, see *People v. Dreyer*, 71 Cal.App.2d 181, 162 P.2d 468, and hence sufficient to sustain appellant's conviction of the crime of burglary.

[3, 4] Appellant, however, contends that he could not have committed the offense in view of the testimony of one of his witnesses that he had spent every night at her home in Oakland from February 23, 1949 to the date of his arrest. Such testimony presented no more than a conflict in the evidence and did not render the testimony of the prosecution witnesses inherently improbable. The weight to be given to the testimony of the witnesses, whether in support of an alibi or otherwise, and their credibility, present questions for the determination of the jury which is binding upon this court on appeal.

See *People v. Tomasello*, 76 Cal.App.2d 645, 173 P.2d 676.

[5] Appellant also refers to minor discrepancies in the testimony of the witness Governor C. Joe as to whether or not the juke box had been moved, which discrepancies appellant urged rendered such testimony untrustworthy. Although the point so raised is of minor significance, since the moving of the juke box was established by other witnesses, nevertheless it may be well to reiterate the well established rule that conflicting statements by a witness do not prevent the jury from considering and weighing his testimony, *People v. Mooney*, 177 Cal. 642, 171 P. 690, and as above stated its determination thereon is binding upon this court on review.

Appellant further urges that it would have been impossible for him to have passed through the hole in the partition which was only twelve inches wide, and that the testimony of the police officers that he did so is therefore inherently improbable. The record contains absolutely no evidence whatever to indicate that appellant's physical proportions were such as would have prevented him from passing through the opening, and in the absence thereof we are unable to consider appellant's contention in this regard. Moreover, appellant was present in the courtroom during his trial subject to observation by the jury which presumably must have considered appellant's size in considering the challenged testimony.

[6] It is next urged by defendant that the identification of himself as the person inside the cafe is insufficient since one of the officers who identified him was uncertain as to whether he used a flashlight, and that without the use of a flashlight it was hardly possible to identify a person under the light conditions he contends existed at the time of the alleged crime, and since a witness may be easily mistaken the identification in the present case was insufficient. In considering this contention it is sufficient to note that the officer testified that he did shine his flashlight directly upon appellant in the cafe, and that he positively identified the defendant as did

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the other officer. Additionally it may be said that the question of identification is one for the jury and as on any other factual question its determination thereon will not be disturbed on appeal. *People v. Finkel*, 70 Cal.App.2d 508, 161 P.2d 298.

[7] Appellant lastly argues that the police investigation of the crime was conducted in an unscientific manner and that the real perpetrator of the offense was therefore not discovered. The prosecution is not compelled to make such investigations or to produce additional evidence (8 Cal.Jur. 227), and in view of the evidence of appellant's guilt the verdict of the jury may not be set aside upon such a ground.

The judgment is affirmed, and the purported appeal from the order denying defendant's motion for a new trial is dismissed.

ADAMS, P. J., and VAN DYKE, J.,  
concur.



97 Cal.App.2d 777

**WILSON v. LOS ANGELES COUNTY CIVIL SERVICE COMMISSION et al.**

Civ. 16921.

District Court of Appeal, Second District,  
Division 3, California.

May 26, 1950.

H. J. Wilson filed proceedings against the Los Angeles County Civil Service Commission, and others, to annul an eligible list on the grounds that the civil service examination was violative of the county charter. The Superior Court, Los Angeles County, Allen W. Ashburn, J., gave judgment for petitioner and defendants appealed. The District Court of Appeal, Shinn, P. J., held that the oral phase of the examination was competitive that the record kept was sufficient to show the basis of the ratings, and that the standards used were adequate within the meaning of the charter requirements.

Reversed.

**1. Officers** ⇨11.3

Where oral phase of civil service examination included use of general qualifications appraisal record forms and each candidate was questioned with respect to experience, education, personal fitness and other items listed on appraisal forms, examination was competitive, record kept was sufficient to show basis of ratings, and standards used were adequate within meaning of county charter requirements.

**2. Officers** ⇨11.3

Detailed definition of various qualities listed for rating on general qualification record forms used in oral phase of civil service examination would be unnecessary refinement insofar as effecting any more uniform application of grading candidates.

**3. Officers** ⇨11.3

In proceeding to annul civil service eligible list on grounds that examination was violative of county charter, evidence did not sustain trial court's findings that oral phase of examination was not competitive, that it was based principally on subjective standard, and that no record was made or kept showing basis of rating of candidates.

**4. Officers** ⇨11.3

Encomiums as to civil service candidate's qualities and expressions of personal esteem given in proceeding before Board of Supervisors at time of candidate's induction as temporary county clerk did not show any partiality on part of civil service commission when there was no evidence that such proceedings were known to or influenced actions of commission.

**5. Officers** ⇨11.3

Mere fact recipient of temporary appointment achieves highest honors in subsequent examination provides no logical basis for inference of favoritism by civil service commission.

**6. Mandamus** ⇨187(9)

On appeal from judgment granting peremptory writ of mandamus requiring civil service commission to cancel eligible list and hold new examination, where trial court made findings in respect to only one of nine grounds on which petitioner had

challenged validity of examination, fact that appellate court's careful examination of record disclosed no evidence to support petitioner on any of other grounds made absence of specific findings on those issues immaterial.

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Fred M. Cross, Los Angeles, for appellant Earl Lippold.

Harold W. Kennedy, County Counsel, Andrew O. Porter, Deputy County Counsel, John B. Anson, Deputy County Counsel, Los Angeles, for appellants Los Angeles County Civil Service Commission, et al.

Harmel L. Pratt, Los Angeles, for respondent H. J. Wilson.

SHINN, Presiding Justice.

H. J. Wilson and Earl O. Lippold together with certain individuals participated in a civil service examination for the office of county clerk. All nine candidates passed the examination. Wilson's name was ninth on the eligible list and Lippold's was first. Appointment to the office is limited to the first three names on the list by section 34 (6) of the Los Angeles County Charter. Wilson's appeal to the Civil Service Commission was denied. He thereupon filed the present proceedings in the superior court seeking by certiorari to annul the eligible list. Upon order of the court Lippold was brought in as an indispensable party. The voluminous return to the writ of review was not controverted by petitioner. The court concluded that the examination was violative of the county charter, and treating the petition as one in mandamus gave judgment in favor of petitioner and issued a peremptory writ of mandate requiring the commission to cancel the eligible list and to hold a complete new examination in conformity with the charter and with the principles set forth in a memorandum opinion of the court which had been previously filed. All defendants have appealed from the judgment.

The petition challenged the validity of the examination on nine separate grounds. the court made findings in respect to only one of the grounds urged, namely, that the oral phase of the examination was not



competitive, was based principally upon subjective standards and that no record was made or kept showing the basis of rating of the candidates. The judgment recited that further findings and conclusions had been expressly waived by all the parties. In proceedings involving certain motions made after judgment however, it appears from a statement of the trial judge that counsel for petitioner Wilson did not waive findings, although it is not questioned that appellants did so.

[1-3] Appellants contend that the recent decision of the Supreme Court in the case of *Almassy v. Los Angeles County Civil Service Comm.*, 34 Cal.2d 387, 210 P.2d 503, which involved a substantially identical oral examination conclusively establishes that the present examination was competitive, that the record kept was sufficient to show the basis of rating, and that the standards used were adequate within the meaning of the charter requirements. Comparison of the records in the two cases compels us to conclude that appellants' contention is correct. The only difference in the evaluation procedures and standards employed is that a confidential report of the candidates' departmental superior officer was not required or used in the present examination as it was in the *Almassy* case. The mere "general qualifications appraisal record" forms were used in both instances and the conduct of the oral interviews and methods employed for translating the examiners' notations into a numerical value were practically identical. Petitioner testified that in his oral interview he was asked only three questions, one, as to why he wanted to be county clerk, another, as to what changes in procedures and organization he would effectuate as county clerk and, a final question, whether there was anything further that he wished to state. A judge of the superior court, who was one of the oral examiners, also testified to the effect that he and the other two examiners questioned each of the candidates with respect to experience, education, personal fitness and the other items listed on the appraisal form. Respondent, upon whom the burden of proof rested, made no effort to obtain the testimony of the other examiners and

candidates relating to the actual conduct of the oral interviews. The testimony to which we have referred in no way sustains respondent's contention that the oral phase of the examination did not test the relative ability of the various candidates. Likewise, in view of the *Almassy* opinion, respondent's contention that no measurable standards evaluating the candidates on the oral phase of examination were employed, cannot be sustained. As the Supreme Court there stated, a detailed definition of the various qualities listed for rating would have been "an unnecessary refinement insofar as effecting any more uniform application of grading the candidates. \* \* \* Manifestly, a candidate's personality and attitudes cannot be measured through the mechanical application of fixed standards in the course of an interview, but the pattern thereof must develop in part according to the individual being tested and the precise line of procedure will reflect the skill of the examiner in achieving an appropriate appraisal, including the 'final evaluation' factor as a composite picture reflecting the end result of delicate weighing and balancing of the separate judgments on the personality factors." *Almassy v. Los Angeles County Civil Service Comm.*, 34 Cal.2d 387, 403, 210 P.2d 503, 512, *supra*. It follows that the findings of the trial court are not sustained by the evidence.

[4, 5] Respondent seeks to sustain the judgment on the ground that the evidence would support a finding that the examination was not impartial. The record is devoid of any evidence to support this contention. He relies on the fact that respondent Lippold was appointed to the temporary office of county clerk a month before the examination was held and apparently contends that this influenced the result of the examination in which, as already stated, Lippold received the highest grade. A transcript of the proceedings before the Board of Supervisors at the time of Mr. Lippold's induction as temporary county clerk is replete with encomiums as to Lippold's character, qualities, and expressions of the personal esteem of the speakers. However, as the trial judge correctly observed, many of these remarks

may properly be attributed to forensic license. There is no evidence that these proceedings were known to or influenced the actions of the commission or any of the well qualified oral examiners. The mere fact that the recipient of a temporary appointment achieves highest honors in the subsequent examination provides no logical basis for an inference of favoritism; on the contrary, such a result is equally likely to be a vindication of the good judgment of the appointing authority in selecting the best qualified candidate for the temporary appointment.

[6] Respondent does not contend that the judgment is supportable on any other theory. A careful examination of the voluminous record discloses sound reasons for this reticence. We have found no evidence which would have supported a finding favorable to respondent upon any of the other issues raised by his petition, and we are satisfied that the memorandum of the trial court's decision satisfactorily disposes of each of them. The absence of specific findings on these issues is therefore immaterial.

The judgment is reversed.

WOOD, J. concurs.

VALLÉE, J., deeming himself disqualified, did not participate.



97 Cal.App.2d 717

MOON et al. v. PAYNE et al.

Civ. 4046.

District Court of Appeal, Fourth District,  
California.

May 24, 1950.

Rehearing Denied June 5, 1950.

Action by F. W. Moon and Vernice Moon, his wife, and Jean Ann Moon, an infant, by her guardian ad litem, Vernice Moon, against

Alfred Payne and others, for injuries sustained by Jean Ann Moon, aged five years, from a fire set by the defendant to burn dead vines in an alley near his home. The Superior Court, Kings County, Clark Clement, J., entered judgment for the plaintiffs, and defendants appealed. The District Court of Appeal, Mussell, J., held that fact that defendant started fire without first obtaining a written permit from the fire chief as required by city ordinance did not create any liability on part of defendant in absence of evidence that failure of defendant to obtain the permit was a proximate cause of the injuries sustained.

Judgment reversed.

# 1. Negligence $\Rightarrow$ 6, 56(3), 121(1)

An act or failure to act below statutory standard is negligence per se, and that act which is performed in violation of an ordinance or a statute is presumptively an act of negligence, but presumption is not conclusive and may be rebutted by showing that the act was justifiable or excusable under the circumstances, but until so rebutted it is conclusive, and it is also necessary to show that violation was a proximate contributing cause of the injury.

# 2. Negligence $\Rightarrow$ 56(3)

Where city ordinance providing that it shall be unlawful for any person to burn any rubbish, paper or other materials in any yard or open space within city without first obtaining a written permit so to do from fire chief was violated by defendant, who started fire in alley near his home to burn dead vines, and plaintiff, five years of age, was injured by fire, findings that defendant was only guilty of negligence in failing to comply with ordinance and that such failure was proximate cause of injuries sustained by minor plaintiff were not sufficient to support judgment for plaintiffs.

Walch & Griswold, Hanford, for appellants.

Sidney J. W. Sharp, Herbert M. Braden and Lawrence W. Clawson, all of Hanford, for respondents.

MUSSELL, Justice.

Plaintiff, Jean Ann Moon, aged five years, sustained injuries from a fire set by

the defendant in the city of Coalinga. At the time defendant was burning dead bean vines which he had raked off his garden patch into a small pile in the alley near his home.

After the defendant had ignited the bean vines and the fire had burned to coals, he noticed three children, including the plaintiff, Jean Ann Moon, in the vicinity. When the defendant first noticed the children, they were approximately five feet from the fire and he looked toward them, told them not to get around the fire and to go home. After the children had been thus warned, they all started down the alley and defendant watched them until they were about twenty feet away from the fire. He then turned back to his work of cleaning the garden and remained within approximately twenty-five feet of the live coals. Within two or three minutes he heard a whimper, looked around and saw that the plaintiff's slacks had caught on fire. He picked her up, tore off the burning slacks and carried the child to her parents, who were next door.

Plaintiff sustained disabling and painful burns and the present action was brought to recover damages for the injuries sustained. Trial was had by the court without a jury and judgment was rendered in favor of plaintiff.

It was shown at the trial that the defendant violated ordinance No. 255 of the city of Coalinga, the pertinent part of which is as follows: "Section 4. It shall be unlawful for any person to burn or bury any garbage in the yard or open space within the city or to burn any rubbish, paper or other materials in any yard or open place within the city without first obtaining a written permit so to do from the fire chief." The trial court found that the defendant had violated the above provision of the ordinance; "that said violation is without justification or excuse and constitutes an act of negligence per se which the court finds to be the proximate cause of the injuries and loss and damages sustained by Jean Ann Moon, and the loss and damages sustained by F. W. Moon and Vernice Moon". The court further found "that the defendant was only guilty of the negligence

above referred to"; "that by reason of said act of negligence of the defendant, Alfred Payne, which act of negligence the court finds to be the proximate cause of the injuries and loss and damages sustained by Jean Ann Moon and the loss and damages sustained by F. W. Moon and Vernice Moon".

The question here involved is whether the foregoing findings are sufficient to support the judgment; it being conceded that the defendant failed to obtain the written permit required by the ordinance.

[1] An act or failure to act below the statutory standard is negligence per se, or negligence as a matter of law and an act which is performed in violation of an ordinance or a statute is presumptively an act of negligence, but the presumption is not conclusive and may be rebutted by showing that the act was justifiable or excusable under the circumstances. Until so rebutted, it is conclusive. *Satterlee v. Orange Glenn School District*, 29 Cal.2d 581, 588, 589, 177 P.2d 279. It is also necessary to show that the violation was a proximate contributing cause of the injury. *Satterlee v. Orange Glenn School District*, supra, 29 Cal.2d 590, 177 P.2d 279; *Dennis v. Gonzales*, 91 Cal. App.2d 203, 207, 205 P.2d 55; *Eigner v. Race*, 54 Cal.App.2d 506, 512, 129 P.2d 444; *Le Blanc v. Browne*, 78 Cal.App.2d 63, 72, 177 P.2d 347.

In the instant case it is apparent from a reading of the ordinance in question that the act of burning rubbish, paper or other materials within the city is not prohibited. The prohibition is that a permit from the fire chief must first be obtained. There is no evidence in the record to create a causal connection between the failure of the defendant to procure a license and the injury sustained.

In *Arrelano v. Jorgensen*, 52 Cal.App. 622, 199 P. 855, the parents of a minor were held not liable for damages sustained in a collision of an automobile owned by such minor and negligently operated by him, from the mere fact that they knowingly permitted him to operate the machine without the license required by law, in the absence of any evidence causally connecting the absence of the license with the in-



juries. The court said, 52 Cal.App. at page 624, 199 P. at page 856: "By no stretch of the imagination could it be said that the plaintiff would have been saved these injuries had the operator of the automobile renewed his operator's license for the year 1920. Therefore, even if it be conceded that the parents had the full control of the son and consented to his operation of the machine without an operator's license, this violation of law on their part had nothing whatever to do with the injuries for which the plaintiff seeks to recover. As was said in *Shimoda v. Bundy*, 24 Cal.App 675, 142 P. 109: 'One who violates an ordinance wherein a penalty is fixed for noncompliance with its provisions, may be subjected to the penalties therein prescribed, but he cannot, in addition thereto, be deprived of his civil right to recover damages, perhaps in many thousands of dollars, sustained by reason of the negligence or wrong of another, when such violation bore no relation to the injury and did not contribute in the remotest degree thereto.'"

In *Strandt v. Cannon*, 29 Cal.App.2d 509, 518, 85 P.2d 160, this court held, in an automobile collision case, that the operator's negligence is to be determined by the facts existing at the time of the accident, and whether the operator had a license to operate an automobile under the laws of this state is immaterial unless there is some causal relationship between the injuries and the failure to have a license or the violation of the statute in failing to have one.

In *Shimoda v. Bundy*, 24 Cal.App. 675, 142 P. 109, it was held that the failure of a driver of a motorcycle to register it as required by ordinance as a condition to lawfully operating it on the streets of a city, did not bar his right to recover for negligently being struck by the driver of an automobile.

*Roos v. Loeser*, 41 Cal.App. 782, 183 P. 204, was an action for damages sustained by plaintiff by reason of the killing of dog. It was there held that plaintiff could not be charged with contributory negligence because of the fact that her dog was upon the public streets without being licensed, where her omission to comply with the

ordinance requiring dogs to be licensed did not contribute to the incident which caused the death of the dog.

[2] The principles set forth in the foregoing cases are applicable in the case before us and while the question of probable cause is ordinarily one for the trier of fact, *Dennis v. Gonzales*, supra, 91 Cal.App.2d 207, 205 P.2d 55, it becomes one of law in the instant case when there is no evidence that the failure of defendant to obtain the permit was a proximate cause of the injuries sustained. *Satterlee v. Orange Glenn School District*, supra, 29 Cal.2d 590, 177 P.2d 279. For aught that appears in the record, plaintiff might have sustained the injuries complained of even though the defendant had in fact procured the required permit. The trial court found that the defendant was only guilty of negligence in failing to comply with the ordinance and that such failure was the proximate cause of the injuries sustained. These findings are not sufficient to support the judgment.

Judgment reversed.

GRIFFIN, Acting P. J., and SHEPARD, Justice, pro tem., concur.



97 Cal.App.2d 662

**BELOIN et al. v. BLANKENHORN et al.**

Civ. 17452.

District Court of Appeal, Second District,  
Division 2, California.

May 22, 1950.

Proceeding for a writ of mandate by Lynn Beloin and others, on behalf of themselves and all other owners of real property situated as is the property of the named petitioners and plaintiffs, against David Blankenhorn, The Board of Zoning Appeals of the City of Los Angeles, Charles E. Scott, and others, members of the Board and others, to compel the Board to annul its order granting a vari-

ance and seeking to enjoin the administrator from approving plans for the construction of a service station in a residential district. Judgments for plaintiffs was entered in the Superior Court of Los Angeles County, Clarence M. Hanson, J., and the defendant appealed. The Court of Appeal, McComb, J., held that the trial court erred in giving judgment for plaintiffs after defendants' demurrer was overruled without a trial of the issues of fact raised by the pleadings.

Reversed.

#### 1. Mandamus ☞174

In a mandamus proceeding where issues of fact are raised by the pleadings, findings of fact are indispensable unless waived by the parties.

#### 2. Mandamus ☞174

In proceeding for writ of mandate to compel the Board of Zoning Appeals to annul an order granting a variance for commercial purposes in a residential district where material issues of fact were raised by the pleadings and findings of fact were not waived by the parties, failure to make findings was error.

#### 3. Judgment ☞106(7)

Trial court is authorized to render a judgment for plaintiff without a trial of issues of fact on overruling of a demurrer only if there is no answer on file and defendant fails to file an answer creating issues of fact within the time allowed by the court. Code Civ.Proc. § 586, subd. 2.

#### 4. Mandamus ☞174, 187(9)

In proceeding for writ of mandate to compel board of zoning appeals to annul its order granting a variance in a residential district for use of property for commercial purposes, where only matter submitted to court at time of hearing of the order to show cause was a demurrer to the petition and there was never any trial of the issues of fact raised by denials in the answers which were filed, trial court committed prejudicial error in giving judgment in favor of plaintiff. Code Civ.Proc. § 586, subd. 2.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, Los Angeles, for appellants Board of Zoning Appeals et al.

J. Henry Schweitzer and John L. Bland, Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal by defendants from a judgment ordering defendant Board of Zoning Appeals to vacate a zoning variance for the construction of a gasoline service station.

#### Chronology

1. Defendant David Blankenhorn, who owned property situated at the northwest corner of Sunset Boulevard and Barrington Avenue, Los Angeles, which property was zoned for residential purposes only, applied to the planning commission of the City of Los Angeles seeking a variance with respect to his property so that it could be used for commercial purposes. After hearing before the zoning commission administrator of Los Angeles, his application was denied.

2. Defendant Blankenhorn then appealed to the board of zoning appeals from the decision of the zoning administrator and after hearing before said board an order was made granting his request for a variance.

3. Plaintiffs on behalf of themselves and all other property owners similarly situated filed the present petition for a writ of mandate to compel the board of zoning appeals to annul its order granting a variance and seeking to enjoin the zoning administrator from approving plans, and the general manager of the department of building and safety from issuing a permit for the construction of a service station on defendant Blankenhorn's property.

4. Defendants, board of zoning appeals and its members, filed a general demurrer to the petition.

5. All defendants filed answers denying most of the material allegations of the petition; e.g., (a) that the action was filed by plaintiffs in a representative capacity, (b) the reliance by plaintiffs upon the fact that the property was in a resi-

Hanna & Morton, Byron C. Hanna, Los Angeles, for appellant David Blankenhorn.

dential zone when they purchased it, and (c) that defendant Blankenhorn knew when he purchased the property that it was zoned for residential purposes only. In addition various affirmative defenses were pleaded.

6. At the time of the hearing of defendants' demurrer to the petition it was stipulated that a certified copy of the record before the board of zoning appeals, which includes the record made on the hearing before the zoning administrator, could be considered in connection with the petition. After argument the demurrer was submitted for the court's consideration.

7. June 30, 1949, the trial court caused an order to be entered overruling the demurrer to the petition and ordering judgment for plaintiffs as prayed.

8. July 29, 1949, a judgment was entered in favor of plaintiffs in accordance with the prayer of the petition.

9. Findings of fact were never made, signed or filed by the court, nor were they waived by the parties.

#### Questions

First: *Assuming without deciding that the proceedings enumerated above constituted a trial, did the trial court commit prejudicial error in failing to make findings of fact?*

[1, 2] This question must be answered in the affirmative. In a mandamus proceeding where issues of fact are raised by the pleadings, findings of fact are indispensable unless waived by the parties. (Davis v. State Board of Optometry, 35 Cal.App.2d 428, 433 et seq., 95 P.2d 959) In the instant case material issues of fact were raised by the pleadings, and findings of fact were not waived by the parties. Thus it was prejudicially erroneous to fail to make findings.

Second: *Did the trial court err in giving judgment for plaintiffs after defendants' demurrer was overruled without having a trial of the issues of fact raised by the pleadings?*

[3] This question must likewise be answered in the affirmative. The court is authorized to render a judgment in favor

of plaintiff without a trial of issues of fact upon the overruling of a demurrer only if there is no answer on file and the defendant fails to file an answer creating issues of fact within the time allowed by the court. (Sec. 586, subd. 2, Code Civ. Proc.; Warden v. Lamb, 98 Cal.App. 738, 741, 277 P. 867. Cf. Felice v. City of Inglewood, 84 Cal.App.2d 263, 267, 190 P.2d 317.)

[4] In the present case the record discloses that the only matter that was submitted to the court at the time of the hearing of the order to show cause issued pursuant to the petition was the demurrer to such petition, and that there was never any trial of the issues of fact raised by the denials in the answers which were filed. Hence the trial court committed prejudicial error in giving judgment in favor of plaintiffs.

In view of our conclusions it is unnecessary to discuss other points argued by counsel.

Reversed.

MOORE, P. J., and WILSON, J., concur.



97 Cal.App.2d 702

KING v. MILLER et al.

Civ. 14374.

District Court of Appeal, First District,  
Division 2, California.

May 23, 1950.

Patricia King, also known as Patrene King, brought action against Mildred A. Miller and another to recover on a note which was executed by defendants as final payment for hotel lease purchased by the defendants from plaintiff, wherein the defendants filed a cross-complaint. A judgment for the plaintiff was entered by the Superior Court in and for the City and County of San Francisco, Theresa Meikle, J., and



the defendants appealed. The District Court of Appeal, Nourse, P. J., held that evidence supported finding that defendants purchased hotel lease from plaintiff after personal investigation, with full knowledge of probable income, and without reliance upon plaintiff's fraudulent representation in newspaper advertisement as to net income realized from hotel, and hence defendants could not avoid payment of balance due on note or recover amount already paid.

Judgment affirmed.

#### 1. Fraud ☞20

A party can escape liability for fraudulent representations when case shows that other party did not rely on the misrepresentations and was not harmed by them.

#### 2. Landlord and tenant ☞28(1)

Evidence supported finding that defendants purchased hotel lease from plaintiff after personal investigation, with full knowledge of probable income, and without reliance upon plaintiff's fraudulent representation of newspaper advertisement as to net income realized from hotel, and hence defendants could not avoid payment of balance due on note executed as final payment for the hotel lease or recover amount previously paid on ground that they were defrauded in the transaction.

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Joseph E. Isaacs, Alan H. Critcher, San Francisco, Martin J. Jarvis, San Francisco, of counsel, attorneys for appellants.

Walter H. Duane, San Francisco, attorney for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to recover on a promissory note which was executed by defendants as final payment for a hotel lease owned by plaintiff. The total price was \$6,800 and defendants paid \$4,000 cash. Defendants claim that they were defrauded in the transaction, and cross-complained after notice of rescission to plaintiff for the \$4,000 already paid.

The only question on this appeal is whether there was sufficient evidence to support the judgment. There is no conflict over the facts that plaintiff advertised

in a local newspaper for the purpose of selling the hotel lease; that the advertisement stated "Net income \$500 Month;" and that the hotel was not earning anywhere near that figure when the advertisement was published, nor for some months prior thereto, nor since that date.

Appellants testified, and claim that the testimony is uncontroverted, that they believed the advertisement, relied on it, and that they were defrauded because respondent knew it to be false at the time it was printed.

The trial court did not find that the advertisement was untrue, but did find that all the allegations of fraud were untrue because appellants made an independent investigation of the premises and hence did not rely upon the advertisement.

The evidence supporting the judgment is that appellants, who were experienced in the rooming house business in San Francisco, visited the premises, learned that but three of the twenty rooms then had steady roomers and that respondent, because of other commitments, had been unable to attend to the business and that the income had fallen far below that advertised. Appellants later visited the premises with a friend of their selection who was an experienced real estate man. They inspected the premises thoroughly in company with the lessor of the building. The lack of roomers was discussed, and the lessor offered appellants free rent for one month to enable them to get the business started. From this evidence respondent contends that the purchase was made after personal investigation, with full knowledge of the probable income, and without reliance upon the statement in the advertisement.

[1] We cannot say that the evidence did not support the finding and, this being so, the only question of law raised is whether a party can escape liability for fraudulent representations when the case shows that the other party did not rely on the misrepresentations and was not harmed by them. The authorities answer the question in the affirmative. An early case supporting the judgment is *Ruhl v. Mott*, 120 Cal. 668, 53 P. 304. Authorities following the same rule of non-liability are:

Carpenter v. Hamilton, 18 Cal.App.2d 69, 62 P.2d 1397; Smith v. Brown, 59 Cal. App.2d 836, 140 P.2d 86; Blackman v. Howes, 82 Cal.App.2d 275, 185 P.2d 1019, 174 A.L.R. 1004; 12 Cal.Jur. p. 750; 23 Am.Jur. p. 939; 37 C.J.S., Fraud, § 102, p. 406.

[2] Since the appellants failed in their proof and the trial court believed the evidence of respondent showing no reliance on the representations, the appeal must fail.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.



97 Cal.App.2d 668

**PEOPLE v. NEAL.**

Cr. 4444.

District Court of Appeal, Second District,  
Division 3, California.

May 22, 1950.

Homer Fletcher Neal was convicted in the Superior Court of Los Angeles County, Joseph M. Maltby, J., of attempts to murder and of arson, and he appealed. The District Court of Appeal, Vallée, J., held that evidence was sufficient to sustain convictions, that the admission of certain testimony was not error, and that Superior Court erred in permitting district attorney to refer to defendant's alleged conviction of other offenses when passing on question whether defendant's sentences should be concurrent or consecutive.

Judgments affirmed, and order directing that two sentences should run consecutively reversed.

Wood, J., dissented.

**1. Homicide ☞256**

Evidence sustained convictions of attempt to murder.

**2. Arson ☞37(1)**

Evidence sustained conviction of arson.

**3. Criminal law ☞1159(2)**

On appeal from convictions of attempt to murder and arson, District Court of Appeal had no concern with the weight of the evidence.

**4. Criminal law ☞44**

Where an attempt to commit a crime is charged, a specific intent to commit the crime and a direct ineffectual act towards its commission are essential to a conviction.

**5. Criminal law ☞568**

Specific intent as an element of a crime may be proved by showing circumstances surrounding the act from which it may be inferred by the court as a trier of facts, and though direct proof is not required, the circumstances must be such as would justify the court in inferring the intent with which the act was done.

**6. Homicide ☞25**

Fact that intent to murder may have been directed toward husband only and not toward wife when defendant allegedly poured gasoline into house in which the husband and wife were sleeping and set fire to the house, did not the less make the crime complete as regards charge of attempt to murder the wife.

**7. Assault and battery ☞48**

**Homicide ☞17**

Where one intends to assault or kill a certain person, and by mistake or inadvertence he assaults or kills another, it is nevertheless a crime, and the intent is transferred from the party who was intended to the other.

**8. Criminal law ☞412(1)**

In prosecution of defendant who allegedly poured gasoline into house in which people were sleeping and set fire to the house, for attempted murder and for arson, admission of declarations of defendant about six months before the offenses charged as to what could be done with five gallons of gasoline and a match, was not error.

**9. Criminal law ☞345**

In prosecution of defendant who allegedly poured gasoline into house in which people were sleeping and set fire to the house, for attempted murder and for arson,

admission of evidence that about a week before offenses charged were committed rock was thrown through bathroom window of house of prosecuting witnesses and that air was let out of the tires of three automobiles parked outside of the house was not error.

**10. Criminal law** ⇨412(1)

In prosecution of defendant who allegedly poured gasoline into house in which people were sleeping and set fire to the house, for attempted murder and for arson, admission of evidence that the night before the offenses were committed defendant informed witness that he was going to get even with somebody and that witness should watch the headlines in the papers the next day, was not error.

**11. Criminal law** ⇨345

In prosecution of defendant who allegedly poured gasoline into house in which people were sleeping and set fire to the house, for attempted murder and for arson, admission of testimony of one of the prosecuting witnesses that about two hours before offenses were committed witness chased defendant out of witness' backyard, was not error.

**12. Criminal law** ⇨338(7)

Fact that evidence may have tended to prejudice the defendant in the minds of the jurors was not ground for its exclusion.

**13. Criminal law** ⇨977(1)

Court in which defendant was convicted of attempts to murder and of arson, was required to direct whether sentences should run concurrently or consecutively. Pen.Code, § 669.

**14. Criminal law** ⇨986

In determining whether consecutive or concurrent sentences should be imposed, any testimony bearing on the character or antecedents of the convicted person, may be presented to the court.

**15. Criminal law** ⇨662(1), 937

A defendant has a right to be present when judgment is pronounced against him, and he has a right to be confronted with witnesses who have accusations to make against him. Pen.Code, § 1193.

**16. Criminal law** ⇨986, 1177, 1189

In determining whether concurrent or consecutive sentences should be imposed on defendant who was convicted of attempts to murder and of arson, it was error to permit district attorney to refer to prior convictions without any evidence being introduced to prove the prior convictions, and a portion of judgment ordering that sentences on the convictions of assault to murder should run consecutively would be reversed, and case would be remanded for purpose of determining whether sentences should be concurrent or consecutive.

Houser, Houser & Spence, and J. Everett Houser, Long Beach, for appellant.

Fred N. Howser, Attorney General, and Gilbert Harelson, Deputy Attorney General, for respondent.

VALLÉE, Justice.

The court, sitting without a jury, convicted the defendant of: Count 1. Attempt to murder Theodore R. Raymond. Count 2. Attempt to murder Myrtle Mae Raymond. Count 3. Arson. He was also accused of a prior conviction of burglary with respect to each count. He admitted the prior conviction. He was sentenced to state prison on each count, the sentences for attempt to murder to run consecutively, the sentence for arson to run concurrently with the others. Defendant appeals from the judgment.

The offenses were charged to have been committed about 4:15 a. m. on June 4, 1949. Theodore R. Raymond and Myrtle Mae Raymond were husband and wife. They had known defendant about 16 months and had lived in the same trailer court in Long Beach as defendant and his wife. On June 4, 1949, the Raymonds were living in a frame house in Long Beach. Defendant's wife and two children lived in the Raymond house with the Raymonds from May 16 to May 28, 1949. Defendant was confined in the county jail from December 30, 1948, to May 27, 1949.

On the night of June 4, 1949, Mr. and Mrs. Raymond occupied a bed in their home in a room with a screened window. The



foot of the bed was near the window which was open. About 4:15 a. m. Raymond was awakened by a dog jumping on his chest, scratching and growling. He saw a flame coming through the window. In a moment the clothes of Mr. and Mrs. Raymond, her hair, the bed, and the interior of the bedroom were afire. Mr. and Mrs. Raymond were severely burned. He was in a hospital 8 weeks; she, 7 weeks.

The fire was of incendiary origin. Gasoline had been thrown through the window across the foot of the bed. The court could reasonably have inferred that a considerable amount of gasoline had been thrown through the window. The outside of the house was only slightly burned. The bedroom and the bed were badly burned. A garbage can which had been in the fire, containing a small amount of gasoline, was found on the ground about 10 feet from the bedroom window.

Shortly before the fire, during the time defendant was in the county jail, he wrote 4 letters to Raymond. The letters contained the following pertinent matters: Defendant advised Raymond to leave him and his family alone, that if he did not "I would make you sorry"; he called Raymond a "crook"; he indicated that there was some improper relation between Raymond and defendant's wife,—that they had conspired to put him in jail; he threatened to prosecute Raymond; he said that Raymond had tried to ruin his life, "[t]hat is one mistake you will pay for. By the time you get this letter, there will be two cooked geese, you and Ivy [defendant's wife], and maybe, Mert [Mrs. Raymond]"; he accused his wife and Raymond of having defrauded the county; he said Raymond had wrecked his home, saying "You have sure done me plenty dirty, Ted [Raymond]. You tried to help send me to San Quentin but that failed then you called the police and said that stuff under my trailer was stolen but it wasn't. You even turned Ivy against me"; he said that Raymond was sitting on a keg of dynamite and "Just think what I can do when I get out," and "If you [Raymond] think I am going to forget about what you have done to me, you are crazy."

Raymond testified that in December, 1948, at a time when he and defendant were

standing together as a police car driven by a police officer passed by, defendant said, "Five gallons of gas and a match would do that son of a bitch a lot of good." Mrs. Raymond testified substantially to the same effect. Another witness testified that in December, 1948, as he and defendant were driving past a police car parked alongside of a house, defendant said, "[T]here must be an officer lives there because there is a cruiser car sitting in the driveway, and he said what a man should do was take a can of gas and throw it on the house and strike a match and burn the house down."

Defendant was released from the county jail on May 27, 1949, and immediately went to Long Beach. His wife and children were living in the Raymond home at the time. About 11:30 that night a rock was thrown through the bathroom window of the Raymond house and the air was let out of the tires of three automobiles parked outside of the house.

A witness testified that about 10:00 or 11:00 p. m. the night of June 3, 1949, in a bar in Long Beach, he had a conversation with defendant in which defendant said he was going to get even with somebody, to watch the headlines in the paper the next day. On June 5, after seeing a newspaper account of the fire at the Raymond house, the witness reported the conversation to the police. About October 10, 1949, defendant wrote a letter to this witness, threatening him if he testified against defendant. Raymond testified that about 12:20 a. m. on the night of June 3, 1949, he chased defendant out of his back yard.

On June 13, 1949, defendant was in Bakersfield. He knew the police were looking for him as a suspect in the Raymond case. He then changed his name to Robert Allen to conceal his identity and left for Northern California, finally arriving in Oakland. In Albany he bought an automobile and had the certificates and contract made out in the name of Robert Allen. He returned to Southern California about August 19, 1949. About midnight or after on the night of August 20, defendant went to the Raymond house. He was looking for the Raymonds. They were not in the house. At the time he had 5 gallons of gasoline in a can in his automobile. He

was arrested at Torrance on August 21, driving the automobile. A five-gallon can filled with gasoline was on the floor of the automobile at the time of the arrest. When asked why the car was registered in the name of Robert Allen, defendant said he did not want to take any chances of being traced through the registration. On the way to the police station, defendant asked an officer, "How are the people?" At the police station he said the Raymonds "were a bad bunch"; that "he had had several run-ins with them and fights, and it was just a question of him or them."

The testimony of the defendant varied in a number of particulars from a statement he made to police officers and the district attorney after his arrest.

As grounds for reversal, defendant contends: 1. There was no substantial evidence to connect him with the crimes charged. 2. There was no proof of a specific intent to commit murder. 3. The court erred prejudicially in the admission of evidence. 4. The court erred prejudicially in receiving hearsay evidence in aggravation of punishment.

[1-3] The evidence was sufficient to connect the defendant with the crimes charged. In contending that it was not, defendant argues the credibility of the witnesses and the weight of the evidence, matters with which we have no concern.

[4,5] In contending that there was no proof of a specific intent to murder either Mr. Raymond or Mrs. Raymond, defendant assumes, but makes it plain that he does not admit, that he threw the gasoline and started the fire. Where an attempt to commit a crime is charged, two important elements are essential to conviction: a specific intent to commit the crime, and a direct ineffectual act toward its commission. *People v. Miller*, 2 Cal.2d 527, 530, 42 P.2d 308, 98 A.L.R. 913. "Specific intent as an element of a crime may be proved by showing circumstances surrounding the act from which it may be inferred by the court as a trier of facts. Direct proof is not required, but the circumstances must be such as would justify the court in inferring the intent with which the act was done. *People v. Maciel*,

71 Cal.App. 213 [234 P. 877]." *People v. Rothrock*, 21 Cal.App.2d 116, 119, 68 P.2d 364, 366. Defendant declared that: Raymond was going to pay for ruining his life and was going to be a "cooked" goose, and maybe Mrs. Raymond; Raymond was sitting on a keg of dynamite; "It was just a question of him [defendant] or them [the Raymonds]." The declarations of defendant, together with the circumstances surrounding the commission of the offenses, were sufficient to warrant the trial judge in concluding that defendant had a specific intent to murder Mr. and Mrs. Raymond.

[6,7] The fact that the intent to murder may have been directed toward Mr. Raymond did not the less make the crime complete as regards the charge of attempt to murder Mrs. Raymond. "[W]here one intends to assault or kill a certain person, and by mistake or inadvertence assaults or kills another in his stead, it is nevertheless a crime, and the intent is transferred from the party who was intended to the other." *People v. Wells*, 145 Cal. 138, 140, 78 P. 470, 471; *People v. Rothrock*, 21 Cal.App.2d 116, 119, 68 P.2d 364; *People v. Walker*, 76 Cal.App.2d 10, 15, 172 P.2d 380.

Defendant contends the court erred in admitting in evidence over his objection: 1. The declarations of defendant made in December, 1948, to Raymond and another witness as to what could be done with five gallons of gasoline and a match. 2. The happenings on the night of May 27, 1949. 3. The declaration of defendant made on the night of June 3, 1949. 4. The testimony of Raymond that about 12:20 a. m. on the night of June 3, 1949, he chased defendant out of his back yard.

[8-12] There was no error in admitting the items of evidence mentioned. The declarations as to what could be done with five gallons of gasoline and a match were relevant and material to show the state of mind of defendant. They were admissible to prove that he had an inclination to pyromania. His interest in gasoline and the use of it was a circumstance tending to identify him as the one who committed the crimes. *People v. Adamson*, 27 Cal.2d 478, 485, 165 P.2d 3. The happenings on the night of May 27—the day defendant

was released from jail and immediately went to Long Beach, his wife being at the Raymond home—were admissible as tending to prove continued hostility on the part of defendant toward the Raymonds. They constituted a logical link in the chain of evidence. The other items of evidence were manifestly admissible. The credibility of the witnesses, argued by defendant, was for the trial judge. The fact that the evidence which defendant contends was erroneously admitted, may have tended to prejudice him in the minds of the jurors, is no ground for its exclusion. "The tendency of modern decisions is to admit any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy, or [give] any weight in determining the issue, leaving the strength of such tendency, or the amount of such weight, to be determined by the jury; and, in determining the relevancy of evidence that may be offered upon an issue of fact, much depends upon the nature of the issue to sustain which or against which it is offered, and a wide discretion is left to the trial judge in determining whether it is admissible or not." *Moody v. Peirano*, 4 Cal.App. 411, 418, [88 P. 380, 382]. This principle should apply *a fortiori* where the court sits without a jury." *Estate of Ades*, 81 Cal.App.2d 334, 342, 184 P.2d 1, 6.

Defendant, immediately after he was found guilty, waived time for pronouncing sentence. The court then made inquiry of defendant as to his history and habits and sentenced him to state prison for the time prescribed by law on each count, whereupon the following occurred:

"[The Court] Now I will hear from either or both counsel on the question of whether the sentences should run concurrently or consecutively. I will hear from the District Attorney first. \* \* \*

"Mr. Sten: [Deputy District Attorney] Your Honor has properly denominated this crime as a fiendish crime. \* \* \* This defendant, in my opinion and from the investigation of this case and the developments of it and the hearing of the testimony here in court, is a dangerous man of definite criminal tendencies. He has a long

police record going back to the time he was a juvenile, when he was made a ward of the Court for stealing a car, for molesting a four year old child, for stealing a bicycle, and for other crimes. He was also arrested on a 288 charge upon which no complaint was filed; so that might be ignored. He entered a plea of guilty to the crime of grand theft, a felony, in 1937 or '38. In any event, it doesn't matter as to the date. There was a plea of guilty entered to the crime of grand theft, a felony, when this defendant was nineteen years old, and he was dealt with at that time as a juvenile.

\* \* \* Subsequently in 1939, approximately, the defendant was arrested virtually in the act of snatching a purse from a lady by the name of Mrs. Haight at 1100 Cedar Avenue in Long Beach in the night time, and in the commission of that offense the defendant knocked this woman down and grabbed her purse and was approximately ten or fifteen feet away from her at the time he was apprehended by Police Officers Wiggins and Grant. In that case he was tried by Judge Desmond, as I recall, and he was found guilty of the charge of robbery. There was also a plea of not guilty by reason of insanity interposed in the case. Two alienists appointed by the Court found the defendant, upon his own statements and those of his relatives, to be insane, and one alienist found him to be sane. Judge Desmond found, by virtue of the findings of the alienists, that the defendant was not guilty of the crime by reason of insanity, and at that time he was sentenced to Mendocino. Three months later or approximately four months later the defendant sued out a writ of habeas corpus in Mendocino County and there took the witness stand and testified that his statements to the alienists were strictly false, fictitious, and fraudulent, and that he had perpetrated a fraud on the Court and upon the alienists, and that he was not insane at the time that he entered such a plea, and that he was not insane or crazy at the time he committed the offense and that he had misled the alienists by telling them a bunch of facts that were not true, and that he tried suicide in the County Jail pending the matter of the trial of the case on the robbery, and he also stated that it



was only a feigned attempt for the purpose of further fooling the alienists. The writ of habeas corpus was granted because the doctors up there found he was not insane, and he was sent back here for further proceedings. Of course, nothing could be done on that robbery conviction because there had been a finding and a judgment of the Court. However, his probation was revoked on the previous burglary offense [the prior conviction charged in the information here], and he was sentenced to San Quentin.

"Subsequently he did one hundred and twenty days for contributing or molesting a child, as I recall. The offense that he was sentenced on in February of 1949, this year, and upon which he was arrested on December 30, 1949 [1948?], was petty theft with a prior, involving the stealing of some pipe metal belonging to the City of Long Beach, I believe. He was given a one hundred and twenty day sentence upon that, and then he got out and committed this offense. There are a considerable number of other arrests, petty thefts, which I haven't gone into.

"I have taken your Honor's time for this one purpose: I believe that this defendant should be kept in prison a long time. I believe that when he gets out of prison, which he will some day, he will go right back into leading a criminal life. I believe further that if and when he gets out of prison, some harm will come to some of the persons that testified in this case if he can find them. I therefore ask the Court to consider running at least two of these counts consecutively to assure a more extended term in the penitentiary." Defendant, on cross-examination, had admitted the conviction of theft of an automobile when he was a juvenile.

The attorney for the defendant then stated that he knew nothing about some of the matters stated by the district attorney, and argued that the sentences should run concurrently. The court then ordered that the sentences for attempt to murder run consecutively and that the sentence for arson run concurrently with the other two.

[13] The court was required to direct whether the sentences should run concurrently or consecutively. Pen.Code, sec. 669. In this state the statute prescribes the rules

of evidence applicable to the manner in which a judge may obtain information to guide him in the imposition of sentence upon an already convicted defendant. Penal Code section 1204 prescribes the evidence that may be received in aggravation or mitigation of the punishment to be imposed. It provides: "The circumstances must be presented by the testimony of witnesses examined in open court, \* \* \*. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section."

[14] Section 1204 requires the court in determining the consequences of guilt to receive *evidence* either in mitigation or aggravation of the punishment to be imposed. "To this end any testimony bearing upon the character or the antecedents of the convicted person—whether he has theretofore been of good or bad character or borne a good or bad reputation or been previously convicted of some offense against the law—may be presented to the court." *People v. Rudolph*, 28 Cal.App. 683, 685, 153 P. 721, 722. The section expressly condemns the practice followed in the present case. *People v. Giles*, 70 Cal.App.2d Supp. 872, 879, 161 P.2d 623.

[15, 16] The defendant has a right to be present when judgment is pronounced against him, and he has a right to be confronted with the witnesses who have accusations to make against him. Pen.Code, sec. 1193; *People v. Giles*, *supra*, 70 Cal. App.2d Supp. at page 882, 161 P.2d 623. The statement of the district attorney, wholly unsupported by any evidence, was highly inflammatory and prejudicial. If any of the matters referred to by the district attorney was true, it should have been presented to the court in the form of evidence. The statute demands that the duty of determining the question of aggravation or mitigation of punishment be performed with scrupulous fairness to the defendant. The fact that the defendant here had been convicted of "a fiendish crime" did not justify departure from the command of the statute. The comment of the Supreme Court of Pennsylvania in

*Commonwealth v. Johnson*, 348 Pa. 349, 35 A.2d 312, at pages 313, 314 is particularly pertinent: "It is a prisoner's constitutional right in this Commonwealth 'to meet the witnesses face to face' (Sec. 9, Declaration of Rights Const.P.S.). In *Com. v. Corsino*, 261 Pa. 593 at page 598, 104 A. 739, at page 740, we held: 'It is the inherent right of the prisoner in a capital case to be present at every stage of the proceedings from the arraignment to the rendition of the verdict. Neither court nor judge can take any step affecting his right in his absence.' \* \* \* A judge whose duty it is to determine the proper sentence imposed on those convicted of crime cannot be expected to limit himself to only that which appears in the record of the trial of the prisoner. It is to the benefit of society and it may be of benefit to the prisoner, to have the sentencing judge consider facts other than those adduced at the trial. Such facts might militate in a prisoner's favor or they might militate against him. However, when a judge is faced with the duty of determining whether or not a convicted murderer is to be sentenced to death or life imprisonment the seriousness of the problem is such that a judge who is possessed of that zeal to do justice which characterizes the just judge, will as far as is practicable, give the defendant an opportunity to confront the witnesses against him and to offer evidence in his own behalf. Such a procedure if followed will be informative to the understanding and enlightening to the judgment, of the sentencing tribunal."

A separate judgment was entered on each count. The judgment ordering that defendant be punished for attempt to murder Myrtle Mae Raymond as charged in count 2 of the information, insofar as it directs that the sentence ordered run consecutively with the sentence imposed as to count 1 (attempt to murder Theodore R. Raymond), is reversed. The superior court is directed to proceed anew to determine whether the sentence imposed as to count 2 shall run concurrently or consecutively with the sentences as to counts 1 and 3, and to receive such legal evidence

only as may be offered by either party with respect thereto. In all other respects said judgment is affirmed. The judgments for attempted murder of Theodore R. Raymond and for arson are, and each is, affirmed.

SHINN, P. J., concurs.

WOOD, Justice (dissenting).

I cannot agree that the trial judge committed prejudicial error in ordering that the sentences for attempted murder run consecutively.

Immediately after the arguments in the case the trial judge proceeded to make comments preliminary to announcing his decision. Among other things, he said: "This is the most fiendish, the most brutal, the most vicious crime that has ever come to the attention of this Court, and as a result of the acts of this man Mrs. Raymond is going to be a helpless cripple the rest of her life." Then the judge stated that he found the defendant guilty on each of the three counts. The defendant waived time for pronouncing sentence. The deputy district attorney requested permission to address the court upon the subject of concurrent and consecutive sentences. The judge replied, "Very well." Then he sentenced the defendant on each count to imprisonment in the penitentiary for the term prescribed by law. Then the deputy made the remarks stated in the above opinion. No objection was made by defendant to the statement of the deputy, and no motion was made to strike out any part of the statement. At the time of ordering that the sentences run consecutively the judge made no statement indicating that his order was based upon anything the deputy had said. In 15 Am.Jur. 168 it was said: "It is presumed that the court in inquiring as to circumstances of aggravation or mitigation disregards all incompetent evidence." In *People v. Popescue*, 345 Ill. 142, at pages 155-156, 177 N.E. 739, at page 745, 77 A.L.R. 1199, it was said: "In the case at bar the written order of the judge sentencing the two defendants to die in the electric chair made no reference to any crime other than the

crime charged \* \* \*. The order therefore fails to show that the judge abused his discretion in any regard. In such case the presumption of regularity must obtain. Even if it should be assumed that the evidence of the murder committed by these defendants three hours before they murdered Merrill was incompetent, this was a hearing before the court without a jury, and the court is supposed, as in chancery cases, to disregard all evidence heard except that which is competent and relevant to the issue."

In view of the fact that, prior to the statement of the deputy, the judge had said that the crime was the most fiendish, the most brutal, and the most vicious one which had ever come to his attention and that the defendant had crippled Mrs. Raymond for life, and in view of the fact that it was shown during the trial that defendant had been convicted twice previously, it is practically certain that, irrespective of the statements of the deputy, the judge would have ordered that the sentences run consecutively. Concurrent sentences were not indicated by the evidence. Defendant designedly planned to murder two persons by fiery torture. He maimed and tortured them mercilessly. It is clear there was no miscarriage of justice. In my opinion the error of the deputy district attorney was not prejudicial and the judgments should be affirmed.



OWEN v. OFF et al.  
Civ. 17477.

District Court of Appeal, Second District,  
Division 2, California.  
May 22, 1950.

Rehearing Denied June 7, 1950.  
Hearing Granted July 20, 1950.\*

Action by Le Roy D. Owen against Edward T. Off, individually and as executor of the last will of Katharine S. Off, deceased

\* Subsequent opinion 227 P.2d 457.

and another, to recover commission for sale of securities. The Superior Court of Los Angeles County, Arnold Praeger, J., entered summary judgment which was granted on motion of defendants upon affidavits filed on behalf of the respective parties, and the plaintiff appealed. The District Court of Appeal, Wilson, J., held that the Corporate Securities Act, Gen.Laws, Act 3814, does not require a person to have a license to act as broker in order to maintain an action to recover a commission for the sale of securities when the sale is made on behalf of a vendor who is not the issuer or underwriter thereof but who is a bona fide owner and disposes of them for his own account.

Judgment reversed.

1. Licenses ⇨18½(4)

The words "herein" in section of Corporate Securities Act that except as "herein" expressly provided the provisions of "this act" shall not apply to certain sale of securities means "in this section" and the words "this act" refer to the entire statute, and the section means that the provisions of the entire act except as provided in such section are not applicable to sale of securities described in the section Gen.Laws, Act 3814, § 2(c) (3).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Herein" and "This Act".

2. Licenses ⇨39.14

Under Corporate Securities Act, person is not required to have license to act as broker in order to maintain action to recover commission for sale of securities when sale is made on behalf of vendor who is not issuer or underwriter thereof but who is bona fide owner and disposes of them for his own account. Gen. Laws, Act 3814, § 2(a) (9, 10, 14), (c) (3), § 6.

3. Statutes ⇨212.1, 212.4

In inserting words "on behalf of" in section of Corporate Securities Act exempting from the Act the sale of securities by or "on behalf of" vendor who was not issuer or underwriter thereof but who is bona fide owner disposing of his own property for his own account, the legislature would be presumed to have had a purpose and not to have intended to do an idle and fruitless act and to have been inspired by



the court decision that broker not holding license was not entitled to commission for sale of securities personally owned by another. Gen. Laws, Act 3814, § 2(c) (3).

#### 4. Statutes ⇨212.1, 212.2

The legislature is presumed to have known of and given consideration to prior decisions of courts with reference to a statute when adopting amendments thereto.

#### 5. Statutes ⇨223.5(4)

When statute relating to one subject contains provision that is omitted from a similar statute containing same or cognate subject or when express provision of statute is deleted or new words or phrases are inserted, it is evident that intention of legislature in later statute was different from that in former statute.

#### 6. Statutes ⇨188, 206

A statute should be so construed if reasonably possible as to give effect to each sentence, word and phrase used therein, and words used in statute should be given their ordinary meaning and receive sensible construction, and construction should be avoided that implies that legislature was ignorant of meaning of language employed or that words of statute were inserted in vain.

#### 7. Licenses ⇨18½(4)

The Corporate Securities Act is a penal statute and must be strictly construed and its import cannot be expanded to include acts not explicitly defined. Gen. Laws, Act 3814, § 18.

#### 8. Statutes ⇨241(1)

Strict construction of legislative language is demanded when an act not forbidden by the common law is made criminal by statute.

#### 9. Licenses ⇨39.1

A licensing statute enacted for protection of public, imposing penalty for its violation, will preclude unlicensed person from recovering under his contract, but such statute cannot be construed beyond its plain intent and cannot be made applicable to persons other than those whom legislature clearly intended to include within its terms.

#### 10. Judgment ⇨181(18)

In action for commission for sale of securities by unlicensed broker on behalf of vendor who was not issuer or underwriter thereof but who was bona fide owner disposing of securities for his account, rendering of summary judgment was error, where Corporate Securities Act did not require broker to secure license in order to be entitled to sell another person's personally owned securities, and pleadings presented triable issues of fact raised by denials and special defenses set up in vendors' answer. Code Civ.Proc. § 437c, Gen. Laws, Act 3814.

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Morrow & Trippet, F. B. Yoakum, Jr., Los Angeles, for appellant.

Gibson, Dunn & Crutcher, Sherman Welpton, Jr., Los Angeles, for respondents.

WILSON, Justice.

The question at issue on this appeal is whether under the Corporate Securities Act, Gen.Laws, Act 3814, a person is required to have a license to act as broker in order to maintain an action to recover a commission for the sale of securities when the sale is made on behalf of a vendor who is not the issuer or underwriter thereof but who is a bona fide owner and disposes of them for his own account.

It is conceded by plaintiff that if, under the circumstances stated above, a license is required he is not entitled to recover in this action.

Plaintiff has appealed from a summary judgment, Code Civ.Proc., sec. 437c, granted on motion of defendants upon affidavits filed on behalf of the respective parties.

Plaintiff alleged in his complaint that defendants authorized him in writing to sell shares of stock owned by them in Figueroa Building Corporation and agreed to pay him for his services in the event he found a purchaser and was the procuring cause of the sale of the stock for the price named; that the sale of the shares was to be made by and on behalf of defendants who were the contemplated vendors of such stock; that they were the bona fide owners thereof, that neither of them was

an issuer or underwriter of the shares, and it was contemplated that defendants would dispose of such shares as their own property and for their own account and not directly or indirectly for the benefit of the issuer or underwriter of the stock or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of law; that plaintiff commenced negotiations with Greene-Haldeman Company looking toward the sale of the stock and from time to time during 1945 and to and including July, 1946, with the knowledge, consent, acquiescence and approval of defendants, continued his efforts with that company and eventually obtained it as a purchaser ready, able and willing to purchase the stock for the sum named in the contract, and defendants were immediately advised thereof; that thereafter, without informing plaintiff of their intentions and with the object and purpose of depriving plaintiff of payment for his efforts in procuring a purchaser, defendants consummated a sale to Greene-Haldeman Company for a sum in excess of the amount stated in plaintiff's agreement with defendants, and that the sale was made possible as a direct result of plaintiff's efforts; that defendants have refused to pay for plaintiff's services although demand was made therefor.

Defendants answered and admitted (1) having entered into a written contract with plaintiff relative to the sale of their shares referred to in the complaint; (2) they were not the issuers or underwriters of the stock and any contemplated sale thereof was not to be made for the direct or indirect promotion of any scheme or enterprise with intent of violating or evading the law; (3) during the term of the agreement defendants did have an offer submitted by plaintiff purportedly on behalf of Greene-Haldeman Company pertaining to the sale of the stock but the offer was not acceptable and did not result in the sale of the stock to that company.

Defendants' motion for a summary judgment was made upon the pleadings and an affidavit of defendants' attorney that plaintiff's deposition had been taken in

the action and he had therein admitted he had never been licensed under the Corporate Securities Act as an agent or broker to sell securities. Plaintiff's affidavit filed in opposition to the motion stated: he was at all times mentioned in the pleadings a licensed real estate broker; during the year 1944 he was employed by defendants as a broker and endeavored to sell the land and building known as Figueroa Street Building; before he was able to procure a purchaser for the building it was determined for tax purposes it would be advisable to sell the stock in the corporation which owned the building; in excess of 91 per cent of the stock was owned by defendants, and on or about March 5, 1945, the contract was entered into between plaintiff and defendants authorizing the former to find a purchaser for the stock; the sale of the stock by plaintiff was a single and isolated transaction so far as he was concerned, and he was at all times engaged in acting as a real estate broker and not in the sale of stock or other types of securities; the sale of the stock was to be made by him on behalf of defendants, who were the contemplated vendors thereof and who were neither issuers nor underwriters of the stock but were bona fide owners, and it was contemplated that they would dispose of the stock as their own property for their own account and the sale was not to be made directly or indirectly for the benefit of the issuer or underwriter of the stock or for the promotion of any scheme or enterprise with intent of violating or evading the law.

Defendants' motion was granted and judgment entered in their favor reciting, among other things, that the court found from the admitted facts as set forth in the affidavits and in plaintiff's deposition that no triable issue of fact was presented and that plaintiff's action had no merit. From this judgment plaintiff has appealed.

At the time of the transaction which is the subject of this action the provisions of the Corporate Securities Act bearing on the question involved were the following, as amended in 1947:

Section 2. "(a) \* \* \* When used in this act, the following terms shall, unless the context otherwise indicates, have the following respective meanings: \* \* \*

"9. Agent. The word 'agent' means and includes every person or company employed or appointed by a company or broker or any other person who shall, within this State, either as an employee or otherwise, for a compensation, sell, offer for sale, negotiate for the sale of or take subscriptions for any security.

"10. Broker. The word 'broker' includes every person or company, other than an agent, who shall, in this State, engage either wholly or in part in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in any security issued by others, including all securities of the classes listed in paragraphs 1, 2, 3, 4, 5, 6, 7 and 9 of subdivision (b) of this section or of underwriting any issue of such securities, or of purchasing such securities with the purpose of reselling them, or of offering them for sale to the public. Provided, however, the word broker shall not include the following: The United States of America or any territory or insular possession thereof, or the District of Columbia, or any state, territory, county, or municipality, or taxing district therein \* \* \*

"[Sec. 2.] (c) Sales of securities exempted. Except as herein expressly provided, the provisions of this act shall not apply to the sale of any security in any of the following transactions: \* \* \*

"3. The sale of securities when made by or on behalf of a vendor not the issuer or underwriter thereof who, being a bona fide owner of such securities, disposes of his own property for his own account, and such sale is not made, directly or indirectly, for the benefit of the issuer or an underwriter of such security, or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or

evading any provision of this act." Stats. 1947, ch. 198, p. 759 ff; Deering's Gen. Laws, Act 3814, 1947 Supp.<sup>1</sup>

Section 6. "No person or company shall act as an agent or broker until such person or company shall have first applied for and secured from the commissioner a certificate, then in effect, authorizing such person or company so to do \* \* \*." As am. Stats. 1943, ch. 419, p. 1957.<sup>2</sup>

Defendants contend that by reason of the fact that plaintiff did not possess a certificate from the Commissioner of Corporations authorizing him to act as agent (sec. 2(a) 9) or broker (sec. 2(a) 10) he was forbidden (sec. 6) to act for defendants in either capacity and therefore is not entitled to a commission for effecting a sale of their securities. Such contention is in disregard of the effect of section 2(c) 3 which provides that "Except as *herein* [in this section] expressly provided, the provisions of *this act* [the entire statute] shall not apply to the sale" of securities when made by or "*on behalf of*" a vendor who is not the issuer or underwriter thereof, but who as "a bona fide owner \* \* \* disposes of his own property for his own account \* \* \*"

The allegations of the complaint are in the language of section 2(c) 3 and the answer admits such allegations. Defendants' affidavit on the motion for summary judgment does not controvert the statements in the complaint and plaintiff's affidavit reaffirms them.

[1, 2] In the expression "Except as *herein* expressly provided" the term "*herein*" means "in this section," and the words that follow, "the provisions of *this act* shall not apply \* \* \*", refer to the entire statute. The placing of the words "*herein*" and "*of this act*" in the same sentence and their proximity in the sentence make it manifest that the Legislature did not intend and did not achieve vagueness or obscurity. Hence the section means that the provisions of the entire act, except as provided in that

1. The subject matter of sections 2(a) 9, 2(a) 10, 2(c) 3 are now in sections 25005, 25006, 25152, respectively, of the

Corporations Code. Stats. 1949, ch. 384, p. 698.

2. The subject matter of section 6 is now in section 25700, Corporations Code, *supra*.



section, are not applicable to the sale of the vendor's own securities, whether made by himself or by another person for him, when he is a bona fide owner and disposes of them on his own account and not for the benefit of the issuer or an underwriter thereof. Since the "provisions of this act" relating to agents and brokers and the requirement of a license as a condition precedent to a person's acting as such do not apply to the sale of a vendor's personally owned securities, the facts alleged by plaintiff and admitted by defendants remove the former from the purview and limitations of section 6.

The conclusion expressed above is confirmed, if confirmation be necessary, by the legislative history of subdivision 3 of section 2(c). In 1929 that subdivision read: "The sale in a bona fide way of any security by an owner who is not the issuer or an underwriter thereof, who sells the same for his own account; and not for the purpose of evading the provisions of this act." Stats.1929, ch. 707, pp. 1251, 1254. While section 2(c) 3 was in effect in this form only a sale made *by the owner* of securities, selling directly and on his own account, was exempted from the provisions of the statute.

[3,4] In 1931 the section was amended to cover the sale of securities "by or on behalf of a vendor." Stats.1931, ch. 423, pp. 937, 941. It must be presumed that the Legislature had a purpose in inserting the term "on behalf of" and that it did not intend and did not do an idle and fruitless act. The Corporate Securities Act was adopted in 1917. Stats.1917, ch. 532, p. 673. It had been amended at every session of the Legislature between 1917 and 1931, and in fact amendments have been adopted at each regular session to this date. The act was not perfect at the beginning and may not now cover all conditions that shall arise in the future. Experience and experiment have shown that changes are necessary from time to time. The Legislature considered the amendment of 1931 to have been a needful modification of the former strict rule circumscribing the sale of one's personally owned property. In 1929 the case of *Van Wyke v. Burrows*, 98 Cal.App. 415,

277 P. 190, held that a broker, not holding a license from the Corporation Commissioner, was not entitled to a commission for the sale of shares in a bank which were personally owned by the defendants in the action. At that time the exception allowed by section 2(c) 3 was applicable only to a sale of securities "by an owner." (See section quoted above.) In 1931 came the amendment reading "by or on behalf of a vendor" which may be assumed to have been inspired by the decision in the *Van Wyke* case, since the Legislature is presumed to have known of and given consideration to prior decisions of the courts with reference to a statute when adopting amendments thereto. *Whitley v. Superior Court*, 18 Cal.2d 75, 78, 113 P.2d 449; *McColgan v. Jones, Hubbard & Donnell, Inc.*, 11 Cal.2d 243, 247, 78 P.2d 1010; *In re Halcomb*, 21 Cal.2d 126, 129, 130 P.2d 384; *Johnson v. Sanches*, 56 Cal.App.2d 115, 117, 132 P.2d 853.

[5] When a statute relating to one subject contains a provision that is omitted from a similar statute concerning the same or a cognate subject, or when an express provision of a statute is deleted or new words or phrases are inserted, it is evidence that the intention of the Legislature in the later statute was different from that in the former. *Johnson v. Sanches*, supra; *Whitley v. Superior Court*, supra, 18 Cal.App.2d at page 79, 113 P.2d at page 449; *People v. Valentine*, 28 Cal.2d 121, 142, 169 P.2d 1; *Estate of Garthwaite*, 131 Cal.App. 321, 326, 21 P.2d 465.

[6] A statute should be so construed, if reasonably possible, as to give effect to each sentence, word and phrase used therein, and words used in a statute should be given their ordinary meaning and receive sensible construction. *County of Los Angeles v. Frisbie*, 19 Cal.2d 634, 641-642, 122 P.2d 526; *County of Los Angeles v. Emme*, 42 Cal.App.2d 239, 242, 108 P.2d 695. A construction should be avoided that implies the Legislature was ignorant of the meaning of the language employed or that the words of the statute were inserted in vain. *Prager v. Isreal*, 15 Cal.2d 89, 93, 98 P.2d 729.

Under the foregoing rules of statutory construction it must be held that the words "on behalf of" were not inserted in vain and giving those words their ordinary meaning we conclude that by the amendment of 1931 the Legislature intended to change the former exception by enlarging it to exclude sales made by any person other than the owner and therefore the provisions regarding a license do not apply to sales by a person who sells another's personally owned shares on behalf of such owner on the latter's account and not for the benefit of the issuer or an underwriter.

Furthermore, subdivision 10 of section 2(a) includes in the term "broker" every person (other than an agent) engaged in selling a security issued by others including those of the classes listed in certain numbered paragraphs of subdivision (b) of section 2 but excluding some by failing to include them, the excluded securities being thereby exempted from the provisions of the statute. Following subdivision 14 of section 2(b) it is provided that brokers are subject to the provisions of the act with respect to all transactions involving "the foregoing classes of securities enumerated in this subdivision (b), excepting those securities hereinabove specified in paragraphs 8, 10 and 11 of this subdivision (b)." The provision in subdivision 10 of section 2(a) defining broker as one selling certain specified securities, some, but not all, being exempt and the proviso following subdivision 14 were added in 1933. Stats.1933, ch. 898, pp. 2308, 2310. Had it been the intent of the Legislature to require a person to be licensed as a broker in order to sell securities exempted from "the provisions of this act" by section 2(c) 3 it must be assumed it would have so declared in 1933 when it amended sections 2(a) 10 and 2(b) 14.

[7-9] Section 18 of the Corporate Securities Act declares that the wilful violation of the statute is a crime punishable by imprisonment in the county jail or state prison or by fine, or both. Stats.1931, ch. 423, pp. 937, 950.<sup>3</sup> Since the act is a penal statute it must be strictly construed and its import cannot be expanded to in-

clude acts not explicitly defined. Strict construction of legislative language is demanded when an act not forbidden by the common law is made criminal by statute. *Oakley v. Rosen*, 76 Cal.App.2d 310, 314, 173 P.2d 55. A licensing statute enacted for the protection of the public, imposing a penalty for its violation, will preclude an unlicensed person from recovering under his contract but such a statute cannot be construed beyond its plain intent and cannot be made applicable to persons other than those whom the Legislature clearly intended to include within its terms. *Henigson v. Bank of America Nat. Trust & Savings Ass'n*, 32 Cal.2d 240, 245, 195 P.2d 777; *Los Angeles Scenic Studios, Inc. v. Television, Inc.*, 17 Cal.App.2d 356, 359, 61 P.2d 1192; *Weingast v. Rialto Pastry Shop, Inc.*, 243 N.Y. 113, 152 N.E. 693, 694; *Salisbury v. Alskog*, 144 Wash. 88, 256 P. 1030-1031.

The case of *Van Wyke v. Burrows*, 98 Cal.App. 415, 277 P. 190, supra, relied on by defendant manifestly is not relevant to the instant case: (1) There was no contention that the sale that gave rise to the action was an exempt transaction. (2) The plaintiff relied on the fact that this was a single transaction and therefore a license was not a prerequisite to his recovering his commission. (3) When the case was decided in 1929, section 2(c) 3, as we have pointed out, exempted sales only when made *by the owner*, and the section was amended at the next session of the Legislature by the insertion of the words "*on behalf of a vendor*." The other cases cited by defendants state the familiar rule with reference to the inability of an unlicensed person to recover for his services if the statute covering the subject of his activities requires him to possess a license in order to engage in his business.

Defendants cite *Rhode v. Bartholomew*, 94 Cal.App.2d 272, 210 P.2d 768. The court there held that the plaintiff was a broker in the transaction and since he did not have a license from the Commissioner of Corporations he was not entitled to a commission. The case is not an authority

3. The contents of section 18 are now in section 26104 of the Corporations Code.

in the instant case since (1) exemption of the sale from the provisions of the statute was not claimed, (2) section 2(c) 3 of the Corporate Securities Act is not mentioned in the opinion and was not cited in the briefs.

[10] Since (1) it was not necessary that plaintiff secure a license or permit from the Commissioner of Corporations in order to be entitled to sell defendants' personally owned securities, and (2) the pleadings present triable issues of fact raised by the denials and the special defenses set up in defendants' answer, among them whether plaintiff procured a buyer ready, able and willing to purchase the shares covered by his contract with defendants and whether the term of the contract had expired prior to his having obtained a purchaser (there are no doubt others), the rendering of a summary judgment was error.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concur.



97 Cal.App.2d 709

**MURRILL v. STATE BOARD OF ACCOUNTANCY OF DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS et al.**

Civ. 17263.

District Court of Appeal, Second District,  
Division 1, California.

May 24, 1950.

Lynn B. Murrill brought a proceeding for a writ of mandate to compel the State Board of Accountancy of the Department of Professional and Vocational Standards to set aside and rescind its order revoking petitioner's license to practice public accountancy. From an order of the Superior Court of Los Angeles County, Clarence M. Hanson, J., sustaining a general demurrer to the petition, and a judgment of such court, deny-

ing the petition, affirming revocation of the license and discharging an alternative writ, petitioner appealed. The District Court of Appeal, Drapeau, J., held that revocation of the license because of petitioner's conviction in a federal court on his plea of guilty of violating a federal statute by failing to supply information for income tax assessments in returns made by him for certain clients before the effective date of the State Accountancy Act was not *ex post facto* or retrospective and hence void as depriving petitioner of a vested right, and that the conviction was for a crime of which an essential element is dishonesty, deceit or fraud.

Judgment affirmed, and appeal from order dismissed.

**1. Mandamus  $\Rightarrow$  187(2)**

An order sustaining general demurrer to mandamus petition is not appealable.

**2. Constitutional law  $\Rightarrow$  197**

The State Accountancy Board's revocation of public accountant's license because of his conviction in federal court on plea of guilty of violating federal statute by failing to supply information for income tax assessments in returns made by him for certain clients before effective date of State Accountancy Act was not invalid as *ex post facto*; such revocation not being penal. Business and Professions Code, § 5100(b); 26 U.S.C.A. § 145(a).

**3. Constitutional law  $\Rightarrow$  197**

The phrase, "*ex post facto* laws," in state and federal constitutions is inapplicable to civil laws, but applies only to penal and criminal laws providing punishment for antecedent acts not punishable at all or not punishable to extent or in manner prescribed by such laws when committed.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "*Ex Post Facto* Law".

**4. Constitutional law  $\Rightarrow$  101, 190**

A licensed public accountant did not acquire vested right to practice accountancy because of his registration certificate, so that State Accountancy Board's revocation of his license because of his conviction of violating federal income tax law before effective date of State Accountancy Act was not retrospective and void as depriving him of vested right. Business and Profes-



sions Code, § 5100(b); 26 U.S.C.A. § 145 (a).

#### 5. Constitutional law ⇨296(1)

The general right to engage in trade, profession or business is subject to state's inherent power to make necessary rules and regulations respecting use and enjoyment of property for preservation of public health, morals, comfort, order and safety, and such regulations do not deprive owners of property without due process of law.

#### 6. Constitutional law ⇨101

A person licensed to engage in business, trade or occupation subject to legislative control under police powers cannot acquire vested right to continue therein.

#### 7. Licenses ⇨38

Revocation of license to engage in trade or profession is not penal, and its only purpose is to protect public from incompetence and lack of integrity in those practicing trades and professions.

#### 8. Licenses ⇨38

A licensed public accountant, pleading guilty in federal court of willful failure to supply information required by federal statute for income tax assessments in returns made by him for certain clients, is not entitled to presumption that conviction on such plea was for mere negligence, honest mistake or inadvertence, which are least offenses punishable under statute, because there is no factual record of proceedings in that court, as defense to proceeding before State Accountancy Board for revocation of his license because of such conviction. Business and Professions Code, § 5100(b); 26 U.S.C.A. § 145(a).

#### 9. Criminal law ⇨20

The word "willfully," as used in criminal statutes, implies purpose or willingness to commit act and guilty person's knowledge of what he is doing, intent to do it, and free agency, though evil intent is not required. Pen.Code, § 7, subd. 1.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Willfully".

#### 10. Licenses ⇨38

A licensed public accountant's conviction in federal court on his plea of guilty

of violating federal statute by willfully failing to supply information for income tax assessments in returns made by him for certain clients was for crime of which essential element is dishonesty, deceit or fraud, so as to authorize revocation of his license by State Accountancy Board. Business and Professions Code, § 5100(b); 26 U.S.C.A. § 145(a).

George Finucane, Jr., Arroyo Glande, for appellant.

Fred N. Howser, Attorney General, and Alberta Gattone, Deputy Attorney General, for respondents.

DRAPEAU, Justice.

Petitioner seeks a writ of mandate to compel the State Board of Accountancy to set aside and rescind its order revoking his license to practice public accountancy.

On June 16, 1947, in the United States District Court at Los Angeles, petitioner entered a plea of guilty to charges of violating section 145(a) of Title 26 U.S.C.A., to-wit: "failure to supply information for the assessment of income tax" in connection with returns therefor made by him for certain of his clients for the year 1944. He was sentenced to one year's imprisonment on each of two counts, such sentences to run consecutively. The sentence on count 2 was suspended and petitioner was placed on probation for a period of two years.

On April 27, 1948, petitioner was cited to appear before respondent board for disciplinary action on a charge of unprofessional conduct, to-wit: that he "did wilfully and knowingly hide, or cause to be hidden, the true income of a client, in order to defraud the United States Government of its true and rightful assessment of taxes." Said citation also alleged that petitioner had theretofore been convicted of such offense upon his plea of guilty; and that such conviction constituted ground for revocation of his license pursuant to section 5100(b) of the Business & Professions Code.

Upon hearing respondent board adjudged petitioner guilty of unprofessional conduct, as charged, and revoked his license to practice public accountancy in California. An alternative writ was issued in the instant proceeding and upon return thereof a general demurrer to the petition was sustained without leave to amend.

[1] Petitioner appeals from the order sustaining the demurrer, and also from the judgment denying his petition for writ of mandate, affirming revocation of his license and discharging the alternative writ. The order sustaining the demurrer is not appealable. *Ross v. O'Brien*, 1 Cal. App.2d 496, 498, 36 P.2d 1108.

[2,3] Appellant urges that the violations of the income tax law occurred prior to the effective date of the State Accountancy Act; hence the application given to section 5100(b) of the Business & Professions Code is (1) *ex post facto* as to him; and (2) retrospective and therefore void as depriving him of a vested right.

*Foster v. Board of Police Commissioners*, 102 Cal. 483, 490-492, 37 P. 763, 765, 41 Am. St.Rep. 194, involved the validity of an ordinance revoking a license to sell liquor on the ground of misconduct prior to the issue of the license. The Supreme Court in sustaining the ordinance commented as follows:

"The ordinance in question is not an *ex post facto* law, within the meaning of the constitution of this state or of the United States. In *Watson v. Mercer*, 8 Pet. [88], 110, [8 L.Ed. 876], it was said: 'The phrase, "*ex post facto* laws," is not applicable to civil laws, but to penal and criminal laws, which punish a party for acts antecedently done, which were not punishable at all, or not punishable to the extent or in the manner prescribed.'

"In *Ogden v. Saunders*, 12 Wheat. [213], 267, [6 L.Ed. 606], in speaking of bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, it was said:

"The first two of these prohibitions apply to laws of a criminal, and the last to laws of a civil character."

"And such is the uniform construction given by all the authorities.

"The ordinance in question punishes no past act committed, done, or suffered to be done by appellant. It simply furnishes a standard, applicable to all persons, by which their fitness to conduct a business in itself dangerous to the morals and good order of the city shall be measured. \* \* \*

"But appellant contends that the ordinance, properly construed, applies only to those who have, *since its adoption*, violated its provisions. But this construction cannot be sustained. The language is too explicit to admit it. Though not an *ex post facto* law, it is retrospective in so far as it determines from the past conduct of the party his fitness for the proposed business. Felons are also excluded from obtaining such license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons, as a class. Nor can we perceive why such evidence should be more conclusive of unfitness, were the act done after the passage of the ordinance than if done before." See, also, *McDonough v. Goodcell*, 13 Cal. 2d 741, 750, 91 P. 1035, 123 A.L.R. 1205.

[4-6] Appellant did not acquire a vested right to practice accountancy by reason of his registration certificate. As was so aptly stated in *Gregory v. Hecke*, 73 Cal.App. 268, 283, 238 P. 787, 793: "The general right to engage in a trade, profession or business is subject to the power inherent in the state to make necessary rules and regulations respecting the use and enjoyment of property necessary for the preservation of the public health, morals, comfort, order, and safety; such regulations do not deprive owners of property without due process of law. 12 C.J., p. 1272, § 1074. No person can acquire a vested right to continue, when once licensed, in a business, trade, or occupation which is subject to legislative control under the police powers. 6 R.C.L. 482, § 481; *Hurtado v. People of State of California*, 110 U.S. 516, 4 S.Ct. 111 [292], 28 L.Ed. 232, [see, also *Rose's U.S. Notes*]."

[7] Revocation of a license is not penal in any respect, and its only purpose is to

protect the public from incompetence and lack of integrity in those practicing trades and professions.

Pursuant to section 5100(b) supra, the certificate of an accountant may be revoked upon the ground "(b) Conviction of any crime, an essential element of which is dishonesty, deceit or fraud."

Appellant contends that the accusation before the State Board of Accountancy is fatally defective, "in that it does not appear that dishonesty, deceit or fraud is an essential element of the crime upon which plaintiff was convicted."

[8] Section 145(a), Title 26 U.S.C.A., reads: "*Failure to file returns, submit information, or pay tax.* Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who *willfully fails to* pay such estimated tax or tax, make such return or declaration, keep such records, or *supply such information*, at the time or times required by law or regulations, *shall*, in addition to other penalties provided by law, *be guilty of a misdemeanor* and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution." (Emphasis included and added.)

In connection with this point, appellant argues that since he pleaded guilty in Federal Court and there is no factual record of the proceedings therein, he is entitled to the presumption that the conviction was for the least offense punishable under the statute, i. e., mere negligence, honest mistake or inadvertence.

By pleading guilty to a *willful failure* to supply the information required by section 145(a), Title 26 U.S.C.A., such defense is not now available to petitioner.

"A willful differs essentially from a negligent act. The one is positive and the other negative. \* \* \* In common parlance, 'willful' is used in the sense of 'in-

tentional', as distinguished from 'accidental' or 'involuntary.'" Black's Law Dictionary, 2d Ed.

[9] "The word 'wilfully' as used in criminal statutes implies a purpose or willingness to commit the act (Pen.Code, § 7, subd. 1), and although it does not require an evil intent, it implies that the person knows what he is doing, intends to do what he is doing, and is a free agent." In re Trombley, 31 Cal.2d 801, 807, 193 P.2d 734, 739.

Rheb v. Bar Ass'n of Baltimore City, 186 Md. 200, 46 A.2d 289, 291, was a proceeding for disbarment of an attorney, who had theretofore pleaded guilty in Federal Court to an indictment charging a violation of section 145(a), Title 26 U.S.C.A. (here under consideration).

The statutory grounds for disbarment of an attorney in Maryland are "professional misconduct, malpractice, fraud, deceit, crime involving moral turpitude, or conduct prejudicial to the administration of justice." Appellant there contended that the facts and circumstances upon which he was convicted in the Federal Court did not (1) establish his guilt of a crime involving moral turpitude; or (2) sufficiently connect him with deceit or misrepresentation.

The court stated: "The appellant testified (at the disbarment hearing) that he had been practicing law since 1932, but that he had never filed an income tax return of his personal income, Federal or State. He admitted that he made \$6,500 in 1939 (as to which limitations prevented indictment), that he made from \$7,500 to \$10,000 in each of the years 1940 and 1941, and 'a top of \$7,500 in 1942.' He admitted knowing the requirements of law in regard to returns, testified that he made returns for others, attributed his own failure to 'just pure neglect.' These admissions, coupled with his admitted failure to keep adequate records, justify a finding that he deliberately failed to make returns or keep records, for the purpose of cheating the Federal Government and the State of Maryland out of taxes justly due. We think it is immaterial whether the federal crime is to be classed as a misdemeanor or a felony, an act of



omission or commission. *Such conduct might properly be characterized as fraud or deceit*, even if it did not involve moral turpitude. However, the authorities support the proposition that a crime of this character, even though not a felony, involves moral turpitude."

[10] Likewise in the case under review, appellant was convicted of a crime, an essential element of which may properly be characterized as dishonesty, deceit or fraud. He was convicted after the effective date of the State Accountancy Act and his license was revoked because of that conviction.

For the reasons stated, the judgment is affirmed, and the purported appeal from the order is dismissed.

WHITE, P. J., and DORAN, J., concur.



97 Cal.App.2d 829

**PACIFIC COAST TITLE INS. CO. v. LAND  
TITLE INS. CO. et al.**

Civ. 17376.

District Court of Appeal, Second District,  
Division 1, California.

May 31, 1950.

Pacific Coast Title Insurance Company, a corporation, sued Land Title Insurance Company, a corporation, and United Title Guaranty Company, a corporation, to enjoin use of business and trade secrets, the breach of agreement between defendant United Title Guaranty Company and plaintiff's assignor and plaintiff, and for other relief, and defendant United Title Guaranty Company filed a cross-complaint, and defendants moved for a change of venue for convenience of witnesses and to meet ends of justice. The Superior Court of the County of Los Angeles, William B. McKesson, J., denied defendants' motion for change of venue and defendants appealed. The District Court of Appeal, White, P. J., held that trial court did not abuse its discretion in denying the motion. Judgment and order affirmed.

**1. Appeal and error ⇨965**

In reviewing an order denying a motion for change of venue on ground of convenience of witnesses, the Appellate Court can only reverse the order upon a clear showing of abuse of discretion.

**2. Venue ⇨52(1)**

In action to enjoin breach of agreement whereunder defendant was to issue in specified county, only policies of title insurance written by plaintiff, trial judge under the evidence did not abuse discretion in denying defendant's motion for change of venue from county in which action was brought, which was a county in which principal office of a defendant was located, to county in which agreements were made, executed and performable, which motion was made on ground of convenience of witnesses.

**3. Venue ⇨52(3)**

In passing on a motion for change of venue on ground of convenience of witnesses court is not entitled to consider the convenience of an expert witness, where the witness has no personal knowledge of facts involved, although he has personal knowledge of the details of the industry derived from personal observation and training.

**4. Venue ⇨68**

On defendants' motion for change of venue for convenience of witnesses, burden of proof was upon defendants to show inconvenience of witnesses.

**5. Appeal and error ⇨843(2)**

Where defendants who moved for change of venue for convenience of witnesses did not sustain their burden of proof to show inconvenience of witnesses, other aspects would not be considered on appeal from judgment and order denying motion.

Paul Briskin, Riverside, Faries & McDowell, Charles E. McDowell, McIntyre Faries and Willard J. Stone, Los Angeles, for appellants.

David H. Cannon, Los Angeles, for respondents.

WHITE, Presiding Justice.

Defendants have appealed from an order and judgment denying their motion for a change of the place of trial from the county of Los Angeles to the county of Riverside for the convenience of witnesses and to meet the ends of justice pursuant to section 397, subdivision 3, of the Code of Civil Procedure. It is claimed the denial of the motion constitutes an abuse of discretion.

Plaintiff filed suit against defendants to enjoin the use of business and trade secrets, the breach of agreements by defendant United Title Guaranty Company (hereinafter referred to as "United") with plaintiff's assignor and plaintiff, and for damages and loss of profits sustained by plaintiff as a result of the conspiracy of defendants inducing and resulting in the breach of said agreements.

Plaintiff's assignor and United allegedly entered into an agreement whereby United would issue in Riverside County, California, only policies of title insurance written by plaintiff's assignor. Plaintiff became the assignee of said agreement and United accepted and ratified the assignment.

Both defendants filed demurrers which were overruled, and they then filed answers pleading the general issue together with various special defenses. United also filed a cross-complaint for declaratory relief to which plaintiff and cross-defendant filed its answer.

Defendants then moved for a change of venue for the convenience of witnesses and to meet the ends of justice, which was denied without prejudice February 1, 1949, upon insufficient showing as to whether certain persons named would testify as to material facts within their personal knowledge and insufficient showing of inconvenience. The present motion on the same grounds was filed April 18, 1949, and was denied May 4, 1949, resulting in this appeal.

The affidavits filed by defendants in support of their motion in substance point out that the agreements were made, executed, and performable only in Riverside County and that the policies pertained only to real or personal property in Riverside County;

that plaintiff has alleged costs and efforts were expended in solicitation and advertising for the purpose of building up the good will and business standing of defendant United, plaintiff's predecessor, and plaintiff; that one of the defenses will be that plaintiff did no soliciting or advertising; and that as a further defense defendants will contend a material failure of consideration excusing the defendant United from performance of its agreements in that the policies of plaintiff were not merchantable or salable or vendible.

The affidavits set forth the names of 35 persons together with their residences and places of business as material witnesses for the defense who will be subpoenaed and "who will testify if called as a witness." Of the 35 persons named, eleven are connected with banks or lending institutions and the substance of their testimony will be that their firms would and did refuse to make loans if the policies of plaintiff or plaintiff's predecessor were evidences of ownership and that said firms were not personally solicited by plaintiff or plaintiff's predecessor for the purpose of establishing good will; four are escrow office owners and will testify they were not solicited personally or through advertising and that purchasers in Riverside County refused policies of plaintiff and plaintiff's predecessor; seven are engaged in the real estate business and will testify they were not contacted through advertising or personal solicitation; four are connected with Riverside title companies and will testify that reports and insurance policies are based on public records and no trade secrets are involved; nine are owners and publishers of newspapers and will testify neither plaintiff nor plaintiff's predecessor advertised therein. The witnesses are said to be located from 60 to 200 miles from Los Angeles, that travel and trial time would entail the loss of at least one day from employment; that eleven witnesses are not subject to subpoena and defendants would be deprived of their personal appearance under Section 1989 of the Code of Civil Procedure.

In the affidavit filed in opposition to the motion, it is pointed out that defendants

waited two and one half months after denial of this original motion before filing another motion and that plaintiff therefore suffered further delay and great inconvenience, that there is no showing the witnesses would refuse to testify in Los Angeles, that the plaintiff will stipulate to the taking of depositions at such time as the court may fix and will stipulate that the witnesses named by defendants' affiants will testify as stated except that defendants or their witnesses must furnish the names and addresses of the purchasers refusing to accept the policies of plaintiff.

On appeal appellants reiterate that the convenience of witnesses requires a change of the place of trial:

(a) that while the action was "properly" filed in Los Angeles County in that the principal office of one of the defendants is in that county, nevertheless the action involves only Riverside County;

(b) that the principal issue will be the presence or absence of plaintiff's good will in Riverside County and evidence thereof can be given only by residents of Riverside County;

(c) that in addition to the time lost from business of the witnesses, eleven of the witnesses are not amenable to a subpoena issued by the Los Angeles Court;

(d) that plaintiff has made no showing that its evidence would not be equally available in Riverside County or that any of its witnesses would be inconvenienced;

(e) that the inconvenience to defendant's witnesses is not remedied by plaintiff's offer to stipulate to their testimony as the correctness of testimony is to a large measure determined by a witness's personal appearance upon the stand; and

(f) that the offer of plaintiff to stipulate to depositions is of little worth as depositions would entail prohibitive costs and personal testimony is far more desirable to give weight to credibility.

[1,2] Appellants concede that the action was properly filed in Los Angeles County. The question on appeal is solely one of abuse of discretion on the part of the trial court in denying the motion. In reviewing an order denying a motion for

change of place of trial on the ground of convenience of witnesses, the appellate court can only reverse the order upon a clear showing of abuse of discretion, *Di Giorgio Fruit Corp. v. Zachary*, 60 Cal. App.2d 560, 141 P.2d 8. After reading the reported cases wherein orders of the trial court granting or denying motions for change of venue on the ground of convenience of witnesses have been reviewed on appeal, it is manifest that the appellate court must base its determination of an abuse of discretion on facts peculiar to each case. Keeping in mind that the principal office of one of the appellants is in Los Angeles County, that the officers of respondent do not reside in Riverside County, that all of respondent's witnesses do not reside in Riverside County, and after a critical examination of the alleged convenience, competency, materiality, and character of appellants' witnesses, this Court is unable to say as a matter of law that the trial judge in the instant case abused the discretion vested in him in denying appellants' motion.

In establishing the materiality of the testimony to be given by the witnesses named by appellants in their affidavits, the latter have questioned the legality and validity of the original agreement between United and respondent's predecessor and whether the agreement was binding in view of lack of mutuality and consideration. These are matters to be determined upon trial of the action on its merits. For purposes of this appeal and in order to view the matter in a light most favorable to the materiality of the testimony of appellants' witnesses, it will be assumed that upon the trial of this action on its merits the trial court will find that there was a legal, valid, and binding contract but that the merchantability of respondent's policies is a constructive condition precedent to performance by defendant United.

[3] A group of four witnesses named by appellants are all connected with Riverside title companies and will rebut the allegation of respondent that trade secrets are involved by testimony that reports of title companies and insurance policies are based on public records. In passing on a



motion for change of venue on the ground of convenience of witnesses the court is not entitled to consider the convenience of an expert witness, where the witness has no personal knowledge of the facts involved, although he has personal knowledge of the details of the industry derived from personal observation and training, *Barnett v. United Oil Co.*, 5 Cal.App.2d 175, 42 P.2d 656.

By the testimony of the remaining thirty-one witnesses appellants seek to establish: (1) that the policies were nonmerchantable; and (2) that no monies and no effort were expended by respondent for the purpose of building up good will or business standing, rebutting an allegation of respondent as to costs of advertising and solicitation.

Fifteen witnesses are to testify to the non-merchantability of the policies. Respondent has pointed out that the affidavits in support of the motion do not state that the persons named will refuse to testify if the matter is tried in Los Angeles County, but rather that they have told appellants' attorney that they will testify. Aside from that, it is noted that of the fifteen witnesses, eleven are from various branches of four or five banks. Of these eleven, five are not amenable to subpoena. The remaining seven are not over two hours' driving time from Los Angeles County. Of these seven, three are without rail service to Los Angeles County.

Of the fifteen witnesses to establish non-merchantability, four are escrow office owners. Of these four, two are not amenable to subpoena—the remaining two are not over two hours' driving time from Los Angeles County.

Thus of the fifteen witnesses to establish the defense of non-merchantability, a total of eight are amenable to subpoena and are within two hours' driving time of Los Angeles County. It can hardly be said as a matter of law that there has been an abuse of discretion on the part of the trial court in denying a motion for change of venue on the ground of convenience of witnesses where the affidavits in support of said motion merely set forth two hours' travel time and the loss of at least one busi-

ness day for both trial and travel time. The seven witnesses of this group of fifteen not amenable to subpoena would only offer cumulative testimony and the respondent has stipulated that they would so testify. While it is true as appellants contend that an offer to stipulate to testimony is not sufficient to defeat the motion for a change of venue because it does not provide that the facts sought to be established by the witnesses will be admitted at the trial and the trier of facts would be denied the opportunity of observing the appearance of such witnesses upon the stand and the manner in which they gave their testimony—factors that in no small degree aid in the determination of the truth and correctness of testimony, *Nelson v. Enos*, 47 Cal.App. 2d 79, 81, 117 P.2d 429, nevertheless, in the instant case, the testimony of the witnesses in question would be no more than cumulative. And the testimony of the other eight witnesses who make a personal appearance upon the stand would suffice to enable the trier of fact to determine the truth or falsity of the testimony as a whole.

All thirty-one witnesses are to testify to the second defense set forth in the affidavits supporting the motion, either that they were not personally solicited or that the respondent did no advertising. Of the remaining sixteen, seven are connected with real estate businesses—all are amenable to subpoena and are within one and one-fourth hours' travel time to Los Angeles County. The remaining nine witnesses are connected with newspapers. Four of them are not amenable to process. Five are within two hours' driving time to Los Angeles County. Two of the five are without rail service.

The same conclusion as to convenience of witnesses would be applicable to these sixteen witnesses as was applicable to the above-mentioned fifteen witnesses.

Reading the record as a whole, it cannot be said that the principal issue will be the presence or absence of respondent's good will in Riverside County nor that the action involves only Riverside County inasmuch as there is an allegation by respondent that defendant United entered into agreement with respondent with full knowledge of the non-merchantability of its policies.

[4, 5] As to another of appellants' contentions on appeal not yet considered, respondent was under no duty to show that its evidence would not be equally available in Riverside County or that any of its witnesses would be inconvenienced. The burden of proof is upon the moving party to show inconvenience of witnesses, 25 Cal. Jur., 910; Carr v. Stern, 17 Cal.App. 397, 408, 120 P. 35, and if the moving party fails therein, there is no reason to consider other aspects.

As to the insufficiency of the offer to stipulate to the taking of depositions in view of cost and the greater desirability of personal testimony, by reason of the foregoing discussion as to the witnesses of appellants, the matter of depositions need not be considered.

The judgment and order are affirmed.

DORAN and DRAPEAU, JJ., concur.



97 Cal.App.2d 714

**RIESENBERG v. RIESENBERG.**

Civ. 17293.

District Court of Appeal, Second District,  
Division 3, California.

May 24, 1950.

Action for divorce by William F. Riesenber against Renee F. Riesenber. The Superior Court of Los Angeles County, Kurtz Kauffman, J., rendered an interlocutory judgment of divorce for plaintiff, and defendant appealed. The District Court of Appeal, Vallée, J., held that evidence showing that husband only transferred property in joint tenancy for convenience reasons and that it was orally agreed that property should remain his separate property supported finding that such property was separate property of husband.

Affirmed.

**1. Husband and wife ⇨264**

In divorce action evidence showing that husband transferred property constituting his separate property in joint tenancy

for convenience only and that it was orally agreed between spouses that property should remain his separate property supported finding that such property was separate property of husband.

**2. Appeal and error ⇨1012(1)**

The rule that evidence in order to establish a particular fact must be clear and convincing is directed to trial court.

**3. Appeal and error ⇨1012(1)**

Whether evidence is clear and convincing must be determined by the trial court and reviewing court must accept such determination as conclusive if there is substantial evidence to support it.

Louis Naiditch, Los Angeles, for appellant.

Arthur A. Jones, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from an interlocutory judgment of divorce granted plaintiff.

At the time the parties married, plaintiff husband owned real and personal property of the value of about \$26,400; defendant wife owned personal property consisting of stocks and bonds of the value of about \$5000. Shortly thereafter plaintiff transferred most of his separate property to defendant and himself as joint tenants, and defendant transferred her separate property to plaintiff and herself as joint tenants. During their married life the parties deposited income from the properties in joint tenancy bank accounts, and bonds purchased were issued in joint tenancy. After the parties separated and shortly prior to the beginning of this action, plaintiff transferred and delivered to defendant stocks and bonds of the value of \$5000. After the separation he withdrew money from joint tenancy bank accounts and open accounts in his name alone.

The court found that certain of the property standing in joint tenancy and the bank accounts which plaintiff had transferred from joint tenancy into his name were his separate property; that the household furniture and furnishings, with minor excep-

tions, were the separate property of the wife; that bonds of the face value of \$1100 were community property and should be divided one-half to each party; and that the stocks and bonds of the value of \$5000 transferred by plaintiff to defendant after the separation were her separate property. The judgment awarded the property accordingly. Defendant contends the evidence does not support the findings that the property standing in joint tenancy and the bank accounts which plaintiff transferred from joint tenancy to his name alone are the separate property of plaintiff.

[1] Plaintiff testified that about 30 days after the parties married defendant suggested it was customary to put property in joint tenancy for the principal reason that in the event of his death she would acquire the property and not have to pay inheritance taxes; that he said "this" was his separate property and he would agree to putting it in joint tenancy only if it remained his separate property and on demand she would reconvey it to him; he said he would do the same thing and reconvey her separate property. Plaintiff testified further that on each occasion an item of property was transferred in joint tenancy, the parties orally agreed that property which was the separate property of either should remain such; that it was transferred in joint tenancy "as a convenience only"; and that on demand of either party his or her separate property would be reconveyed. This evidence is sufficient to support the findings attacked. *Huber v. Huber*, 27 Cal.2d 784, 167 P.2d 708; *LaMar v. LaMar*, 30 Cal.2d 898, 903, 186 P.2d 678; *Swallers v. Swallers*, 89 Cal. App.2d 458, 201 P.2d 23; *Bassi v. Bassi*, 89 Cal.App.2d 886, 202 P.2d 96; *Hopkins v. Detrick*, 97 Cal.App.2d 50, 217 P.2d 78; cf. *Sears v. Rule*, 27 Cal.2d 131, 142, 163 P.2d 443; *Rogers v. Rogers*, 86 Cal.App.2d 817, 820, 195 P.2d 890.

[2, 3] Defendant argues that the testimony of plaintiff with respect to the agreement was not clear and convincing, and that it was dispelled by his oral and written declarations and conduct indicating that at all times he considered he and defendant were the owners of the property as joint tenants. "The rule that to establish a par-

ticular fact the evidence must be clear and convincing is directed to the trial courts. Whether the evidence is clear and convincing must be determined by the trial court and a reviewing court must accept that determination as conclusive if there is substantial evidence to support it. *Baines v. Zuieback*, 84 Cal.App.2d 483, 488, 191 P.2d 67." *Trancoso v. Trancoso*, 96 Cal.App.2d 797, 216 P.2d 172, 173. The evidence which defendant asserts dispelled the testimony of plaintiff as to the agreement did nothing more than create a conflict which the trial court resolved against her.

What defendant asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own. There is much evidence which would have supported contrary findings. That the trier of fact rejected that evidence does not impeach the soundness of his conclusions. Defendant has failed to establish any greater grievance here than she might in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the opposite party. Such a choice between two permissible views of the weight of the evidence is not error.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



97 Cal.App.2d 606

PIKE et al. v. HAYDEN et al.

HAYDEN et al. v. PIKE et al.

Civ. 4126, 4127.

District Court of Appeal, Fourth District.  
California.

May 17, 1950.

Rehearing Denied June 5, 1950.

Hearing Denied July 13, 1950.

Milton Pike and Thelma H. Pike sued Mark Hayden and Bertha Hayden in unlawful detainer to recover a service station and cafe in possession of defendants, and Mark Hayden and Bertha Hayden sued Milton Pike and Thelma H. Pike for specific performance of an agreement whereunder a



pre-existing lease between the Pikes as landlords and one Cerny and his wife, as tenants, was to be cancelled and the Haydens were to be given a lease by the Pikes. The cases were consolidated for trial. The Superior Court of San Bernardino County, A. D. Mitchell, J., denied recovery in the unlawful detainer action and rendered judgment for the Haydens in the specific performance action, and the Pikes appealed. The District Court of Appeal, Griffin, Acting P. J., held, inter alia, that the agreement was not too indefinite for specific performance.

Judgments affirmed.

#### 1. Landlord and tenant ⇨115(1)

Where plaintiff landowners entered into written agreement whereunder pre-existing lease between plaintiffs and third persons was to be cancelled, and defendants were to be given a three year lease at rental specified in pre-existing lease, when defendants performed obligation under agreement to buy fixtures and merchandise from third persons, and defendants performed obligation to third persons, and pre-existing lease was cancelled, and defendants given possession and paid rent as rent became due pursuant to pre-existing lease, and were not in default of obligations, plaintiffs could not successfully claim that agreement was but month to month tenancy.

#### 2. Landlord and tenant ⇨116(4)

Where written agreement was entered into whereunder lease between plaintiff landowners and husband and wife as tenants was to be cancelled, and defendants were to be given a three year lease at rental specified in such lease when defendants performed their obligation under agreement, and plaintiff signed lease cancellation, and defendants performed obligation to husband and wife and were given possession, and defendants paid rent to plaintiffs as rent became due pursuant to such lease, although defendants had not been given new lease, and plaintiffs presented a new lease to defendants, conduct of parties sustained finding that prior lease had been cancelled.

#### 3. Specific performance ⇨28(3)

Where lease between landowners and third persons was to be cancelled and defendants were to be given a lease at rental

specified in cancelled lease when defendants performed obligation to third persons under agreement, and note was written on copy of original lease that lease by mutual consent of parties was cancelled, and date for cancellation was left blank, but date was to be filled in as of date defendants went into possession, and defendants performed obligation and went into possession and paid rent as of such date, date of commencement of term of lease was not too uncertain to entitle defendants to require landowners to specifically perform.

#### 4. Specific performance ⇨28(1)

A written agreement providing in effect that landowners and tenants agreed to cancel written lease of a gasoline service station and cafe, and that plaintiffs agreed to buy fixtures and merchandise owned by tenants, and that landowners agreed to lease premises to plaintiffs for three years under same financial arrangements as existed under lease to be cancelled, when plaintiffs performed their obligation to tenants under agreement, was not too uncertain for specific performance where provisions of original lease were specific and certain.

#### 5. Contracts ⇨155

Written agreement is to be interpreted most strongly against party who caused uncertainty to exist. Civ.Code, § 1654.

#### 6. Specific performance ⇨32(3)

Where landowners and tenants agreed to cancel lease, and plaintiffs agreed to buy tenants' fixtures and merchandise, and landowners agreed to lease to plaintiffs under same financial arrangement as existed under lease to be cancelled, when plaintiffs performed obligation under agreement, and plaintiffs signed note on copy of original lease that original lease was cancelled, and date of cancellation was to be date when plaintiffs took possession, and plaintiffs performed obligation to original tenants, were given possession, paid rental prescribed under original lease, and demanded execution of more formal agreement, agreement was not lacking in mutuality, and plaintiffs could require landowners to specifically perform.

### 7. Specific performance ☞6

Plaintiffs would be entitled to specific performance by landowners of agreement whereunder landowners and tenants agreed to cancel written lease, and plaintiffs agreed to buy tenants' fixtures and merchandise, and landowners agreed to lease premises to plaintiffs under same financial arrangements as existed under lease to be cancelled, notwithstanding any lack of mutuality of remedy, where any lack of mutuality of remedy was brought about by landowners' refusal to give plaintiffs the lease plaintiffs requested, containing agreed upon terms. Civ.Code, § 3386.

### 8. Specific performance ☞73

Agreement whereunder landowners and tenants agreed to cancel written lease, and plaintiffs agreed to buy tenants' fixtures and merchandise, and landowners agreed to lease premises to plaintiffs under same financial arrangements as existed under lease to be cancelled, did not require performance of personal services so as to preclude plaintiffs from being entitled to require landowners to specifically perform agreement, because of provisions requiring plaintiffs to keep involved service station open to the public for 24 hours a day and to conduct business under lease in an efficient manner.

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Wilson & Wilson, San Bernardino, for appellants.

Novack & Haberkorn, San Bernardino, for respondents.

GRIFFIN, Acting Presiding Justice.

Appellants owned a 10 acre tract of land in Baker, bisected by U. S. Highway 91. A service station and cafe known as "Pike's Mobile Station and Cafe" occupies a portion of the property lying south of the highway. On April 29, 1947, appellants, under a written lease, leased the service station and cafe to one Cerny and wife for a three-year term. By the terms thereof the lessees were required to and did pay to appellants \$600 as a last month's rental payment, and \$2,000 as liquidated damages in the event of the breach of its provisions.

About September 15, 1948, some matrimonial differences arose between the Cernys and on that date appellants, the Cernys and respondents Hayden, met in an attorney's office for the purpose of arranging for the transfer by the Cernys to the Haydens of their interest in the service station and cafe. It was there orally agreed, by all present, that instead of assigning the Cerny lease to the Haydens (which had only two years to run), the Cerny lease should be cancelled and a new lease for the term of three years should be given by the Pikes to the Haydens and that the sum of \$2,600, covering the guarantee and last month's rental deposit originally made by the Cernys with the lessors, should be held by the appellants for the benefit of respondents Hayden. It was then agreed that the Haydens would deposit \$3,500 in escrow, \$600 for the last month's rent, deposit of \$2,000 in advance guarantee, and \$900 to cover purchase price of inventory of cafe which was to be subsequently taken.

Respondents' attorney was too busy to draw a lease in accordance with these arrangements on September 15, the day of this meeting. All parties insisted on some written agreement to this effect. As a result thereof, on that same day, a written agreement was signed by the Pikes and Haydens reciting in part as follows: "Whereas" appellants are owners of the station and cafe; Cerny and wife are now leasing it; lessors and lessees have mutually agreed to cancel said lease; Haydens have agreed to purchase from Cernys the fixtures and stock of merchandise now owned by them; the Pikes "therefore \* \* \* agree \* \* \*" to lease said station and cafe to the Haydens, "for the term of three years, under the same financial arrangements as now exist between the" Pikes, as owners, and the Cernys, as lessees, "as soon as the deal between" the Cernys and the Haydens "is consummated". On September 15, 1948, the following note was written on one copy of the Cernys' lease: "By mutual consent of all parties hereto this lease is hereby cancelled as of the — day of September, 1948." It was signed by the Pikes and by Mr. Cerny. Mrs. Cerny refused to sign until she was assured of her portion

of the money to be received from the Haydens in consideration of the transfer. It was the testimony that the date of this cancellation was to be filled in as of the date when the Haydens went into possession and the Cernys left the premises. On September 18, the Cernys and the Haydens took inventory of the premises and on that same day the Haydens went into possession of the property and commenced payment to the appellants of \$600 per month as rental, as provided in the Cerny lease. Haydens also paid a portion of the purchase price of the lease to Cernys, outside of escrow. On September 22 Cernys and Haydens went into escrow. Haydens deposited \$3,500, covering the items previously mentioned. On September 23, Cernys admittedly received payment for the groceries and supplies in the cafe as established by the inventory. On September 20, appellants' attorney delivered two copies of the proposed new lease to the Pikes, but they did not inform respondents that such a lease had been prepared. The Haydens kept insisting that appellants obtain a written lease for them to sign. They continued to pay appellants \$600 per month rental. It was not until early in February, 1949, that appellants showed respondents the proposed lease that was delivered to appellants by their attorney in September, 1948. At that time appellants presented to respondents the proposed lease and demanded that it be returned by February 5. That proposed lease thus presented contained many more onerous terms and conditions than those contained in the Cerny lease. Among them was a provision that in the event a certain contract between the lessees and the General Petroleum Corporation was cancelled for "any reason" or "without reason", said lease would be cancelled and the lessees' \$2000 would be forfeited. There was likewise an additional provision for forfeiture of that sum in the event the premises should be destroyed by fire. There was testimony that the Haydens and the Pikes did agree upon certain changes that were to be made in some of the provisions of the proposed lease which provisions were not contained in the Cerny lease. On February 8, the appellants served upon the

Haydens a 30-day notice in writing to quit, and on March 11, commenced an action in unlawful detainer against respondents to recover the service station and cafe. This action involves 4 Civil 4126 on this appeal. In this action the Haydens pleaded as an equitable defense the memorandum of September 15, 1948, alleged that they took possession of the property under said agreement; that they have paid plaintiffs the sum of \$600 per month rent, and alleged that appellants orally agreed that the sum of \$2,000 and the sum of \$600 paid by the Cernys to plaintiffs under the terms of their written lease should be applied on the new lease to be executed; that respondents, relying upon their written and oral agreement, purchased the inventory and paid for the use of the cafe and gas service station; and alleged generally the facts above mentioned in connection with their agreement to execute the lease.

On May 11, the Haydens commenced an action against the Pikes to secure specific performance of the agreement which was pleaded in substantially the same form as the equitable defense in the unlawful detainer case which bears the number 4 Civil 4127 on this appeal. The two actions were consolidated for trial. The trial court denied recovery in the unlawful detainer action and in the specific performance action rendered judgment in favor of the Haydens and directed execution by the parties of a lease which was substantially in the same form as the Cerny lease. Judgment was entered accordingly. The Pikes have appealed.

Appellants' first contention in reference to the ejectment proceeding is that the evidence shows only a month to month tenancy; that respondents' only defense thereto is an equitable defense, is not one that equity would specifically enforce, and that since respondents did not show a superior right to possession they cannot successfully defend the action of plaintiffs, citing such cases as *Bruck v. Tucker*, 42 Cal. 346; *Bradbury v. Higginson*, 167 Cal. 553, 140 P. 254; and *Swasey v. Adair*, 88 Cal. 179, 181, 25 P. 1119.



[1] In the instant action appellants and respondents entered into a written agreement by which it was then and there agreed between them that lessors would lease the premises for three years at the rate specified in the Cerny lease, as soon as the deal between the Cernys and the Haydens was consummated. Apparently the deal between them was consummated and to their entire satisfaction. The Haydens were given possession under this writing and they were not in default in any of their obligations. Appellants may not now successfully claim that such agreement was but a month to month tenancy.

In *Schubert v. Lowe*, 193 Cal. 291, 295, 223 P. 550, the court held that while the defendant was not entitled to a judgment decreeing specific performance of the agreement to execute the lease, that nevertheless the part performance of such an agreement could be interposed as an equitable defense to plaintiff's attempt to wrest from them the possession of the premises by summary proceedings in unlawful detainer. See, also, *Gray v. Maier & Zobelein Brewery*, 2 Cal.App. 653, 84 P. 280. Likewise, in *Rishwain v. Smith*, 77 Cal.App. 2d 524, 175 P.2d 555, a factually similar question arose where a prior written agreement to lease was involved. The court stated, 77 Cal.App.2d at page 531, 175 P.2d at page 560: "That agreement was partly performed by the defendants' taking possession of the buildings and paying the stipulated rent. If a more formal lease was contemplated by the parties, as we think it was, the burden was on the plaintiffs to execute and present to the defendants such lease in substantial conformity with the expressed terms of the agreement. Plaintiffs failed to do so. They thereby breached their written agreement to lease the property. It follows that the defendants were not unlawfully withholding possession of the buildings, and the court properly determined that plaintiffs were entitled to recover nothing by their action. \* \* \* Under such circumstances it is immaterial that the defendants may not be entitled to specific performance of the agreement to lease in the unlawful detention proceeding."

[2] It does not appear that the agreement of September 15 was contingent on the written cancellation by all the parties named in the Cerny lease. The conduct of the parties clearly supports the finding that a cancellation of that lease was effected. *Baker v. Eilers Music Co.*, 26 Cal.App. 371, 374, 146 P. 1056; *Welcome v. Hess*, 90 Cal. 507, 512, 27 P. 369, 25 Am.St.Rep. 145; *Boswell v. Merrill*, 121 Cal.App. 476, 478, 9 P.2d 341; *Rognier v. Harnett*, 45 Cal.App.2d 570, 574, 114 P.2d 654; *State Guaranty Corp. v. Richardson*, 9 Cal.App.2d 287, 289, 49 P.2d 606.

As to the judgment decreeing specific performance, appellants argue that the agreement between the parties was too uncertain to be susceptible of specific performance in that (1) the commencement of the term thereof is uncertain; (2) that the memorandum was uncertain with respect to the contents of the lease; (3) that the signed agreement lacks mutuality; (4) that it requires personal performance of personal services by the lessee; and (5) that the findings are not supported by the evidence in this respect. Citing such cases as *Wineburgh v. Gay*, 27 Cal.App. 603, 150 P. 1003; *Rohan v. Proctor*, 61 Cal.App. 447, 214 P. 986; *Enlow v. Irwin*, 80 Cal.App. 98, 251 P. 658; *Martin v. Hall*, 219 Cal. 334, 26 P.2d 288; *Civ.Code*, sec. 3386; and *Moore v. Heron*, 108 Cal.App. 705, 292 P. 136.

[3] In none of the cases cited by appellants did the lessees have possession of the subject premises. Here, the lessees were let into possession by the lessors on September 18, the date agreed upon by the parties, and which was the date fixed by the court as the date of commencement of the lease. Respondents commenced paying rent as of that date. Appellants accepted these payments without objection over a period of months. There was sufficient certainty as to the date when the lease was to commence to support the court's finding.

[4,5] Secondly, the written agreement contained all the necessary terms to make a valid lease. *Losson v. Blodgett*, 1 Cal.App.2d 13, 36 P.2d 147. In *Levin v. Saroff*, 54 Cal.App. 285, 201 P. 961, 963,

it is stated: "To create a valid lease, but few points of mutual agreement are necessary: First, there must be a definite agreement as to the extent and boundary of the property leased; second, a definite and agreed term; and, third, a definite and agreed price of rental, and the time and manner of payment." (Citing cases.)

By reference, the agreement adopted the terms of the Cerny lease as to the "financial arrangements", which provisions were specific and certain. The description of the property was not fatally ambiguous or uncertain. *Beckett v. City of Paris Dry Goods Co.*, 14 Cal.2d 633, 637, 96 P.2d 122; *Guttman v. Berry*, 83 Cal.App.2d 507, 510, 189 P.2d 41. If there were to be other and added provisions in an additional lease to be subsequently prepared, the question of its terms and conditions, as agreed upon by the parties, was a factual question for the trial court to determine. The agreement was prepared by appellants' attorney. In case of uncertainty the agreement must be interpreted most strongly against the party who caused the uncertainty to exist. Civ.Code, sec. 1654.

[6] Third, the instrument is not lacking in mutuality. The Haydens signed the agreement and lease, took possession of the property, paid the rental prescribed, have performed all the obligations imposed by such agreement and have demanded the execution of a more formal agreement which appellants failed to furnish.

[7] In commenting on section 3386 of the Civil Code, the section relied upon by appellants, in *Miller v. Dyer*, 20 Cal.2d 526, 530, 127 P.2d 901, 141 A.L.R. 1428, the court said the rule was never considered applicable where the unavailability of the remedy to the party against whom relief was sought resulted from his own default, citing cases. Thus, it is evident that if there is any lack of mutuality of remedy, such lack was brought about by the appellants' refusal to give the respondents the lease they had requested, containing the terms upon which both parties had agreed. Under *Allen v. Dailey*, 92 Cal.App. 308, 268 P. 404, appellants are precluded from enforcing this claim.

[8] Under the fourth contention appellants argue that since the lease requires that the lessees shall keep the station "open to the public for twenty-four hours a day" and conduct all "business here under lease" in an efficient manner, etc., such provisions require the personal services of the lessees. These provisions are not unusual to such leases and do not constitute a contract of employment. The lease does not require the performance of personal service. *Harms v. Reed*, 73 Cal.App.2d 853, 862, 167 P.2d 747; *George v. Weston*, 26 Cal.App.2d 256, 266, 79 P.2d 110.

Lastly, the terms of the lease ordered executed follow closely the terms of the Cerny lease. The only variances do not materially affect or prejudice appellants' rights. The evidence fully supports the findings and judgments entered.

Judgments affirmed.

MUSSELL, J., and SHEPARD, Justice pro tem., concur.

Hearing denied; SCHAUER, J., dissenting.



97 Cal.App.2d 611

GERSICK v. SHILLING.

Civ. 14197.

District Court of Appeal, First District,  
Division 1, California.

May 22, 1950.

Gertrude A. Gersick sued Richard D. Shilling for injuries sustained when struck by defendant's automobile. Plaintiff's motion for new trial, on ground that the jury's award of \$1,500 as damages was inadequate, was denied and plaintiff appealed. The Court of Appeal, Peters, P. J., held that \$1,500 for injuries to plaintiff's head and thigh, and broken leg, was not inadequate as a matter of law.

Judgment affirmed.

**1. Appeal and error** **↪1004(3)**  
**Damages** **↪208(1)**

Amount of damages is a question of fact, which is for jury in first instance and secondly for trial judge on motion for new trial.

**2. Appeal and error** **↪1004(1)**

Normally, appellate court cannot interfere on question of damages unless facts suggest passion, prejudice or corruption on part of jury, or uncontradicted evidence demonstrates that award is insufficient as matter of law.

**3. Appeal and error** **↪948**

In determining whether there has been abuse of discretion, facts on issue of damage most favorable to respondent must be considered.

**4. Evidence** **↪571(1, 7)**

Jury was not bound by doctors' evaluation of their services and necessity therefor.

**5. Damages** **↪144**

Claim for loss of earnings, no matter how pleaded, is an item of general damage.

**6. Evidence** **↪571(1), 589**

Jury was not bound by testimony of doctors or of plaintiff as to extent of injuries, where jury saw plaintiff and observed her actions, and saw X-rays taken after accident.

**7. Damages** **↪132(15)**

\$1,500 to married woman for lacerations on head and thigh, and small fractures in leg, which allegedly would cause permanent instability in knee, was not inadequate as matter of law.

**8. Appeal and error** **↪1048(6)**  
**Damages** **↪182**

Permitting cross-examination of plaintiff to show that most of her hospital bills had been paid by insurance, and that plaintiff had drawn money from United States employment service for disability, was error, but was cured by instruction.

**9. Damages** **↪59**

Total or partial compensation received from a collateral source, wholly independ-

ent of wrongdoer, does not reduce damages recoverable.

**10. Appeal and error** **↪930(2)**

In determining whether instructions cured error in admission of testimony, reviewing court must presume that jury followed instructions.

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Willens & Boscoe, Stockton, for appellant.

Weinmann, Rode, Burnhill & Moffitt, Oakland, Cyril Viadro, San Francisco, of counsel, for respondent.

PETERS, Presiding Justice.

In a personal injury action, the jury brought in a verdict for plaintiff in the sum of \$1,500. Plaintiff moved for a new trial on the ground that the damages awarded were inadequate. The motion was denied, and plaintiff appeals on the sole ground that the damages awarded are inadequate as a matter of law.

There is ample, although conflicting, evidence to sustain the implied findings of the jury that defendant's negligence proximately caused the accident and resultant injuries, and that plaintiff was not contributively negligent. Since defendant did not move for a new trial, nor has he appealed, it is not necessary to review in detail the evidence on the issue of liability. Suffice it to say that the evidence shows that plaintiff, while crossing the street in a marked crosswalk, at about 7:15 a. m., April 29, 1947, was hit by an automobile being driven by defendant and going at less than 15 miles per hour. The evidence, although conflicting on all issues supports the implied findings that plaintiff had the right of way; that defendant negligently violated her rights; that such negligence was the proximate cause of the accident, and that plaintiff was not contributively negligent.

Plaintiff was dazed by the accident, but did not lose consciousness. She suffered lacerations on her head and thigh, and an injured leg. She was taken to the emergency hospital, where she received emergency treatment. Her sister, a nurse, called for



her about two hours after the accident, and plaintiff was taken to her sister's home. Later that day her sister accompanied her to the office of Dr. Walker, plaintiff's family doctor. Plaintiff walked into the office, and the doctor changed the dressings on her head and thigh, and strapped her knee, which was badly swollen. Because of the swollen condition of the knee, Dr. Walker advised plaintiff not to walk on that leg, advised bed rest, and had plaintiff taken to her sister's automobile in a wheel chair. Plaintiff remained in bed at her sister's home for two days, and then returned to her own home, where she remained in bed for six more days. Then she was taken to the hospital, at Dr. Walker's suggestion, where she remained for nineteen days. At the hospital, an orthopedic specialist was called in, and X-rays were taken. It was then discovered that plaintiff had two small fractures of her left leg. The leg was placed in a cast from her ankle to her groin, and the cast was kept on for about five weeks. She used crutches for some time thereafter and later bound her leg with an Ace Bandage.

of the doctor, plus the instability of the ligaments, will lead to some degenerative change in that the left knee joint will wear faster than the other; that plaintiff can walk all right on the level, but when any strain is imposed on the leg, such as in walking up and down stairs, or on an uneven surface, plaintiff must consciously tense the muscles of the left leg or it will give way; that such instability will be permanent; that the knee is a "useful" one and will carry her through most normal pursuits; that the muscles of the knee are in good condition; that "fairly certainly" plaintiff will have arthritic change in her left knee joint; that she can no longer play tennis or ski or engage in other active sports of that nature; that he recommended that the patient swim to strengthen the leg muscles; that when he examined her about a year after the accident the dizziness and nervousness had cleared up; that he had been paid \$100 for his services and anticipated no further treatments by him for plaintiff.

Dr. Walker testified as to the condition he found on April 29, 1947, the date of the accident, and of recommending bed rest; that on May 7, 1947, he caused her to be sent to the hospital and two days later called in Dr. Barnard; that after the cast was removed she was on crutches for eight weeks; that for some time after the accident she was nervous, but that he anticipated this would clear up; that he advised plaintiff she could return to work in January of 1948; that he thought he should see the plaintiff every month or two for another six months to check on her nervousness; that he had not yet been paid for his services, and had not given the subject of fee any thought, but believed \$250 would be reasonable for his past services and that about \$25 would cover future services. He admitted that for three or four months prior to the accident plaintiff was under his care for an infection.

The trial was had in June of 1948. Testimony as to damages, and that is all that we are interested in on this appeal, was given by Dr. Barnard, Dr. Walker and by plaintiff. No medical witnesses were presented by defendant. Dr. Barnard, an orthopedic specialist, testified that he first examined plaintiff on May 9, 1947, when he was called in by Dr. Walker; that he then found lacerations of the scalp and thigh, which had almost fully healed; that he ascertained that the left knee was swollen and had some loose ligaments; that plaintiff complained of dizziness and back pains; that X-rays disclosed no back fracture, but they did disclose two small fractures of the lower left leg; that he recommended the cast; that his diagnosis disclosed that two major ligaments of the knee were torn; that the ligaments act as a secondary protection to the knee, while the knee muscles are the primary protection; that both keep the joint in place; that because of the torn ligaments this knee, at least when subjected to strain, is unstable; that the fractures, in the opinion

Plaintiff testified that at the time of trial she still had "a slight nervousness," and that, while she had no trouble walking on the level, her knee was still unstable when going up or down stairs or when she moved quickly; that before the accident she had

been quite athletic but could not now engage in the more vigorous sports; that about three months after the accident, on the doctor's advice, she had started to go swimming and had kept this up; that starting in November, 1947, she had gone dancing with her husband and had repeated this several times since; that after the accident she started to perform some of her housework in August of 1947, but was unable to perform all her duties until December; that for two years prior to the accident she had worked for Hunt, Hatch and Company as head bookkeeper at a gross salary of \$55.00 per week, with take-home pay of \$44.70 per week; that this company filled her job after the accident and would not rehire her; that in January, 1948, she obtained a similar job with another employer, but after four days had to quit because of her nervous condition; that up to the time of trial she had been unable to secure a comparable position. In response to a question from her own counsel as to why she was unable to secure another job, she testified: "Well yes, in the past several years since I had married, I hadn't worked, and the position I had had, the first one I had held, and during the war time I could get a job without too much previous experience, and now the employers are asking for more experience, and to get a job like the other one would be more difficult, and the fact that I am getting past 35." She implied that she might have secured a job at a lesser salary. She testified that the hospital bill was \$268; that an X-ray cost her \$7.50; and that she had spent \$35 for medicines. At least \$30 of this last sum was spent for vitamin pills, and it is not clear whether these were made necessary as a result of the infection or as a result of the accident. Plaintiff also claimed in her complaint, \$400 for doctor bills, \$3,025 for loss of wages and \$50,000 general damages.

On this evidence the jury brought in a verdict of \$1,500. Plaintiff, on this appeal, contends that the damages are inadequate as a matter of law.

[1-3] The principles applicable to such an appeal are well settled. The question as to the amount of damages is a question of fact. In the first instance, it is for the

jury to fix the amount of damages, and secondly, for the trial judge, on a motion for a new trial, to pass on the question of adequacy. Whether the contention is that the damages fixed by the jury are too high or too low, the determination of that question rests largely in the discretion of the trial judge. The appellate court has not seen or heard the witnesses, and has no power to pass upon their credibility. Normally, the appellate court has no power to interfere except when the facts before it suggest passion, prejudice or corruption upon the part of the jury, or where the uncontradicted evidence demonstrates that the award is insufficient as a matter of law. In determining whether there has been an abuse of discretion, the facts on the issue of damage most favorable to the respondent must be considered. See *Bencich v. Market St. Ry. Co.*, 20 Cal.App.2d 518, 67 P.2d 398; *Sassano v. Roullard*, 27 Cal.App. 2d 372, 81 P.2d 213; and the many cases cited therein.

Plaintiff, while recognizing the existence of these rules, contends that the facts here demonstrate, as a matter of law, that the damages are inadequate, and, in this connection, places her primary reliance on the rules announced in the *Bencich* case, *supra*. In that case, on the first trial, a verdict of \$20,000 was rendered, but the trial court granted a new trial. On the second trial the jury brought in a verdict of \$5,000. Plaintiff's motion for a new trial on the ground of inadequacy was denied, and plaintiff appealed. This court reversed the judgment on the ground that the award of \$5,000 was inadequate as a matter of law. After the reversal, the cause was retried, and resulted in a judgment for \$20,000, which was affirmed. 29 Cal.App.2d 641, 85 P.2d 566.

In the opinion in 20 Cal.App.2d 518, pages 520, 521, 67 P.2d 398, 399, this court, after first stating that a motion for a new trial on the ground of inadequacy "appeals peculiarly to the discretion of the trial court, and its order refusing a new trial will not be disturbed on appeal in the absence of a showing of abuse of discretion" set forth the following facts as demonstrating such abuse:

"Appellant received in the accident, in addition to a fractured left humerus and bruises from which he has fully recovered, a badly crushed right foot. He spent approximately six months in the hospital, where traction was placed on the arm, pins were inserted into the toes, and traction also applied on the foot and leg. The outer and forepart of the foot eventually became gangrenous and had to be amputated (including all toes except the big toe), and five skin grafts done. The outer and anterior third portion of the foot has been amputated so that at present it extends back about one-half of the fifth metatarsal to the neck of the fourth and third slightly upon the neck of the fourth. The fifth is intact, as is the big toe. The principal weight bearing surface of the foot is missing, or where the normal foot has a triangle for weight bearing, appellant's foot has but two points for this purpose, namely, the base of the big toe and the heel. To remedy this defect appellant is and will be required to wear a specially prepared brace in his shoe. Appellant was 36 years of age and his occupation was that of a fireman \* \* \* His monthly salary was \$200 \* \* \* Under the regulations of the civil service \* \* \* appellant's status as a fireman was fixed for a remainder of 12 years, at which time he had an optional right to retire. This period, of course, was less than his life expectancy of 30 years. By reason of the injuries received in this accident, appellant was retired upon a life pension of \$100 per month. His special damages for nursing, X-rays, laboratory, physicians' services, etc., were \$2,423.37. Thus, the allowance made by the jury for pain and suffering and permanent disability was \$2,576.63. This is not considering anything for loss of compensation which amounted to \$3,441.72. \* \* \*

"\* \* \* it is patent that at the very most the amount awarded by the jury barely, if at all, repays appellant his special damages. \* \* \*

"\* \* \* It is obvious \* \* \* that the award to appellant is out of all proportion to the expenses necessarily incurred by him as a result of the injury and

the damages he has sustained through pain and suffering, and permanent injury and disability."

Thus the court demonstrated, mathematically, that the damages were inadequate as a matter of law, and properly reversed the judgment. The cases in which this can and has been done are relatively few in number. One other such case is *Weiskopf v. Smith*, 44 Cal.App.2d 438, 112 P.2d 665. There, a minor and his parents received a judgment for \$100, and plaintiff appealed. The evidence demonstrated that the minor had received a badly and permanently scarred face as a result of the accident, and other serious but not permanent injuries. Doctor bills already incurred amounted to \$100, and at least \$200 more would have to be incurred, plus the cost of hospitalization. The automobile damage amounted to \$60. Solely on the basis of the *Bencich* case, the judgment was reversed.

As opposed to these two cases, there are many cases where the appellate courts have refused to interfere on the ground of inadequacy. Illustrative of these is *Sassano v. Roullard*, 27 Cal.App.2d 372, 81 P.2d 213. There, a jury awarded a seven-year-old plaintiff but \$250 for a badly cut and permanently scarred face. There were no special damages incurred by the child. After the verdict was brought in, the trial judge criticized the jury, stating, among other things, that, 27 Cal.App.2d at page 375, 81 P.2d at page 215, "if he is entitled to anything he is entitled to more than \$250. \* \* \* I know that it [the verdict] isn't adequate at all if he is entitled to anything. \* \* \* I know this, if he is entitled to anything he is entitled to 10 times that sum, easily. Yes, easily so." In spite of this view expressed by the trial judge when the verdict was rendered, a short time later he denied plaintiff's motion for a new trial on the ground of inadequacy. This was affirmed on appeal, the court stating, 27 Cal.App.2d at page 373, 81 P.2d at page 214:

"In considering this question we must bear in mind the firmly established rules that the jury is the judge of the weight and sufficiency of the evidence and the



credibility of the witnesses; that the question of the award of damages and their amount is primarily one for the jury; that on a motion for new trial the trial judge sits as a thirteenth juror; that it becomes his duty to again weigh the evidence and its sufficiency and measure the credibility of the witnesses; that in so doing it is also his duty to consider the adequacy or inadequacy of the amount of damages awarded; that if he finds the damages either excessive or inadequate it is his duty to grant a new trial either generally or upon the special issue of the amount of damages or himself reduce excessive damages.

"Doing justice between litigants is the prime object of the law. It is in the trial court that this object should be sought and can be obtained by a trial judge who will fearlessly perform the duties of his office and who will exercise a reasonable and lawful control over verdicts. This is a responsibility that cannot be shifted to an appellate court. It rests on the shoulders of the trial judge and no other for the power of appellate courts to control the amount of damages awarded comes into play only when the facts before it are such as to suggest passion, prejudice or corruption on the part of the jury."

In *Caulfield v. Market Street Ry. Co.*, 20 Cal.App.2d 220, 66 P.2d 752, a plaintiff received judgment for \$400, moved for a new trial on the ground of inadequacy, and, upon the denial of the motion, appealed. There, as here, it was contended that the special damages proved, exceeded the award. This court affirmed, stating, 20 Cal.App. at page 221, 66 P.2d at page 753:

"There was a conflict in the testimony as to the nature and extent of her injuries; and from that adduced by the defendant the jury was justified in finding that they were not serious or permanent.

"It was testified that she lost time from her employment and incurred liability for hospital care and the services of physicians and nurses, the aggregate of the amounts claimed exceeding the judgment. While amounts agreed to be paid for services are some evidence of their reasonable value [citing cases], this is not conclusive [citing a case], and the same rule applies as to

expert opinion as to value. [Citing authorities.] Nor was the jury compelled to conclude from plaintiff's testimony as to the time lost from her employment that this was the necessary result of her injuries. [Citing an authority.]

"In view of all the testimony we cannot say that the award was inadequate." See, also, *Johnson v. McRee*, 66 Cal.App.2d 524, 152 P.2d 526, and *Foshee v. Wolters*, 86 Cal.App.2d 766, 195 P.2d 930.

[4] Now how do these rules apply to the present case? Plaintiff testified that her hospital bill was \$268; that she had spent \$7.50 for an X-ray, and \$35 for medicines. She had paid \$100 to Dr. Barnard, and owed, for past and future services, \$275 to Dr. Walker. This is a total of \$685.50 for such special damages. Even as to these items the jury was not bound to find that they were fully recoverable. The jury was not bound by the doctors' evaluation of and the necessity for their services. The jury might have inferred that some of the visits of Dr. Walker were occasioned by the infection for which plaintiff was under treatment at the time of the accident, and were not required by the accident. From the facts that the jury saw this witness for the several days of the trial, saw her walk to and from the witness chair, and around the court, and from the evidence that she went swimming in August and dancing in November, the jury might well have concluded that no future treatments were necessary. As already pointed out, the jury might well have inferred that a major portion of the \$30 spent for vitamin pills out of the \$35 spent for medicine, was not occasioned by the accident. Thus, even as to the items of special damage, the evidence and reasonable inferences therefrom are sufficiently conflicting so as not to require a finding that the special damages amounted to \$685.50.

[5] Plaintiff claims loss of wages in the sum of \$3,025, or \$55 a week for 55 weeks. This claim for loss of earnings, no matter how pleaded, is an item of general damage. *Tornell v. Munson*, 80 Cal.App.2d 123, 125, 181 P.2d 112. Thus, the judgment of \$1,500 includes at least \$814.50 for

general damages, and more if the jury determined, as it could, that the special damages were less than the \$685.50. Moreover, the jury was not bound by plaintiff's testimony that it was not until January, 1948, that she was able to work, and by the doctor's testimony that he first permitted her to seek work in January, 1948. From the testimony that plaintiff went swimming in August and dancing in November, and from observing plaintiff's condition in court in June of 1948, the jury might well have believed plaintiff could, had she wished, sought work before January of 1948. From plaintiff's own testimony, quoted earlier in this opinion, the jury also might have believed that plaintiff's inability to get work was caused by her lack of experience and her age rather than by any impairment of her earning capacity caused by the accident.

[6, 7] As to the extent of the injuries claimed, the jury was not bound by the doctors' testimony or by that of plaintiff. The jury not only saw the plaintiff and observed her actions, but saw the X-rays taken nine days after the accident, and others about a year later. They might well have found that the injuries were not as severe or as permanent as claimed. Under these circumstances, and under the rules above stated, although the award is undoubtedly small, this court cannot say that it is inadequate as a matter of law.

[8-10] There is one other problem that should be discussed. On cross-examination defendant's counsel, over objection, was permitted to elicit from plaintiff the information that most of her hospital bills had been paid by the Blue Cross, with whom she had a policy, and that she had drawn \$460 from the United States Employment Service for disability. It was error to have admitted this testimony. Total or partial compensation received by an injured party from a collateral source, wholly independent of the wrongdoer, does not operate to reduce the damages recoverable from the wrongdoer. *Anheuser-Busch, Inc. v. Starley*, 28 Cal.2d 347, 349, 170 P.2d 448, 166 A.L.R. 198; *Peri v. Los Angeles Junction Ry. Co.*, 22 Cal.2d 111,

131, 137 P.2d 441, see, also, 15 Am.Jur. p. 615, § 198; 18 A.L.R. 678; *Shea v. Rettie*, 287 Mass. 454, 192 N.E. 44, 95 A.L.R. 575. But, although the trial judge erroneously admitted this evidence, he changed his mind before the cause was submitted to the jury, because he fully, fairly and properly instructed that if the jury found defendant was liable, plaintiff was entitled to recover for all expenses incurred, and that the amount of damages should not be reduced "by the receipt of payment by her for loss from a source wholly independent of said alleged wrongdoer" and that "Where the person suffering the damage has procured insurance protecting her against the loss to which the alleged wrongdoer did not contribute in procuring, and her insurer pays her for the loss suffered, said payments by her insurer are not deductible." These instructions cured the error in the erroneous admission of the testimony, inasmuch as this court must presume that the jury followed the instructions.

The judgment appealed from is affirmed.

BRAY, J., and SCHOTTKY, Justice pro tem., concur.



97 Cal.App.2d 657

REICH et al. v. LONG.

Civ. 17446.

District Court of Appeal, Second District,  
Division 2, California.

May 22, 1950.

Action by Bernard Reich and Sylvia Reich against James Harmount Long for personal injuries suffered in automobile collision. The Superior Court of Los Angeles County, J. F. Moroney, J., entered judgment in favor of defendant, and plaintiffs appealed. The District Court of Appeal, Wilson, J., held that where jury could have inferred from evidence that accident was unavoidable,

giving of instruction on unavoidable accident was not prejudicial error.

Judgment affirmed.

#### 1. Appeal and error ⇨1064(1)

In action by motorist and passenger for injuries sustained in collision on highway with defendant's on-coming automobile which turned across motorist's path, where jury could have found from evidence that defendant was not negligent, in which event collision would have been caused by motorist's negligence or would have been result of an unavoidable accident, giving of instruction on unavoidable accident was not reversible error.

#### 2. Automobiles ⇨246(9)

##### Trial ⇨243

In action by motorist and passenger for injuries sustained in collision on highway with defendant's on-coming automobile which turned across motorist's path, instruction that driver of a motor vehicle has duty to be vigilant at all times and to keep vehicle under control to avoid a collision, was not contradictory, and did not erroneously charge motorist and passenger with duty of assuming that other driver might violate law.

#### 3. Appeal and error ⇨1067

In action by motorist and passenger for injuries sustained in collision on highway with defendant's on-coming automobile which turned across motorist's path, where motorist testified that it was a 55 mile zone and defendant did not deny fact, and court instructed jury that speed at which a vehicle travels upon a highway considered as an isolated fact is not proof either of negligence or of exercise of ordinary care, refusal to instruct jury that collision occurred in a 55 mile zone, which fact was not in question, was not prejudicial error.

#### 4. Automobiles ⇨168(2)

Vehicle Act does not fix a maximum speed at which a driver may propel his automobile and escape liability for negligent driving. Vehicle Code, § 1 et seq.

#### 5. Appeal and error ⇨928(4)

In action by motorist and passenger for injuries sustained in collision on highway with defendant's on-coming automobile

which turned across motorist's path, where jury found for defendant, it thereby determined that accident was unavoidable or that motorist and passenger were negligent, and District Court of Appeal in determining whether court correctly refused to instruct jury that it is not necessary that a party incur medical expenses to recover for his injuries including pain, suffering and anxiety, would not assume that jury believed plaintiff could not be compensated for pain and suffering unless he proved he incurred medical expenses.

Pacht, Warne, Ross & Bernhard and Samuel I. Barchas, Beverly Hills, for appellants.

Tripp & Callaway, Los Angeles, for respondent.

WILSON, Justice.

From a judgment in favor of defendant, after trial by a jury in an action for personal injuries, plaintiffs appeal. The appeal is taken upon a settled statement.

The action arose out of a collision between the automobiles of the parties on the highway. From the settled statement it appears that defendant James Long testified that at the time of the collision he was operating his automobile in a northerly direction on Highway 101; shortly before the accident he was proceeding at approximately 30 to 35 miles an hour in the lane next to the center line on the right side of the highway when he slowed down to make a left turn into Hazel Drive; prior to making the turn he made the proper arm signal, stopped his vehicle at the intersection of Hazel Drive and Highway 101, looked to the front and to his left and saw no vehicles or obstacles to the safe completion of his left-hand turn; after he had completed his turn, had crossed the white center line and was facing west in the intersection of Hazel Drive and Highway 101, he noticed a vehicle coming up over the crest of a hill approximately 85 yards from the intersection at a speed of about 60 miles an hour; he proceeded across the in-



tersection and when the front end of his vehicle was four or five feet into Hazel Drive his automobile was hit in the middle of the right side, pushed sideways several feet and turned over.

Plaintiff Bernard Reich testified that he was driving south on Route 101; that he was traveling between 40 and 45 miles an hour in the lane nearest the center line when he saw a sedan proceeding towards him in the same lane of traffic at a speed of about 35 miles an hour; that the car approaching proceeded in that way for about 200 feet when the driver made a left turn short, however, of the intersection; that the car never reached the intersection for a proper left turn and immediately after the impact leaned against a lamp post about 10 feet short of the intersection; the collision occurred in a 55 mile zone; he received injuries to his chest and knees but did not consult a doctor. The evidence indicated that heavy skid marks were laid down by the vehicle driven by Reich for approximately 98 feet, the marks swerving to the right at the time his vehicle hit that of defendant Long. An expert on brakes, skid marks and traffic distances testified that the length of the skid marks indicated the driver must have noted the possible danger of collision at least 146 feet from the point of impact.

Plaintiffs contend that two of the instructions given and the court's refusal to give two instructions requested by them constitute reversible error.

The first instruction complained of is that given on unavoidable accident. Plaintiffs concede it is not error to instruct on unavoidable accident where it is not pleaded as an affirmative defense provided such defense is relied on and evidence of unavoidable accident is offered at the trial. They assert, however, that it was error in the instant case since it was not an issue, was not pleaded and no evidence thereof was introduced; that the case was tried upon the theory of each party that the collision was caused by the negligence of the other.

[1] Contrary to plaintiffs' contention, there is evidence from which the jury could have inferred the accident was unavoid-

able. There is a sharp conflict between the testimony of the two drivers. If the jury believed Long's testimony and determined that he had made a proper left-hand turn, they could also infer from Reich's testimony and from the testimony of the expert that Reich was unable to avoid the collision. Indeed, plaintiffs in their brief assert that he was not able to avoid the accident. Defendant by his answer denied he was negligent and alleged plaintiffs were negligent. If the jury found that defendant was not negligent, either the collision was caused by plaintiff driver's negligence or it was an unavoidable accident. It does not appear, therefore, that plaintiffs were injured by the instruction.

Plaintiffs maintain the court erred in giving the following instruction: "It is the duty of the driver of a motor vehicle operating same on a public street to be vigilant at all times keeping a reasonable lookout to possible danger to himself and others and to keep the vehicle under such control that to avoid a collision, he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent person in like position." Plaintiffs argue that by the above instruction the jury was advised that plaintiffs had to anticipate all possible danger, citing *Prato v. Snyder*, 12 Cal.App.2d 88, 55 P.2d 255. In the *Prato* case there was evidence that the plaintiff was on the wrong side of the road. The jury was instructed that the defendant had no right to assume that the road ahead of him was clear but under all circumstances and at all times was required to exercise reasonable care to anticipate the presence of others. Thus the jury was instructed in that case that the defendant was required under all circumstances and at all times to anticipate the presence of others, even though such others were on the wrong side of the road. In the instant case the jury was instructed that the driver of a vehicle has a duty of being vigilant at all times keeping a *reasonable* lookout to possible danger to himself and others and to keep the vehicle under such control that to avoid a collision he can stop as quickly as might be required

of him by *eventualities that would be anticipated by an ordinarily prudent person in like position*. Obviously an ordinarily prudent person would not anticipate the sudden appearance of another vehicle on the wrong side of the road. Indeed the jury was instructed that "a person who himself is exercising ordinary care, has a right to assume that others, too, will perform their duty under the law, and, has a further right to rely and act on that assumption." Upon plaintiffs' request the jury was instructed "One test that is helpful in determining whether or not a person was negligent is to ask and answer whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he would have foreseen or anticipated that someone might have been injured by his action or inaction. If such a result from certain conduct would be foreseeable by a person of ordinary prudence with like knowledge and in like situation, and if the conduct reasonably could be avoided, then not to avoid it would be negligence."

[2] Considering, as they must be, the instructions as a whole, they do not appear to be contradictory nor do they erroneously charge plaintiffs with the duty of assuming that the other driver might violate the law. It cannot be said that the jury was so misled as to apply an incorrect rule of law and there is nothing in the giving of the complained of instruction that constitutes prejudicial error.

[3, 4] Plaintiffs contend it was error for the court to refuse to instruct the jury that the collision occurred in a 55 mile zone. They argue that plaintiff driver's admission that he was going as much as 45 miles an hour might have seemed to the jury as unreasonably fast unless they were told by the court what the statutory maximum speed was in the area of the collision. They maintain that where the existence or nonexistence of a fact is positive and uncontradicted the jury must be instructed that its existence or nonexistence has been established as a matter of law. Conceding that to be the rule where it is a fact in issue, the speed limit of the zone in which

the collision occurred was not in question. The jury had before it plaintiff driver's testimony that it was a 55 mile zone which fact, apparently, was not denied by defendant. Moreover, the court instructed the jury that "the speed at which a vehicle travels upon a highway, considered as an isolated fact and simply in terms of so many miles an hour, is not proof either of negligence or of the exercise of ordinary care." In view of the foregoing instruction together with the other instructions given on the question of negligence it was not prejudicial error for the court to refuse to give the instruction requested by plaintiffs, especially since it has been repeatedly held that the California Vehicle Act does not fix a maximum speed at which a driver may propel his automobile and escape liability for negligent driving.

[5] Finally plaintiffs contend the court erred in refusing to instruct the jury that "it is not necessary that a party incur medical expenses or receive medical care in order to be compensated for his injuries including pain, suffering and anxiety." They concede that ordinarily such an instruction is not necessary but maintain that it was necessary in the instant case because of the instruction which was given on unavoidable accident and the instruction that plaintiff was bound to anticipate defendant's car on the wrong side of the road. The court instructed the jury that it could award plaintiffs "such sum as will compensate said plaintiff reasonably for any pain, discomfort and anxiety suffered by him and proximately resulting from the injury in question." The foregoing instruction was clearly adequate and it is not reasonable to assume the jury could have been led to believe plaintiff could not be given damages for pain and suffering unless he proved he incurred medical expenses. Nor is it reasonable to assume that the jury was misled regarding plaintiffs' right to damages by the giving of the two instructions complained of which related to the question of liability and not to that of damages. Since the jury found for defendants it obviously determined that the accident was unavoidable or that plaintiffs were negli-

gent in neither of which events would they be entitled to damages.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



**TRUCK INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.**

Civ. 7754.

District Court of Appeal, Third District,  
California.

May 31, 1950.

Rehearing Denied June 30, 1950.

Hearing Granted July 27, 1950. \*

Proceeding by the Truck Insurance Company, a corporation, against Anna B. Groom and Harry P. Sorensen to review an award by the Industrial Accident Commission of the State of California under the Workmen's Compensation Act. The District Court of Appeal, Peek, J., held that insured's policy against liability under the Workmen's Compensation Act had been effectively cancelled.

Award annulled, and cause remanded with instructions.

**1. Workmen's compensation ☞1069**

Workmen's compensation liability policy providing that mailed notice of cancellation should be sufficient was not against public policy, and hence mailing of written notice in accordance therewith was sufficient whether or not notice was actually received by insured. Insurance Code, § 22; Labor Code, 3201 et seq.

**2. Insurance ☞229(2)**

Where insurer's agent had in the past given insured actual notice of delinquencies in order to prevent cancellation, and there was no showing that insured had knowledge of or acquiesced in such practice of its agent, or that insurer had represented to insured that agent would personally notify him of delinquencies, insured was not

estopped from insisting on a mailed notice of cancellation as required by policy. Insurance Code, § 22; Labor Code, § 3201 et seq.

Mullen & Filippi, W. N. Mullen, San Francisco, for petitioner.

T. Groezinger, San Francisco, for respondents.

PEEK, Justice.

The instant matter comes before this court upon the petition of Truck Insurance Exchange for a writ of review of an award made by the respondent Industrial Accident Commission wherein death benefits were awarded to Anna B. Groom, mother of Raymond Groom, deceased, who the Commission found was employed as a truck driver by Harry P. Sorensen, and while so employed sustained an injury which resulted in his death on November 28, 1948. In addition, the Commission found that decedent's employer was insured by petitioner against the liability imposed by the Workmen's Compensation Act, Labor Code, § 3201 et seq., at the time of the injury, resulting in the death of his employee. It is this finding which petitioner attacks herein, contending that it had cancelled Sorensen's policy of insurance by means of a notice of cancellation mailed to him on November 3, 1948 and that the cancellation provided therein was effective upon its mailing despite the fact that it was not received by him until December 1, 1948, three days after the death of his employee.

From the transcript of the proceedings before the respondent Commission, it appears that for several years prior to the death of his employee Sorensen had been carrying compensation insurance issued by the petitioner. Despite the fact that Sorensen was delinquent in his payments of premiums on his policy which expired on September 25, 1948, the petitioner issued a new policy on November 2, 1948 for the year commencing September 25, 1948 and mailed it to him at Clipper Mills, California, the address given by the insured on the prior policy. On November 3, 1948, the



petitioner mailed a notice of cancellation to Sorensen at Clipper Mills stating that he was delinquent in his payments of premiums due under the prior policy and that unless such payments were received by it prior to November 16, 1948 the policy issued on November 2, 1948 would be cancelled as of November 16, 1948, the effective date of cancellation designated in the notice. Sorensen did not receive either the policy issued on November 2, 1948 or the notice of cancellation of such policy mailed on November 3, 1948 until December 1, 1948 due to the fact that he had moved from Clipper Mills to Marysville and had failed to notify the petitioner of such change of address. Sorensen testified that he depended upon petitioner's agent in Marysville to protect him against any cancellation. From his testimony it appears that in the past petitioner's agent would personally contact him when his policy was in danger of being cancelled and that he left his insurance problems in the hands of petitioner's agent. Mr. Day, an employee of petitioner's agent, testified that although a copy of the cancellation notice had been received at the agent's office in Marysville Sorensen was not contacted in the usual way because the copy of the notice had been inadvertently placed in Sorensen's file without having been called to Day's attention. There is no evidence that petitioner had knowledge of, or acquiesced in, the practice of its agent to personally notify Sorensen of such delinquencies.

The policy issued November 2, 1948 contained the following provision with regard to cancellation: "This policy may be cancelled at any time by either of the parties upon written notice to the other party stating when, not less than ten days thereafter, cancellation shall be effective. The effective date of such cancellation shall then be the end of the policy period. \* \* \* Notice of cancellation shall be served upon this employer as the law requires, but, if no different requirement, notice mailed to the address of this employer herein given shall be sufficient notice. \* \* \*

It is petitioner's contention that the policy was cancelled as of the date of mailing of

the notice of cancellation in accordance with the foregoing provision contained in the policy whereas respondent contends that no cancellation was effected until the receipt of such notice by the insured.

In *Farnum v. Phoenix Insurance Co.*, 83 Cal. 246, 256, 23 P. 869, 872, 17 Am.St.Rep. 233, the court stated that "If the notice is sent by mail, and not received, as in this case, the cancellation for non-payment of premium is ineffective." In that case, a fire insurance policy had been issued to the insured by the agent of the insurer. Such agent was authorized to and did grant the insured sixty days within which to pay the premium. During said sixty day period the insurer mailed a notice of cancellation for nonpayment of premium to the insured which was not received. The court held that the notice of cancellation was ineffective upon the ground that personal notice of intended cancellation was required. Later the Supreme Court in the case of *American Building Maintenance Co. v. Indemnity Ins. Co.*, 214 Cal. 608, at page 615, 7 P.2d 305, 307, following the statement in the *Farnum* case stated that "It would seem, however, in view of the fact that if a notice is sent by mail but not received the cancellation is ineffective (*Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 P. 869, 17 Am.St.Rep. 233), that self-interest would prompt an insurance company to make definitely certain the fact that the notice was actually received." The facts in that case showed that an insurance policy had been issued which the insurer sought to modify by means of a rider which it sent to the broker by messenger but which in fact was not received by the insured. The court held that the policy was not thereby modified because of a lack of consent thereto, treating the rider as an offer to modify which the insured had not accepted. In passing upon the question so presented the court observed that the policy provided for cancellation by mailed notice and in that regard made the foregoing statement.

Both the *Farnum* and the *American Building Maintenance* cases were cited and relied upon by this court in support of its

decision in *Naify v. Pacific Indemnity Co.*, Cal.App., 68 P.2d 293, at page 298. However, a hearing was granted by the Supreme Court, and that court stated as follows: "At the outset we are met with a question raised by amici curiae on behalf of various insurance companies, namely, whether a notice of cancellation, sent to the address of the assured as stated in the policy, and pursuant to a provision in the policy stating that the mailing thereof shall be sufficient notice, is effective despite lack of receipt by the insured. In this simple form, the question may perhaps be answered in the affirmative (see *Raiken v. Commercial Cas. Ins. Co.*, N.J.Supp., 135 A. 479), though it has not yet been directly ruled upon in this jurisdiction. See *American Building Maintenance Co. v. Indemnity Ins. Co.*, 214 Cal. 608, 7 P.2d 305. But the special circumstances of this case make such a doctrine entirely inapplicable." 11 Cal. 2d 5, 10, 76 P.2d 663, 666, 115 A.L.R. 476. In view of the foregoing statement it would appear that although the question involved herein has been discussed in the cited cases the specific question has not been decided by the Supreme Court of this state and hence the instant case presents a question of first impression.

[1] Admittedly, there is a conflict of authority upon such question, see 123 A.L.R. 1008, which in part may be due to the variations in the facts of the decided cases and the particular provisions of the policies or statutes involved. However there is no statute in this state which restricts the manner of giving notice of cancellation under the insurance contract here in issue and we perceive no reason prompted by public policy or otherwise preventing contracts containing such a cancellation clause as here in question. Since the relation of insured and insurer is contractual. Insurance Code, section 22, and since we perceive no prohibition against giving effect to such a contract where it does not conflict with a statutory provision or public policy, it is our conclusion that the mailing of written notice, in accordance with the provisions of such a clause, is sufficient, whether or not such notice is actually received by the insured. The authorities supporting this

view are collected in *Trinity Universal Ins. Co. v. Willrich*, 13 Wash.2d 263, 124 P.2d 950, 142 A.L.R. 1.

[2] While respondent did not find nor does it now expressly contend that petitioner is estopped to rely upon the notice of cancellation mailed to the insured pursuant to the provision contained in the policy we nevertheless are impelled to consider such question in view of the emphasis placed by respondent upon the evidence that petitioner's agent had in the past given the insured actual notice of his delinquencies in order to prevent cancellation. As we have already observed, there is no evidence in the record before us that petitioner had knowledge of, or acquiesced in, such practice of its agent nor is there any evidence that petitioner had misrepresented to the insured that its agent would personally notify him of such delinquencies. We are therefore satisfied that under such circumstances no estoppel was raised against the petitioner. 10 Cal.Jur. 626.

The award against defendant Truck Insurance Exchange is annulled and the cause is remanded with instructions to the Commission to enter an award against the defendant Harry P. Sorensen.

ADAMS, P. J., and SPARKS, Justice, pro tem., concur.



SEI FUJII v. STATE.

Civ. 17309.

District Court of Appeal, Second District,  
Division 2, California.

May 22, 1950.

Hearing Granted June 22, 1950.\*

Sei Fujii brought action against the State to determine whether an escheat had occurred under provisions of the Alien Land Law, General Laws, Act 261, as to realty acquired by plaintiff in July, 1948. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., adjudged that property de-

\* Subsequent opinion 242 P.2d 617.

scribed in deed to plaintiff had escheated to the State on the date of the deed, and the plaintiff appealed. The District Court of Appeal, Emmet H. Wilson, J., 217 P.2d 481, held that provisions of the Alien Land Law restricting ownership of land by aliens who are ineligible for citizenship are unenforceable under the Charter of the United Nations, and the State filed a petition for rehearing. The District Court of Appeal, Wilson, J., held on petition for rehearing that the fact that Japan is not a member of the United Nations does not render its nationals ineligible to the guarantees extended under United Nations Charter guaranteeing equal rights to all without distinction as to race, sex, language, or religion.

Petition for rehearing denied.

#### Treaties ☞13

The fact that Japan is not a member of the United Nations does not render its nationals ineligible to the guarantees extended to all persons without exception under United Nations Charter guaranteeing equal rights to all without distinction as to race, sex, language or religion. United Nations Charter, art. 1, § 3, art. 2, § 2, 59 Stat. 1031, 1037.

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J. Marion Wright, Los Angeles, for plaintiff-appellant.

Fred Howser, Atty. Gen., Everett W. Mattoon, Asst. Atty. Gen., John F. Hassler, Jr., Deputy Atty. Gen., for defendant-respondent.

WILSON, Justice.

Section 2 of Article 2 of the United Nations Charter, 59 Stat. 1031, 1037, recognizes that there are rights and benefits on one side of the ledger and obligations on the other. The Members of the Organization are pledged to fulfill in good faith

the "obligations" in order to ensure the "rights and benefits" resulting from membership.

Respondent's reiteration throughout its petition for a rehearing that the Universal Declaration of Human Rights is not a treaty and has no bearing on the question at issue in this case is beside the point, since we did not place reliance on the Declaration in support of the conclusion reached. There is no intimation in the opinion that the Declaration is a treaty, for it is not, or that it has any binding force on the United States or any state or political subdivision thereof. Reference was made to that document, as clearly shown by the opinion, as well as to the address of the President to the Senate, as especially emphasizing the purposes and guarantees of the Charter.

There is no suggestion that sovereign rights of the Government have been surrendered or that the United Nations Organization can impose its will upon any member nation. The sovereignty of the member nations is expressly recognized in the portion of the Charter quoted in our opinion.

Since the Charter guarantees equal rights to all "without distinction as to race, sex, language, or religion", art. 1, § 3, and the members pledge themselves to take joint and separate action for the achievement of the purposes of the Charter, the fact that Japan is not a member of the Organization does not render its nationals ineligible to the guarantees extended to all persons without exception.

Respondent's petition for a rehearing is denied.

MOORE, P. J., and McCOMB, J., concur.



97 Cal.App.2d 679

**BERNARDS v. GREY et al.**

Civ. 14172.

District Court of Appeal, First District,  
Division 1, California.

May 23, 1950.

V. Bernards brought action against George Robert Grey, as administrator of the estate of Adrienne M. Grey, also known as Adrienne M. Blodgett, also known as Adrienne Blodgett, deceased, for a judgment that the deceased at time of her death held title to realty in trust for judgment debtor who had conveyed realty to the deceased, and to have it decreed that plaintiff had a lien against such realty as assignee of judgment. The Superior Court in and for the City and County of San Francisco, Sylvain J. Lazarus, J., rendered a judgment for defendant and the plaintiff appealed. The District Court of Appeal, Schottky, J. pro tem, held that plaintiff was entitled to review of order vacating defendant's default, that Superior Court did not abuse its discretion in determining that there was excusable neglect on part of defendant, warranting the setting aside of the default, that affidavit of merits was sufficient, and that rulings with respect to evidence were proper.

Judgment affirmed.

**1. Appeal and error ⇨873(2)**

Though no appeal lay from order setting aside defendant's default on which no judgment had been entered, because such order was neither a final judgment nor an order made after final judgment, plaintiff was entitled to a review of that order on appeal from a subsequent judgment in favor of the defendant. Code Civ. Proc. § 963.

**2. Appeal and error ⇨935(2)**

Appellate courts are favorably disposed toward such action on part of trial courts as will permit, rather than prevent, adjudication of legal controversies on their merits.

**3. Appeal and error ⇨957(1)**

Orders excusing defaults and permitting controversies to be heard on their merits are rarely reversed on appeal, and never unless it clearly appears that there has been a plain abuse of discretion.

**4. Appeal and error ⇨957(1)**

A trial court's discretion, which will not be interfered with on appeal, in excusing a default, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles.

**5. Appeal and error ⇨957(1)**

If an appellate court is satisfied beyond a reasonable doubt that trial court came to an erroneous conclusion in excusing a default, party complaining of the error is entitled to a reversal.

**6. Judgment ⇨143(3)**

Question as to what is excusable neglect which will entitle a defendant to have a default, on which no judgment has been entered, set aside, depends on the facts of each case.

**7. Judgment ⇨143(3)**

Where summons and complaint were handed to defendant, and he placed them in his brief case, merely noting that they referred to an action against him, and through inadvertence he did not call attention of his counsel to the papers and was not at the time aware of their nature, trial court did not abuse its discretion in determining that there was excusable neglect on part of defendant, entitling him to have default, on which no judgment was entered, set aside.

**8. Judgment ⇨160**

Where proposed answer of defendant was served with his motion to vacate default, on which no judgment had been entered, on ground of excusable neglect, and such answer denied the material allegations of the complaint and also alleged that estate, of which defendant was the administrator, owned property which plaintiff claimed belonged to plaintiff's judgment debtor, there was a sufficient affidavit of merits.

**9. Evidence ⇨471(9)**

In action by assignee of judgment against administrator of estate of deceased daughter of judgment debtor for a judgment that daughter at time of her death held title to realty in trust for judgment debtor and to have it decreed that assignee

had a lien against such realty, testimony that it was necessary to bring action to remove certain liens, that judgment debtor did not want realty in his name, so he conveyed it to his daughter, in order to enable her to bring action to quiet title against such liens, and that there were several liens that had to be removed before there was merchantable title, was properly stricken out as conclusion of witness.

10. Evidence ⇨471(11)

Witnesses ⇨236(4)

In action by assignee of judgment against administrator of estate of deceased daughter of judgment debtor for a judgment that daughter at time of her death held title to realty in trust for judgment debtor and to have it decreed that assignee had a lien against such realty, court properly sustained objection to a question whether witness knew facts and circumstances surrounding execution of the deed from daughter to judgment debtor, on ground that there was no connection with deed from judgment debtor to daughter, on ground that question was too general, and on ground that it called for a conclusion of the witness.

11. Evidence ⇨151(2)

In action by assignee of judgment against administrator of estate of deceased daughter of judgment debtor for a judgment that daughter at time of her death held title to realty in trust for judgment debtor and to have it decreed that assignee had a lien against such realty, assignee, if questions had been properly propounded, would have been entitled to prove the declarations of the judgment debtor, not in disparagement of his deed to his daughter, but to show his intent on question of delivery.

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H. J. Kleefisch, San Francisco, for appellant.

Howard C. Ellis, Bernard B. Glickfeld, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff and appellant on May 14, 1948, filed an action against the administrator of the Estate of Adrienne M. Grey, deceased,

the complaint alleging that one Fred Watwood had obtained a judgment in December, 1944, against G. Borden Yount for \$14,509.85, plus interest and costs; that said judgment had been recorded in the office of the Recorder for the City and County of San Francisco on January 5, 1945; that said judgment is final and unmodified and constitutes a valid lien against certain real property of G. Borden Yount in San Francisco; that before the present action was filed Watwood assigned the judgment in the prior action to the plaintiff herein, V. Bernards; that G. Borden Yount died on or about August 17, 1946, and at that time and at all times involved here he was the owner of two parcels of certain described and unimproved real property situated in San Francisco; that such property was subject to execution and that Yount, in order "to conceal his ownership and interest in said property and to place the title to said property beyond the reach of the said judgment," conveyed it to his daughter, Adrienne M. Grey (also known as Adrienne M. Blodgett); that such conveyance was made without consideration from Adrienne M. Grey, who "took and at all time held said real property and the title thereto under said conveyances, in secret trust for and as the property of said G. Borden Yount"; that on or about January 17, 1946, prior to the death of G. Borden Yount, Adrienne M. Grey died intestate and thereafter the defendant, George Robert Grey, was appointed administrator of her estate, and, as such administrator, claimed that she was the owner of the real property and that it was not subject to the lien of the plaintiff; that plaintiff had no knowledge until May 3, 1948, of the death of G. Borden Yount, his ownership of the property or that it had been conveyed to and held in secret trust by Adrienne M. Grey; that no probate proceeding has been had in the matter of the estate of G. Borden Yount; and that the defendant is attempting to sell said real property "at probate sale, as property purporting to be owned by said estate of Adrienne M. Grey, deceased, and in fraud of the rights and lien of plaintiff."

Plaintiff prayed that G. Borden Yount be decreed the real owner of the property

at the time the judgment was recorded "and that said Adrienne M. Grey at the said time, and at the time of her death, held the same and the title thereto in secret trust for said G. Borden Yount" and that the plaintiff be decreed to have a lien against said real property.

Complaint and summons were served on defendant administrator on May 17, 1948. No answer was filed and at plaintiff's request a default was entered by the clerk on June 22, 1948, but no judgment was entered.

On July 10, 1948, the defendant filed a notice of motion to set aside the default "on the grounds of inadvertence and excusable neglect of defendant." Affidavits of the defendant and his attorney, Bernard Glickfeld, which accompanied the notice of motion, show that the summons was presented to the defendant on May 17 as he was standing outside the courtroom door in the county courthouse of Santa Clara County in San Jose and while talking with Mr. Glickfeld, Howard C. Ellis, the attorney of record for the Estate of Adrienne M. Grey, and John Goodwin, who represented the purchaser of one of the two parcels of land here in question. Such sale had just been approved by the court. The defendant in his affidavit alleges that such confirmation had been sought eleven days earlier, but the matter had been continued until May 17 on the representation of counsel appearing for this plaintiff and/or the Bank of America, and that on the 17th no appearance in opposition was made.

The defendant alleges further that at the time he received the summons and complaint he placed them in his brief case, merely noting that they referred to the present action, and "through inadvertence, did not call to counsel's attention the papers he had received and was not at said time aware of their nature." It was not until on or about July 1, 1948, that the defendant, having the matter called to his attention by his attorney, checked his files and brief case and found the documents.

In support of his motion to vacate the default, the defendant also served a copy of his proposed answer and an affidavit of merits prepared by Howard C. Ellis as

attorney of record. The answer denied all the material allegations of the complaint, alleged that the Estate of Adrienne M. Grey is the owner of the property in controversy and that plaintiff was "guilty of laches in not proceeding at an earlier time in order to enforce any rights therein which he may possess." No counter affidavits were filed.

The motion to set aside the default was granted and order vacating default filed on August 5, 1948. Thereafter the cause was tried without a jury and judgment was rendered in favor of defendant. This appeal is from said judgment.

[1] Appellant's first contention is that the trial court abused its judicial discretion in granting defendant's motion to vacate the default. While there is no appeal from an order setting aside a defendant's default upon which no judgment had been entered, said order not being either a final judgment or an order made after final judgment, Code Civ. Proc. § 963; *Turner v. Follmer*, 84 Cal.App.2d 815, 191 P.2d 777; *Rauer's Law, & Collection Co. v. Standley*, 3 Cal. App. 44, 82 P. 214; *Sherman v. Standard Mines Co.*, 166 Cal. 524, 137 P. 249, yet, as said by this court in *Hughson v. Superior Court*, 120 Cal.App. 658, at pages 659-660, 8 P.2d 227, at page 228, "although no direct or separate appeal lies from an order granting a motion to vacate a default upon which no judgment has been given (citing cases), it has been uniformly held that such an order is reviewable and may be annulled on an appeal from any adverse judgment which might afterwards be rendered in the action. (Citing cases.)" Appellants, therefore, upon this appeal from the judgment are entitled to make the point that the court erred in granting the motion.

[2, 3] In the recent case of *Benjamin v. Dalmo Manufacturing Co.*, 31 Cal.2d 523, at page 525, 190 P.2d 593, 594, our Supreme Court said: "It is well settled that appellate courts have always been and are favorably disposed toward such action upon the part of the trial courts as will permit, rather than prevent, the adjudication of legal controversies upon their merits. (Citing cases.) Apt expression of this attitude is found in *Jones v. Title Guaranty & Trust*



Co., 178 Cal. 375, at pages 376-377 [173 P. 586, 587]: 'This court has always looked with favor upon orders excusing defaults and permitting controversies to be heard upon their merits. Such orders are rarely reversed, and never "unless it clearly appears that there has been a plain abuse of discretion."' \* \* \*

[4, 5] But, as said in the early case of *Bailey v. Taaffe*, 29 Cal. 423, at page 424: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit *in foro legis*, when examined under those rules of law by which Judges are guided to a conclusion, the judgment of the Court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the Court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other."

In 14 California Jurisprudence, at page 1075, it is stated: "The policy of the law is to have every litigated case tried upon its merits; and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence or neglect of his adversary. The discretion of the court ought always to be exercised in conformity with the spirit of the law and in such manner as will subserve rather than defeat the ends of justice."

The facts in *Benjamin v. Dalmo Manufacturing Co.*, supra, bear a striking similarity to the facts in the instant case. It appeared in that case that the president "upon receipt of the copies of summons and

complaint by him and by the secretary, directed the secretary—who was also his private secretary—to forward the papers immediately to defendant's attorney; that the secretary 'misunderstood' the 'directions so given to her \* \* \* and understood (the president) to say that she \* \* \* was to file said papers in the office files'; that 'as a result of such misunderstanding' the secretary 'failed to forward' the papers to defendant's attorney; that neither of the affiant officers knew of the default 'until on or about January 16, 1946,' when the president received a letter from defendant's attorney stating that the latter had noticed that on the preceding day a judgment had been taken against defendant; and that the secretary thereupon forwarded the copies of the summons and complaint to defendant's attorney on January 17, 1946." 31 Cal.2d at pages 526-527, 190 P.2d at page 595. The Supreme Court said, 31 Cal. 2d at pages 527-528, 190 P.2d at page 595: "From these considerations demonstrating that defendant's failure to appear in the action within the period prescribed by law was due to the inadvertent omission of defendant's officers, charged with the duty of responding to the legal process in due time, to notify defendant's attorney of the service made upon them, it may be conceded that there was reasonable ground for the trial court to excuse defendant's conduct to the point of entry of the default judgment. As defendant maintains in this regard with respect to its corporate officers: (1) the president's delinquency stemmed from his reliance upon his secretary to follow his forwarding instructions and his failure to anticipate her misunderstanding them, with the result that the process papers were placed in the office files; and (2) the secretary's delinquency stemmed in some measure from the perfunctory nature of her official position, so that while her failure to 'read' and 'heed' the summons served upon her constituted a neglect of duty (*Gillingham v. Lawrence*, 11 Cal.App. 231, 233-234 [104 P. 584]), whether or not it was 'excusable' was primarily a question for the trial court's discretion (*Ross v. Ross*, 48 Cal.App.2d 72, 76 [119 P.2d 444]), particularly as related to her employee

status. Factual situations generally similar to the present case in that they involved an erroneous filing in the office either of the defendant corporation (*Gorman v. California Transit Co.*, supra, 199 Cal. 246, 248-249, 248 P. 923) or of the attorney (*Downing v. Klondike Mining & Milling Co.*, supra, 165 Cal. 786, 788, 134 P. 970) have been deemed sufficient explanation for failure to make a seasonable appearance in defense of an action. The inadvertence of defendant's officers rested not on mere forgetfulness (*Slater v. Selover*, 25 Cal.App. 525, 527 [144 P. 298]) but on a misunderstanding in the execution of properly given instructions, a mistake which 'might be easily made \* \* \* without any culpable carelessness' on the part of the parties concerned. (*Downing v. Klondike Mining & Milling Co.*, supra, 165 Cal. 786, 789, 134 P. 970, 971.) As heretofore stated, the day following the president's receipt of notice from defendant's attorney regarding the taking of the default judgment, the papers served upon defendant's respective officers were forwarded to the attorney in prompt correction of the prior oversight."

However, in that case the court reversed the order setting aside the default because no proceedings to set aside the default were instituted for more than three months after the papers served upon the officers were forwarded to the attorney, but this fact does not weaken *Benjamin v. Dalmo Manufacturing Co.* as an authority upon the matters relating to the default in the instant case, as here the proceedings to set aside the default were instituted promptly.

In *Gorman v. California Transit Company*, 199 Cal. 246, 248 P. 923, the Supreme Court upheld the order vacating a default judgment due to failure to answer, the reason for such failure given by the defendant being that after service of the summons and complaint on the secretary of the corporation they were mistakenly taken by an employee from the desk of one who was to notify the president of the corporation, and filed, and the attention of the president therefore was diverted from the necessity to act thereon. The court said, 199 Cal. at pages 248-249, 248 P. at page 924: "In the instant case, the inadvertence

and forgetfulness of the secretary of the corporation was due to the fact that he had delivered said summons and complaint to the manager of the traffic department of said corporation with instruction to deliver the same to the president thereof immediately upon his return. The inadvertence of the manager of the traffic department in failing to carry out such instruction was attributable to the fact that the file containing said papers had been mistakenly removed from his desk by another employee of the defendant, and that his attention amid the engrossing details of his department was thus withdrawn from the same and from his duty to present the papers to the president of the corporation upon his return. It seems to us that these intervening facts furnish a sufficient basis to justify the conclusion of the trial court that the inadvertence of the officials of the defendant corporation was excusable, and justified the order from which this appeal has been taken."

[6,7] Appellant argues that here the default was the result of inexcusable neglect and that therefore no grounds existed for relief by the court. What is excusable neglect depends upon the facts of each case, and we believe that all of the cases cited by appellant in support of his contention are clearly distinguishable upon the facts. We are satisfied that the trial court did not abuse its discretion in determining that there was excusable neglect in the instant case.

[8] There is no merit in appellant's contention that there was no sufficient affidavit of merits. The proposed answer of defendant was served with the motion to vacate the default. Said answer denied the material allegations of the complaint and also alleged that defendant estate was the owner of the property in controversy.

In *Shively v. Kochman*, 23 Cal.App.2d 420, at page 422, 73 P.2d 637, at page 638, the court said: "An affidavit of merits was filed by the defendants' attorney, and complaint is made that this also was insufficient. However, one of the defendants verified the answer mentioned, which denied the material allegations of the amended plead-

ing. The answer supplied any deficiencies in the affidavit, and such has been held to be sufficient. (*Waybright v. Anderson*, 200 Cal. 374 [253 P. 148].) So, even if the affidavit of merits were insufficient (which we do not believe it was), the verified answer supplied any deficiencies in the affidavit.

Appellant's next contention is that the trial court abused its judicial discretion and erred in striking out evidence and rendering judgment in favor of defendant.

Plaintiff and appellant through the records of the county recorder introduced into evidence certain deeds and other documents relating to the title of the property in controversy. These records showed that in 1931 G. Borden Yount was the owner of the property and that by deed dated November 19, 1931, he conveyed a one-half interest in and to a certain parcel thereof to W. K. Ephriam. On May 28, 1936, Yount and Ephriam secured a decree quieting their title to the property as against the Bank of America National Trust and Savings Association. By deed dated May 28, 1936, G. Borden Yount conveyed his one-half interest in the property to his daughter, Adrienne Blodgett (Grey). On August 17, 1937, Adrienne Blodgett and Ephriam secured a decree quieting their title to said property as against the Bank of California and others. By deed dated May 1, 1939, Ephriam conveyed his one-half interest to Adrienne Blodgett. Appellant also introduced into evidence a deed dated October 11, 1939, from Adrienne Blodgett to Henry Yount conveying the property owned by Yount and Ephriam in 1936, it being recited in said deed that it was made "by way of security only"; and also introduced a deed from Adrienne Blodgett to H. A. Yount dated October 20, 1939, covering the same property but without any recital as to security. In December, 1944, one Fred Watwood obtained a judgment against G. Borden Yount which judgment was recorded on January 5, 1945, and which judgment was assigned to plaintiff and appellant.

As hereinbefore stated, plaintiff and appellant sought by this action to have it decreed that G. Borden Yount was the real

owner of the property at the time the judgment of appellant's assignor was recorded "and that said Adrienne M. Grey at the said time, and at the time of her death, held the same and the title thereto in secret trust for said G. Borden Yount" and that appellant be decreed to have a lien against said real property. Appellant did not allege any fraud on the part of G. Borden Yount or his daughter, Adrienne M. Grey. At one point in the trial counsel for appellant stated: "Your Honor, the whole proposition is, what I am trying to show is that G. Borden Yount was the actual owner of this property and that Mrs. Grey, who is the same person as Adrienne Blodgett, took title in her name, which later was inventoried in her estate but is in fact the property of G. Borden Yount. In other words, she was the mere receptacle or agent holding title. The consideration was paid by Yount, the deed was at his request, and that is the whole gist of it." And at another point the following occurred:

"The Court: I can't imagine how you are going to establish fraud here or a trust in favor of the plaintiff against the deceased daughter of the original owner of this property.

"Mr. Kleefisch [counsel for appellant]: It is not so much a question of fraud as it is that the property belonged to him and the title was taken in her.

"Mr. Glickfeld [counsel for respondent]: No, your Honor, this is an action by a creditor."

Appellant claims that she was not allowed to prove through Ephriam the facts and circumstances under which the deeds from G. Borden Yount to Adrienne Blodgett, his daughter, in 1936 and from the daughter to Henry Yount in 1939 were made and the quiet title action brought against the Bank of California. As illustrative of this, appellant quotes the following extract from the record:

"Q. Now, Mr. Ephriam, with reference to the deed from G. Borden Yount to Adrienne Blodgett, you know of your own knowledge the circumstances under which the deed was executed by G. Borden Yount?  
\* \* \* A. I do.



"The Court: That deed ran to whom as grantee?"

"Mr. Kleefisch: To Adrienne Blodgett. She is the same lady as Mrs. Grey.

"Mr. Glickfeld: If it please the Court, I object to any testimony along that line as hearsay, unless it can be established that any parties involved in this action were present at any conversations. The question is omnibus in its scope."

However, the record shows that there was no ruling by the court and that appellant's counsel then withdrew the question.

[9] Appellant also contends that the following extract quoted from the records shows error by the trial court:

"Mr. Kleefisch: Q. Now, with reference to the deed from G. Borden Yount to Adrienne Blodgett, and that is the deed described in Book 2954, page 415, May 28, 1946, you know of your own knowledge the circumstances under which that deed was executed by G. Borden Yount? A. [by Mr. Ephriam] It was necessary to bring another action to remove those liens and clouds, and Yount didn't want it in his name, so he conveyed it to his daughter, that she could join with me in bringing that action to quiet title against those liens and judgments. There were several there at the time, amounting to small amounts, that had to be removed before we could have a merchantable title to the property.

"Mr. Glickfeld: I move to strike that as a conclusion of the witness.

"The Court: Yes, motion granted."

It requires no argument or citation of authority to prove that the answer of the witness was a conclusion and therefore properly stricken out by the court.

[10] Appellant also quotes the following as error on the part of the trial court:

"Q. With reference to the deed from Adrienne Blodgett to Henry A. Yount, you know of your own knowledge the facts and circumstances surrounding the making and execution of such deed? A. [by Mr. Ephriam] I do.

"Mr. Glickfeld: I am going to object to the question, I cannot see the connection

of a deed from the deceased here, Adrienne Blodgett to Henry Yount. There is no connection whatsoever. I think we are getting far afield, your Honor.

"The Court: I can't see the connection, of course, and naturally, the question is too general, calls for a conclusion of the witness. Objection sustained. The witness can't construe the meaning of the documents."

We believe that the court correctly stated the reasons why the objection should be sustained.

[11] Appellant complains that she was not permitted to make her proof as to the circumstances surrounding the transfers from Yount to his daughter; but the record shows that when objections were properly sustained to the questions in the form in which they were propounded, her counsel did not ask questions calling for the declarations of G. Borden Yount nor did he make any offer of proof for the record. Appellant's counsel apparently accepted the rulings of the court as final and failed thereafter to ask questions in proper form, and appellant therefore is not in a position to urge on appeal that proper evidence was improperly excluded. Had the questions been properly propounded, appellant would have been entitled to prove the declarations of G. Borden Yount, not in disparagement of his deed but to show his intent on the question of delivery. As was clearly stated by this court in *Dinneen v. Younger*, 57 Cal.App.2d 200, at page 205, 134 P.2d 323, at page 326: "It is also clear that where a valid delivery is established, subsequent acts and declarations of the grantor in disparagement of his deed, outside the presence of the grantee, are not admissible. Such declarations or acts are hearsay and self-serving. See cases cited *infra*. But when the very question presented is whether or not the alleged grantor intended a valid delivery—that is, intended to divest himself of title—his declarations and acts made and done outside the presence of the grantee after physically delivering possession of the deed to the grantee or to a third person, are admissible as bearing upon the vital question of intent. This problem

has frequently been before the courts of this state. The leading case is *Williams v. Kidd*, 170 Cal. 631 [151 P. 1, Ann.Cas. 1916E, 703], where an exhaustive review of the authorities is to be found." We therefore conclude that the trial court did not err in the rulings made nor in rendering judgment in favor of respondent.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



97 Cal.App.2d 704

**LARSSON v. CEDARS OF LEBANON  
HOSPITAL et al.**  
Civ. 17210.

District Court of Appeal, Second District,  
Division 3, California.

May 23, 1950.

Maria A. Larsson brought action against Cedars of Lebanon Hospital, Dr. David L. Peeves, and others, on charge of negligence and malpractice. A judgment dismissing the action as to the named defendants was entered by the Superior Court of Los Angeles County, Wilbur C. Curtis, J., and the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that trial court properly dismissed the causes of action as to named defendants on ground that the causes of action were barred by statute of limitations.

Judgment affirmed.

**1. Insane persons** ⚡26

The adjudication of plaintiff's incompetency on June 24, 1941, did not raise a presumption that plaintiff had been incompetent prior to that time.

**2. Limitation of actions** ⚡55(3), 74(1)

In malpractice action against hospital and physician, where last act of alleged negligence of defendant hospital appeared December 23, 1940, and as to defendant physician, July 25, 1940, the three year

statute of limitations commenced to run as to respective defendants upon those dates and plaintiff's incompetency occurring later, if established, would not have interrupted its operation. Code Civ.Proc. § 352.

**3. Limitation of actions** ⚡195(4)

Where plaintiff's cause of action against hospital and physician for malpractice was barred by statute of limitations unless established that plaintiff was incompetent when her cause of action accrued, and plaintiff refused to produce evidence that she was incompetent when her causes of action accrued or even to admit that fact, trial court properly dismissed action on ground that it was barred by statute of limitations. Code Civ.Proc. §§ 352, 581(4), 581c.

Maria A. Larsson, R. N., in pro per. and Arnold O. Steele, Los Angeles, for appellant.

Schell & Delamer, Los Angeles, for respondent Cedars of Lebanon Hospital.

Reed & Kirtland and Robert C. Packard, Los Angeles, for respondent Dr. David L. Reeves.

SHINN, Presiding Justice.

This is an appeal by plaintiff from a judgment of dismissal following a determination by the court that the action was barred by the statute of limitations. The suit is against Cedars of Lebanon Hospital, Charles C. Manger Company, a corporation, and Dr. David L. Reeves, charging negligence and malpractice. It was alleged in the fourth amended complaint that pursuant to award of the Industrial Accident Commission requiring Cedars of Lebanon Hospital to furnish plaintiff further medical or surgical treatment as might reasonably be necessary to cure or relieve from the effects of an injury theretofore suffered by her, defendant Reeves, as agent of the hospital, performed an operation upon plaintiff. This operation was performed July 25, 1940. It was also alleged that Charles C. Manger Company operated a sanitarium as the agent of defendant hospital; that plaintiff was sent to the sani-

tarium September 24, 1940 and was discharged therefrom December 23, 1940. Dr. Reeves was accused of malpractice, the hospital company and the Manager Company with negligence in the treatment and care furnished plaintiff, her alleged injuries being set forth at length. No acts of negligence or malpractice were alleged as of a date subsequent to December 23, 1940. The fourth amended complaint was filed by E. W. Miller, as attorney for plaintiff. The present action was instituted by another attorney August 12, 1943 against Cedars of Lebanon Hospital and Dr. Reeves. The complaint alleged negligence in connection with the operation of July 25, 1940, but no facts were alleged which would have tolled the running of the statute of limitations during the more than three-year period between the date of the alleged negligence and the institution of the action. By subsequent amendments Manger Company was added as a defendant and in the fourth amended complaint it was alleged that on the 25th day of July, 1940, and continuously until the 9th day of August, 1943, plaintiff was of unsound mind and mentally incompetent, and that from on or about the 24th day of June, 1941, until the 9th day of August, 1943, was under the disability of an adjudication of incompetency, and was an insane person within the meaning of section 352 of the Code of Civil Procedure. No other facts were alleged which would have affected the operation of the statute of limitations. The demurrer of the Manger Company to the fourth amended complaint was sustained without leave to amend and the action was dismissed as to it, but no appeal has been taken from that judgment. The action came on for trial December 9, 1947. Plaintiff was then represented by a third attorney, Neal E. Dow, but a mistrial resulted. Thereafter on motion of defendants it was ordered that a separate trial be had of the defense of the statute of limitations pleaded by all defendants and the defense of the Cedars of Lebanon Hospital that the court was without jurisdiction to try the action. Defendants at that time waived the right to urge dismissal of the action for want of prosecution under sec-

tion 583 of the Code of Civil Procedure. Plaintiff was then appearing in propria persona, and so appeared at the time of the trial of the preliminary issues. In the meantime plaintiff had demanded a jury and the court had authorized the prosecution of the action *in forma pauperis*. On July 7, 1948, the court undertook to try the special defense of the statute of limitations, and jurors were in attendance. In the preliminary discussions between plaintiff, defendants' attorneys, and the court it appeared that plaintiff repudiated the allegations of incompetency contained in her fourth amended complaint. She asserted that they had been placed in the complaint by her attorney without her knowledge or consent, and that they were false. The trial judge explained to her that such allegations of incapacity to sue were necessary, and that they would have to be supported by proof, as otherwise the judgment would go against her because of the delay in bringing suit. This was the sole subject of a discussion which extended into the second day of the trial. The court was extremely solicitous of plaintiff's rights and exercised not only patience but perseverance in an effort to persuade plaintiff that it would be necessary for her to alter her position with respect to her alleged incompetency. All this is disclosed in nearly 100 pages of reporter's transcript. She was advised that she should not try the case herself, but should have an attorney. The same advice had been given her by other judges. She replied that attorneys she had consulted had advised her that as long as she maintained her attitude she could not overcome the defense of the statute of limitations and that they were powerless to help her. Among those who had attempted to assist her were representatives of the Legal Aid Society who had been called in by another judge before whom one phase of the case was pending. She had stated then that she had consulted about 40 or 50 lawyers. The record is replete with evidence of offers of assistance by members of the bar and friendly advice from the court. Plaintiff made clear to the court that she would not offer evidence, or attempt to prove the allegations of in-



competency, and insisted that she had never been incompetent. When the court offered to appoint an attorney for her she stated: "I absolutely refuse to have an attorney appointed for me. I absolutely refuse because I am not an insane person."

It was stipulated during the hearing which resulted in the dismissal that the testimony given on behalf of plaintiff at the former trial upon the issue of incompetency be received in evidence. The transcript contains the testimony of 10 witnesses who had testified for plaintiff. Although most of the testimony was adverse to the contention that plaintiff was incompetent in July, 1940, there was some evidence that both before and after that date her conversation was sometimes irrational.

Both defendants made motion for a dismissal of the action upon the ground of plaintiff's repudiation of the allegations of incompetency in her complaint, and her insistence that she had been competent at all times and would not offer evidence to the contrary. The motion was denied and the matter was further discussed until the motion was renewed upon the following day, when it was granted. At that time the court stated it would be almost farcical, under the circumstances, to submit the question to a jury. It is altogether clear that if plaintiff had expressed a willingness to offer testimony upon the issue of incompetency the case would have been tried to a jury. We think it was the duty of the court to grant the motion of the defendants and dismiss the action.

[1,2] The adjudication of incompetency on June 24, 1941, did not raise a presumption that plaintiff had been incompetent prior to that time. *Avery v. Avery*, 42 Cal.App. 100, 102, 183 P. 453. The last act of alleged negligence of defendant hospital may be taken to have occurred December 23, 1940, and as to defendant Reeves, July 25, 1940. The statute commenced to run as to the respective defendants upon those dates and incompetency occurring later would not have interrupted its operation. Code Civ.Proc. sec. 352; *Davis v. Hart*, 123 Cal. 384, 388, 55 P. 1060; *Rose v. Petaluma & Santa Rosa Ry. Co.*, 64 Cal.App. 213, 221 P. 406; 16 Cal.Jur., sec. 153, p.

557; 54 C.J.S., Limitations of Actions, § 218, p. 252.

[3] Section 581c, Code of Civil Procedure, provides for the granting of a nonsuit upon the opening statement of plaintiff and that unless the court orders otherwise the judgment operates as an adjudication upon the merits. See *Wrightson v. Dougherty*, 5 Cal.2d 257, 262, 54 P.2d 13; *Porter v. Fiske*, 74 Cal.App.2d 332, 335, 171 P.2d 971. The proceedings in the present case amounted to a good deal more than an opening statement by plaintiff. Although, in a technical sense, it did not amount to an abandonment of the case, Code Civ.Proc. sec. 581(4), her persistent refusal to proceed as the court advised was necessary rendered it impossible for her to receive a favorable decision on the issue. The result is that in a practical sense plaintiff did abandon her case.

It would have been an idle act to empanel a jury to try the issue as long as plaintiff remained adamant in her determination not to produce evidence that she was incompetent when her causes of action accrued, or even to admit that fact. She has not changed her attitude. This is shown by her opening brief of 62 pages which represents her own handiwork. She was represented by an attorney in taking the appeal but he felt obliged to be relieved from his assignment. His motion for leave to withdraw was granted, with the consent of plaintiff.

It appears from the record that nothing has been left undone to assist plaintiff to present her case properly and effectively. There is no reason to believe that, if given an opportunity, she would ever accept the advice and assistance which she has repeatedly rejected. Litigation sometimes creates such unfortunate situations, for which there is no remedy except through termination of the litigation. Any feeling of sympathy inclining us to allow the present litigation to be prolonged would be misguided.

The judgment is affirmed. The attempted appeals from numerous orders made prior to judgment are dismissed.

WOOD and VALLÉE, JJ., concur.

97 Cal.App.2d 797

PEOPLE v. ALKOW.

Cr. 4423.

District Court of Appeal, Second District,  
Division 3, California.

May 26, 1950.

Harry Alkow was convicted in the Superior Court for Los Angeles County, Clement D. Nye, J., of the theft of \$200, and from the judgment and from an order denying a motion for a new trial, the defendant appealed. The District Court of Appeal, Shinn, P. J., held that the evidence was insufficient to sustain the conviction.

Judgment and order reversed, and cause remanded for a new trial.

1. Embezzlement  $\S$ 44(1)

In prosecution for theft arising out of alleged failure of collection agency to remit money collected to creditor, tried on theory that corporation was being operated by individual defendant for his own benefit, evidence failed to show that agency was a corporation in name only and was the alter ego of the defendant.

2. Criminal law  $\S$ 327

In prosecution for theft of \$200.00, burden was on prosecution to fasten responsibility upon defendant by direct evidence or by circumstantial evidence so complete as to overcome reasonable theories of innocence, and it was not for defendant to produce facts in order to establish his innocence.

3. Criminal law  $\S$ 327

In a criminal prosecution, evidence which merely creates a strong suspicion of guilt of accused does not shift burden of proof and impose upon accused the duty of overcoming the suspicion.

4. Criminal law  $\S$ 1159(2)

A reviewing court must insist that in trial of a criminal case the evidence of the prosecution should be the best that is obtainable.

5. Embezzlement  $\S$ 44(1)

Evidence was insufficient to support conviction for theft of \$200.

Harry Alkow, Los Angeles, in pro. per.

Fred N. Howser, Attorney General, Donald D. Stoker, Deputy Attorney General, for respondent.

SHINN, Presiding Justice.

Harry Alkow was convicted in a jury trial of the theft of \$200 from Ted Watry. He was sentenced to State prison, execution of the sentence was suspended, he was placed on probation for seven years, one of the conditions being that he serve a year in the County jail. He appeals from the judgment and from an order denying his motion for a new trial. The only ground of appeal that requires decision is that the evidence was legally insufficient to prove the commission of the offense.

Nick Harris Finance Exchange was a corporation, licensed by the state as a collection agency. It had been owned and operated by Nick Harris prior to his death in 1943. His widow succeeded to the business and caused the corporation to be formed. There was testimony that a Mrs. Lux owned 50% of the capital stock and that Mrs. Harris also was a stockholder. One Thomas Morgan was connected with the company and had acted for the company in obtaining the state license. He was its managing director, but it does not appear that he had any special duties for the company, although he appeared at the company office several times each week and was paid by defendant \$25 or \$35 per month for the use of his name. Upon a signature card with the Security-First National Bank of Los Angeles executed September 11, 1949, Morgan was listed as president, and Anne F. Scherrei, as secretary. Either of these two, with defendant, could draw checks upon the company's bank account. One account was carried with the Security and another with the California Bank, also in Los Angeles. It appears also that defendant had an account with the Citizens National Trust & Savings Bank, as trustee for the company. Defendant had been attorney for Nick Harris for many years and continued to act as attorney for the corporation after it was formed. His name

was listed on the Security Bank signature card as attorney.

On or about May 23, 1948, Ted Watry delivered to defendant the promissory note of Lois and James Daly upon which there remained unpaid to Watry \$2,026. Defendant received the note at the office of the company which was also his law office, representing himself to Watry to be "Mr. Brown." He accepted the note for the corporation for collection at a fee of one-third of the amount collected. James Daly was contacted in Alpine, California, came to Los Angeles and met defendant at the company office. A week or ten days later, on June 23rd, Daly made a settlement of the note with defendant for \$1,675, giving him a cashier's check for that amount. Defendant made out a deposit ticket and caused the check to be deposited to the account of the corporation in the Security Bank. Defendant promised Watry that he would be notified when a collection was made. He heard nothing from defendant until the middle of August, when he called defendant by telephone and was told to come in the first of the month when defendant would have a check for him. Watry called at the office of the company September 1st and was told by defendant that \$400 had been collected, that the man who made out the checks was on vacation, but that a check would be mailed to him on September 5th. No check came. About September 20th Watry called defendant who told him a mistake had been made in dating the check and that a check for \$400 would be mailed to him October 1st. No check arrived, and in October Watry again saw defendant at the company office and defendant promised to send a check to him "right away." About November 1st defendant gave Watry a check for \$400 which was dishonored by the bank because it required two signatures and had only one. On December 15th Watry received from defendant a cashier's check for \$350 and his check as trustee for the company in the amount of \$116.66. This latter check was returned for insufficiency of funds. Watry testified that defendant had told him that payments on the note were coming in at the rate of \$150 per month but only

\$600 had been collected and that he would receive \$100 per month. Prior to the trial, Watry was paid two-thirds of \$1,675, with funds received from the sale of assets of the company. A representative of the Security Bank testified that on June 22, 1948, the bank balance of the Nick Harris Agency was \$7.60. At the close of business the day the Watry check had been deposited the balance was \$1,468.10 and on July 1st, \$32.72. In the meantime some 32 checks had been drawn on the account, and some small deposits had been made. Although Mr. Morgan and Miss Scherrei had authority to draw checks on the account there was no evidence as to the signatures appearing upon the checks which had dissipated the account. Mr. Morgan was called as a witness and testified that he sometimes signed numbers of checks in blank at the request of defendant. He was not questioned as to whether he had drawn or issued any of the 32 checks. Miss Scherrei was not called as a witness and her absence was not accounted for by the People. On cross-examination defendant was questioned as to his knowledge of a check for \$225 charged to the account on June 24th, and one for \$250 on June 25th, which were shown on the bank records, and denied that he had any knowledge of either of them. He testified that he had not used any of the money himself, but he was not questioned concerning his knowledge of the issuance of these checks nor as to the purposes for which the money may have been used. It appeared without contradiction that the office of the company was placed under attachment in September and that everything in the office was taken into possession of the Marshall. The bank accounts also were attached but there was no evidence as to the bank balances at that time. Neither defendant nor any other witness was questioned concerning the cancelled checks and so far as appears no effort was made by the People to have them produced at the trial. There was no evidence that defendant wrote or issued any of them, or received or used any of the money. Defendant testified he was not an officer or director of the company and that he owned no stock. There was no con-



tradictory testimony. The evidence was that Mrs. Lux and Mrs. Harris were the owners of the stock and that Mrs. Lux was at the office every day and active in the business although she was out of the city during the month of June. No attempt was made by the People to ascertain the amount of money at any time in the company account in the California Bank, nor was defendant questioned as to whether the company had funds in the account in the Citizens Bank upon which he had drawn a check as trustee. In other words, there was no direct evidence of inability of the corporation to pay the amount that was due Watry if those in charge had seen fit to do so. The People introduced testimony of statements made by defendant during an interview in the District Attorney's office to the effect that defendant stated that he had been in charge of the affairs of the collection agency and that the money had been used to meet obligations of the company. There was also testimony from these witnesses that defendant denied having made use of the money himself.

[1-3] Defendant in his testimony admitted that he had given the fictitious name of "G. Brown" to Watry. His explanation was that he had used that name in the past in dealing with customers of the business and had done so at the suggestion of Harris. He did not deny that he had concealed from Watry that a settlement had been made with Daly nor did he deny any of the other testimony of Watry. The least that can be said of defendant's conduct is that it unquestionably reflects extreme discredit upon him as a member of the bar. The most that can be said as to the legal sufficiency of the evidence to prove the offense is that it creates a strong suspicion of his guilt. The collection agency was the agent of Watry and held money for his use as such. If the money was fraudulently appropriated by means of defendant's actions or pursuant to his directions, he was guilty of embezzlement. The case was tried upon the theory that the company was being operated by defendant for his own benefit, that the collection agency was a corporation in name only and was the alter ego of defendant. The evi-

dence did not sustain this theory, nor was it necessary that it should in order to establish defendant's guilt. However, it was necessary to fasten responsibility upon defendant by direct evidence or by circumstantial evidence so complete as to overcome reasonable theories of innocence. The evidence left much in doubt. Even if it could be said that on the surface it appeared that defendant was probably guilty, this was not sufficient. The facts that would have turned the scales in favor of guilt or innocence lay below the surface and the People made slight effort to unearth them. It was for the People to bring them to the surface if it was believed they would establish guilt, not for the defendant to produce them in order to establish his innocence. As we say, there was no testimony that defendant issued any of the checks or that he had knowledge that they were being issued by others. There was no testimony that the checks did not bear the signatures of Mr. Morgan and Miss Scherrei or that they were not issued by some person or persons other than defendant. The possible inference that others did not issue them was an inadequate substitute for proof of that fact by the testimony of the witness Morgan and by that of Miss Scherrei who, so far as disclosed by the record, was available as a witness. No effort was made to prove the status of the company account in the California Bank, or the resources of the company. Evidence as to these facts would have had a direct bearing upon the motives of the person or persons who made use of the funds on deposit in the Security Bank. The mere fact that those funds were used for the benefit of the company did not of itself constitute the offense in the absence of evidence direct or circumstantial that they were used fraudulently. It is true that defendant lied to Watry and made numerous promises that were not fulfilled. This deceit could have been deemed sufficient to prove a fraudulent intent upon defendant's part if the People had produced evidence to fill in the gaps we have mentioned, but evidence of conduct upon the part of defendant indicating that an appropriation of the funds by him would have been fraud-

ulent was not evidence that the funds were appropriated by defendant, or by other persons with his connivance. Evidence which merely creates a strong suspicion of the guilt of the accused does not shift the burden of proof and impose upon him the duty of overcoming the suspicion. As we say, a strong circumstance tending to prove defendant's guilt would have been proof of the fact that the checks were not issued by others in the company who had authority to issue them. When the People failed to question Morgan, president of the company, and failed to call the secretary, Miss Scherrei, or to account for her absence, to assume that their testimony would have been favorable to the People would be wholly unjustified. The presumption is to the contrary. We have concluded that a reversal is required upon the ground of insufficiency of the evidence. Too much was left to speculation and conjecture on the part of the jury when satisfactory proof was available. As a consequence we are not only faced with a difficult problem concerning a particular case but also a grave question as to our duty as a reviewing court in the establishment of a precedent. The review of a judgment in a criminal case is a heavy responsibility at best, and we are unwilling to overlook trial practices which create serious problems on appeal which could easily have been avoided.

[4,5] It is the right of every reviewing court to insist that in the trial of a criminal case the evidence of the People should be the best that is obtainable. The limitation of jurisdiction on appeal to questions of law implies that the facts which are determinative of the question of guilt will be as firmly established as possible in the trial court and that reliance will not be placed upon the ability of jurors to choose between conflicting inferences when evidence is available to prove material facts. Therefore, as far as possible, uncertainty should be removed from the case. When presentation of the evidence is unnecessarily incomplete, and the crucial facts of the case are left to inference, the tendency will be to relax the requirement that guilt must be established beyond a reasonable doubt and place emphasis upon mere sus-

picion. We have such a record in the present case. The deficiencies of the evidence of the People would have required the jurors to determine upon the basis of probabilities whether a disclosure of further facts would have tended to prove guilt or innocence. We do not believe the evidence was legally sufficient to establish guilt or to warrant the jury in determining beyond a reasonable doubt, by inference from the evidence, that the essential facts which the People did not undertake to put in evidence would have cured the insufficiency.

The judgment and order denying motion for new trial are reversed and the cause is remanded for a new trial.

WOOD and VALLÉE, JJ., concur.



97 Cal.App.2d 766

WILSON v. CLOUGH et al.

RYAN v. WILSON et al.

Civ. 17550.

District Court of Appeal, Second District,  
Division 2, California.

May 26, 1950.

Action by Jack Wilson against Lorton Clough, Martin S. Ryan and Clifford Detty, individually and as copartners doing business under the fictitious firm name and style of Wilson Motors, for breach of contract and to recover loss of profits. Martin S. Ryan filed a cross-complaint against Jack Wilson. The Superior Court of Los Angeles County, George A. Dockweiler, J., entered judgment for plaintiff and defendant Ryan appealed. The District Court of Appeal, Wilson, J., held that the evidence did not support finding of trial court that appellant purchased plaintiff's interest in an automobile dealership and that appellant agreed as part of purchase price to deliver three new model automobiles to plaintiff.

Judgment reversed.

Sales 52(5)

In action for breach of contract, evidence did not support finding of trial court that a defendant purchased plaintiff's interest in an automobile dealership, and that such defendant agreed as part of purchase price to deliver three new model automobiles to plaintiff, and therefore plaintiff was not entitled to a judgment for damages for alleged loss of profits on three automobiles.

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Martin S. Ryan, Los Angeles, in pro. per.

Milton A. Krug, Los Angeles, for respondent.

WILSON, Justice.

From a judgment in favor of plaintiff in an action for breach of contract and to recover loss of profits, defendant Martin S. Ryan appeals.

As grounds for reversal appellant contends the evidence is insufficient to support the findings and that the court erred in not upholding the defense of the statute of frauds.

The trial court found that defendants Lorton Clough, Martin S. Ryan and Clifford Detty were copartners doing business under the firm name of Wilson Motors; that on June 28, 1947, defendant Ryan entered into an agreement in writing with plaintiff whereby, among other things, it was agreed "seller [Jack Wilson] to receive three new model Hudson cars one each for three consecutive months beginning when new models delivered"; that it was orally agreed between plaintiff and defendants that the three new model Hudson cars were to be delivered to plaintiff at the wholesale cost thereof to defendants; that by reason of defendant Ryan's failure to deliver the automobiles to plaintiff as agreed, plaintiff had suffered damage in the loss of profits from the resale in the amount of \$1,500; that the copartnership of Wilson, Ryan and Clough was dissolved by the three copartners by an agreement in writing executed on June

28, 1947; that defendant Ryan was the attorney for and had represented plaintiff Jack Wilson over a period of many years up to and including June 28, 1947; that plaintiff relied upon and had confidence in Ryan and did with such reliance and confidence accept the agreement executed by Ryan on June 28, 1947; that at that same time and place plaintiff delivered to Ryan an executed bill of sale of all his right, title and interest in and to the copartnership and partnership assets of Wilson, Ryan and Clough, and as a part of the same transaction and as additional consideration for the execution of the bill of sale to Ryan, plaintiff accepted the agreement of Ryan dated June 28, 1947; that Ryan represented to plaintiff the agreement was a valid agreement and Ryan is estopped to urge the statute of frauds with reference to the contract; that plaintiff sold his one-fourth interest in and to the partnership of Wilson, Clough and Ryan to the latter and all partnership indebtedness, if any, theretofore existing between Wilson and Ryan as partners was fully and finally settled and adjusted and an account was stated between Ryan and plaintiff as of June 28, 1947.

Appellant Ryan contends that the finding that he purchased the 25 per cent interest of plaintiff in the Hudson dealership and agreed to deliver three new model Hudson cars to plaintiff as a part of the purchase price is not supported by the evidence. It is appellant's contention that plaintiff sold his one-fourth interest to Clifford Detty and that Detty agreed to deliver the three new cars at the retail price; that appellant merely acted on behalf of Detty in consummating the transaction.

There are in evidence two bills of sale signed by plaintiff, each of which is dated June 28, 1947; one is from Jack Wilson to Clifford Detty and the other is from Jack Wilson to Martin S. Ryan. The two bills of sale are identical with the exception of an added paragraph in the one to Detty which reads: "This Bill of Sale is being drawn in conformity with that certain agreement between Messrs. Detty



and Wilson, dated May 29, 1947, relating to the sale of Wilson Motors." The agreement referred to is for the sale of plaintiff's 25 per cent interest in Wilson Motors to Detty for the sum of \$7,500 together with the sum of \$2,500 representing plaintiff's capital investment plus undivided profits up to and including May 31, 1947. The agreement of May 29, 1947, contains a clause reading: "Subject to three new model Hudsons at retail price on basis of one a month beginning when available to dealer." There is also in evidence a third bill of sale which appears to be a carbon copy of the bill of sale from Wilson to Ryan and which contains an added clause reading "Seller to receive three new model Hudson cars one each for three consecutive months beginning when new models delivered." This bill of sale is also dated June 28, 1947, and is signed by Ryan.

Appellant and respondent are in accord that appellant brought the above described documents to respondent's office on June 28, 1947; that the bill of sale to Detty was executed by respondent first; that thereafter and as part of the same transaction respondent executed the bill of sale to appellant; that appellant gave respondent his personal check for some \$15,000; that the check represented the amount agreed upon for respondent's 25 per cent interest in Wilson Motors, being \$7,500 plus the return of his capital investment of \$2,500 and the undivided profits due respondent to June 1, 1947; that appellant advanced the money for Detty and expected to be reimbursed by Detty; that the purpose of the bill of sale to Ryan was to protect him and as security until such time as he was reimbursed by Detty. Respondent testified as follows:

"Q. But at any rate, your deal was made with Mr. Detty wasn't it? A. My deal was made, I guess with Mr. Detty through Mr. Ryan. The only thing I knew was what papers Mr. Ryan brought me and what Mr. Ryan told me. I never talked to Mr. Detty \* \* \*

"The Court: Why, I thought you only had a 25 per cent interest and sold that to Martin S. Ryan. A. No, sir."

Respondent testified that he "sold the last interest to Ryan because he wanted the bill of sale in his name instead of Detty's"; that Ryan gave respondent his check for fifteen thousand and some odd dollars and told him he was advancing the money for Detty and expected to get it from Detty; that in case Detty should die over the week-end, he wanted to have the bill of sale to him (Ryan) so he would have some protection for the money he was putting up; that respondent thought he was selling the interest in the business to Ryan and "Ryan was going to protect himself from Detty until Detty got the money." Respondent then testified as follows:

"Q. So you understood at the time that the deal was with Detty? A. Well, it was with Ryan, but Ryan was protecting himself with Detty. Ryan was handling it for Detty; and for me too, as far as that is concerned.

"Q. Yes. But you understood that the bill of sale to Detty was to be in effect did you not? A. No, I understood that he wanted that one to protect himself and that he would use the other one until that amount of money came from Detty to him.

"Q. By the Court: As I understand it, at the time you were paid that \$15,000 he said he was paying it for Mr. Detty; is that it? A. Well, he meant that he was paying me the proportion that Detty owed me and the other portion was in the bank, belonging to me already."

Respondent further testified that he received \$7,500 for his interest in the franchise and the profits for the month of May as recited in the agreement of May 29th.

Appellant and respondent each testified that the reason for respondent's selling his interest to Detty was because the Hudson Motor Company had threatened to cancel their franchise since none of the partners was managing the agency; that their franchise was coming up for renewal on July 1st, and it would be more likely to be renewed if the interest were sold to some one who would manage the agency. Ap-

pellant testified, and his testimony was not disputed, that Detty went to work in the agency about June 1st, that he was approved by the Hudson Motor Company in July but that appellant was not reimbursed by Detty for several months thereafter because Detty did not have the money until a bank loan was arranged; that he delivered the bill of sale to Detty prior to the time he received the money from him and after Detty had been approved by the Hudson Motor Company he was made a partner retroactively from June 1st and received his share of the profits from that date.

From the testimony of appellant and respondent it is apparent that the latter sold his 25 per cent interest to Detty; that the reason for selling to Detty was because none of the partners could or would manage the agency and this was necessary under their franchise which was coming up for renewal on July 1st. Respondent executed a bill of sale to Detty and received therefor appellant's personal check in the amount called for by the agreement of May 29th, between respondent and Detty. Appellant acted as the agent of Detty and advanced the money for which he expected to be and was later reimbursed by Detty. Appellant asked respondent to execute a bill of sale to him merely for security and respondent so understood the transaction. Therefore, the evidence does not support the finding that appellant purchased respondent's 25 per cent interest in the Hudson dealership and that he agreed as part of the purchase price to deliver three new model Hudson cars to respondent and respondent is not entitled to a judgment against appellant for damages for alleged loss of profits on the three Hudson cars.

In view of our conclusion that the evidence does not support the last-mentioned finding it is not necessary to consider the other findings complained of which are on the same or related issues, or appellant's defense of the statute of frauds.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concur.

MURDOCH v. MURDOCH.

Civ. 17329.

District Court of Appeal, Second District,  
Division 1, California.

May 31, 1950.

Rehearing Denied June 21, 1950.

Hearing Denied July 27, 1950.

Action by Dorothea F. Murdoch against Norman L. Murdoch for divorce, wherein defendant filed a cross-complaint. The Superior Court for Los Angeles County, Thurmond Clarke, J., rendered an adverse judgment for the plaintiff and denied plaintiff's motion for attorney fees, costs and alimony pending appeal, and plaintiff appealed from the judgment and from the order. The District Court of Appeal, Doran, J., held that the award of alimony for one year and denial of the wife's motion was not an abuse of discretion, and that certain findings of fact were supported by the evidence.

Judgment and order affirmed.

1. Appeal and error ☞1012(1)

When a finding of fact is attacked on basis of insufficiency of the evidence, appellate court will not weigh the evidence, but will accept any evidence in support of the finding and any evidence by the respondent.

2. Divorce ☞253

Husband and wife ☞264

In divorce action, evidence supported finding to effect that husband was owner of certain shares of stock and that such stock was not community property.

3. Divorce ☞253

In divorce action, evidence supported finding that it was not true that there was money due and owing to the husband from a certain corporation.

4. Divorce ☞182, 235, 286

Award of alimony and denial of wife's motion for attorney fees, costs and alimony pending appeal involved matters of discretion not subject to appellate review in absence of abuse.

5. Divorce ☞182, 235

In divorce action, award of alimony for one year and denial of wife's motion for attorney fees, costs and alimony pending appeal were not an abuse of discretion.

Hahn, Ross, Goldstone & Saunders, Los Angeles, for appellant.

Leon W. Delbridge, Pasadena, for respondent.

DORAN, Justice.

As stated in appellant's brief, "This is an appeal in a divorce case. The appeal was not taken from that portion of the interlocutory judgment of divorce granting a divorce, but rather from that portion \* \* awarding appellant certain property and awarding respondent certain property, and that portion which awarded appellant support and maintenance for only 12 months". After an appeal from the judgment in plaintiff's favor, there was a denial of plaintiff's motion for attorney fees, costs and alimony pending appeal, from which order plaintiff also appealed. The two appeals have been consolidated.

Mr. and Mrs. Murdoch were married April 23, 1938, at which time both parties were employed. Thereafter, as set forth in appellant's brief, the husband "went to work in a business owned by his uncle called William A. Lohlker Co. after an opportunity presented itself to acquire a one-half interest \* \* \*. Appellant wife and respondent husband both worked in the company, she selling wall paper and he taking care of the books. Thereafter respondent husband went into the service and the appellant wife managed the entire business during the war years. Upon the husband's return \* \* \* he resumed the management \* \* \*".

The record affords evidence that in the fall of 1939 the husband's mother prevailed in certain litigation with a brother, William A. Lohlker in respect to the business in which the mother held 110 shares of stock. The elder Mrs. Murdoch then negotiated a purchase of the remaining 110 shares at a price of \$1,500, for the purpose of gaining complete control of the corporation. To make this purchase the husband's mother increased a loan on certain Altadena property, and according to the husband's testimony, "the balance of it (purchase price) came from my wife". The loan by the wife, approximately \$574.00, "was evidenced by a promissory note from respondent husband secured by a pledge of 40 shares of stock".

The husband testified that "the stock instead of going around through my mother's hands and then to mine, she directed it to me", and that "it was her (the mother's) intent to give (me) the whole 110 shares", but on the attorney's suggestion it was considered "that it might be better if she gave me only 100 and retained the remaining 10 for herself, so she could have control of the business". There is evidence that loans were both repaid out of the corporate earnings.

Appellant complains that Finding No. V of the trial court, "That it is true that the defendant-cross-complainant is the owner of one hundred (100) shares of stock of William A. Lohlker, Inc. \* \* \* but it is not true that said stock is community property", is erroneous and not supported by the evidence.

The record discloses testimony from the mouth of the defendant who was in charge of the books of the corporation that accounts were set up showing moneys due to the husband and wife for expenses incurred, for bonuses and salary due "which were set up for the purpose of convenience and to increase the operating expense of the corporation"; that both the loan negotiated by defendant's mother and by the wife, used in purchasing the stock, were paid directly with corporate funds; and that "these withdrawals were in excess of the established rate of salary that you and she (husband and wife) provided for in the minutes"; that funds were likewise withdrawn and paid to the defendant's mother for living expenses; and that at the end of the business year "the total accumulation" was taken and charged off to the corporation as salary expense, apparently for tax purposes, and that no dividends were declared.

If the above evidence was believed by the trial court, it cannot be said that the finding in question was not supported by substantial evidence tending to show that the stock given to the son by the mother, eventually paid for out of corporate funds, was therefore separate rather than community property. It is true, as pointed out by appellant, that a contrary conclusion might have been drawn from other evidence in the record. The theories adopted by the opposing par-



ties on this matter were directly in conflict as was the evidence from which such theories were evolved.

[1, 2] It is conceded in appellant's brief that "when a finding of fact is attacked on the basis of insufficiency of the evidence that the Appellate Court will not weight the evidence but will accept any evidence in support of the finding and any evidence by the respondent". In view of the present record the above rule will prevent further consideration of this point.

[3] A similar contention is made in respect to Finding No. VI, stating: "It is not true that there is any money due and owing to the defendant-cross complainant from William A. Lohker, Inc." Appellant mentions that there is testimony which reflected an indebtedness of approximately \$5,000 owing to the husband, which would be in the nature of community property which should have been divided by the trial court.

Respondent's brief answers this argument by stating: "The evidence showed that appellant and respondent determined at their pleasure how much money they would take out of the business, without the knowledge, consent or approval of Louise L. Murdoch as majority stockholder and director; that they both withdrew from the corporation more than they were entitled to and that therefore they were, in fact, obligated to the corporation rather than the reverse (Rep. Tr. p. 97, lines 4-18)". The effect of this theory and evidence is not, as appellant claims, to convert a divorce action into one involving a corporation not made a party to the action. Its sole relation to the issues herein is in respect to any indebtedness alleged to be owing by the corporation to the respondent, claimed by appellant to be community property. And since such evidence and conclusions reasonably to be drawn therefrom, would directly support the trial court's finding that such indebtedness did not exist, under the rule hereinbefore mentioned, further appellate consideration is foreclosed.

[4, 5] Appellant's further contentions that the trial court erred in awarding alimony for only one year, and in denying the wife's motion for attorney fees, costs and

alimony pending the appeal, involve matters of discretion not subject to appellate review in the absence of abuse which is not made to appear in the present appeal.

The judgment and order appealed from are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



97 Cal.App.2d 700

**STOECKLE v. DIRECTOR OF DEPARTMENT OF SOCIAL WELFARE.**

Civ. 14310.

District Court of Appeal, First District,  
Division 2, California.

May 23, 1950

Action by Helen A. Stoeckle against the Director of the Department of Social Welfare of the State of California to restrain enforcement of the licensing provisions of the Welfare and Institutions Code, § 1620(a). The Superior Court, Alameda County, Ralph E. Hoyt, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that the institution conducted by plaintiff did not meet the age requirements of the Education Code for admission of children to kindergarten and was a home "for the reception or care of children under 16 years of age" within statute providing that no one may, without a license from the Department of Social Welfare, maintain any institution, day nursery, or other place for the reception or care of children under 16 years of age, either with or without compensation.

Judgment affirmed.

**Asylums** 

An institution conducted for profit for groups of children aged 3½ to 4½ and from 4½ to 5½ years at which children engaged in songs, games, stories and supervised handiwork which did not meet age requirements of Education Code for ad-

mission of children to kindergarten, was a "home for the reception, or care, of children under 16 years of age" within statute providing that no one may, without a license from Department of Social Welfare, maintain any institution, boarding home, or other place for the reception or care of children under 16 years of age, either with or without compensation. Welfare and Institutions Code, § 1620(a); Education Code, § 8401.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Home for the Reception or Care of Children Under 16 Years of Age".

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Russell P. Studebaker, Oakland, for appellant.

Fred N. Howser, Attorney General, Miriam E. Wolff, Deputy Attorney General, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to restrain the Department of Social Welfare from enforcing the licensing provisions of section 1620(a) of the Welfare and Institutions Code. Defendant had judgment, the trial court finding that plaintiff was conducting a "day nursery" within the meaning of the Act.

Section 1620 provides that no one may without a license from the Department "(a) Maintain or conduct any institution, boarding home, day nursery, or other place for the reception or care of children under sixteen years of age, nor engage in the business of receiving or caring for such children, nor receive nor care for any such child in the absence of its parents or guardian, either with or without compensation."

The stipulated facts are that appellant took two groups of children, one aged three and one-half to four and one-half

years, the other aged from four and one-half to five and one-half years.

It is conceded that the school is a private enterprise conducted for profit. Also that two sessions are held daily—one from 9 A.M. to 12 noon, the other from 1 P.M. to 3:30 P.M. The children engage in songs, games and stories, supervised handiwork with building blocks, finger painting and drawing.

The trial court found that the institution was a "day nursery" under the terms of the Act. The appellant says that the institution is a kindergarten and hence not within the Act. This is the meat of the controversy. Clearly the appellant does not meet the age requirements of the Education Code for admission to a kindergarten. Section 8401 fixes that age limit to children between four and one-half and six years. There is no statute expressly covering private kindergartens but it is fair to assume that if it were necessary to define such an institution it would follow the same pattern as to age limits as that fixed in the Code.

There being no definition of a day nursery in the Code it is fair to assume that the legislature intended some pre-public school institution "receiving or caring for" children of pre-public school age. The institution conducted by appellant accepts children who are of pre-kindergarten age. There is no reasonable basis upon which it could be said that appellant's school is a kindergarten and nothing more. The trial court found that it was a "day nursery" which sounds like a good name for it. But if the court was in error in giving it that designation the judgment must nevertheless be affirmed because the institution is certainly a home "for the reception or care of children under sixteen years of age" under the terms of the statute.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

## PEOPLE v. CHESSMAN.

Cr. 5006.

Supreme Court of California, in Bank.

May 19, 1950.

Rehearing Denied June 12, 1950.

Caryl Chessman was convicted in the Superior Court for Los Angeles County, Charles W. Fricke, J., of 17 felonies, and he moved in the Supreme Court for an order requiring the Superior Court to augment, correct and properly certify the record, and for other relief. The Supreme Court, Schauer, J., held that the reporter's transcript was not so inaccurate that a new trial was required, but permitted augmentation of the transcript by including the voir dire examination of jurors and opening statement of the prosecuting attorney.

Motions for an order to the Superior Court denied, and motion for augmentation of the record granted.

Edmonds and Carter, JJ., dissented.

## 1. Criminal law ☞1189

Neither death of a reporter nor impossibility of procuring a transcript is ground for granting defendant in a criminal case a new trial. Code Civ.Proc. § 953e; Rules on Appeal, rules 33(a-c), 35(b), 36(a, b).

## 2. Criminal law ☞1104(6)

The Rules on Appeal providing that reporter shall prepare a transcript and append certificate that it is accurate, and providing that parties may present appeal on an agreed statement does not relieve a defendant of the burden of furnishing a statement on appeal where transcription of reporter's notes cannot be obtained, and rules do not absolutely entitle defendant to a transcription of those notes made and certified by the reporter who took them. Rules on Appeal, Rules 35(b), 36(a, b).

## 3. Criminal law ☞1104(6)

Where literal compliance with rules requiring a reporter's transcript certified by the reporter as correct in a criminal case has become impossible without fault of anyone, Supreme Court should inquire whether there is or can be made available a record on which the court can perform its function of reviewing the cause and determining whether there was error in

the court below, and, if so, whether such error requires reversal. Rules on Appeal, rules 35(b), 36(a, b).

## 4. Criminal law ☞1109(1)

The question of whether a reporter's transcript filed with the Supreme Court in a criminal case is sufficiently complete, accurate and adequate for a fair disposition of the appeal is a question of fact to be determined in each case. Rules on Appeal, rule 35(b).

## 5. Courts ☞85(2)

The Rules on Appeal are intended to simplify and facilitate appellate procedure.

## 6. Criminal law ☞1141(1, 2)

On appeal in a criminal case, it is presumed that defendant has been accorded a fair trial and that the judgment of conviction is valid, and burden is on the appellant to show either prejudicial error in the record, or that the record is so inadequate that he is unable to show such error.

## 7. Criminal law ☞1109(1)

Inconsequential inaccuracies or omissions in a record on a criminal appeal cannot prejudice a party, and if in truth there does exist some consequential inaccuracy or omission, the appellant must show what it is and why it is consequential. Rules on Appeal, rules 33(a-c), 35(b, c), 36(a, b).

## 8. Criminal law ☞1186(4)

In absence of a showing of prejudice in the record or of prejudicial inadequacy in its content, Supreme Court must give heed on criminal appeal to policy providing that, after appeal, court must give judgment without regard to technical errors or defects which do not affect substantial rights of the parties. Pen.Code, §§ 960, 1258, 1404.

## 9. Criminal law ☞1189

Where official court reporter died and transcriber employed by him for many years completed transcript with aid of reporter's notes and dictaphone records and extensive notes of the judge, and defendant had chance to make corrections, and record clearly showed substance and nature of prosecution and defense, and asserted inaccuracies and omissions did not affect



ability of Supreme Court to pass on defendant's contentions, inaccuracies and omissions were not ground for a new trial. Code Civ.Proc. §§ 270, 953e; Rules on Appeal, rules 33(a-c), 35(b), 36(a, b); Pen.Code, § 1181.

#### 10. Criminal law ⇐1110(1)

Appealing defendant was entitled to augmentation of transcript by inclusion of voir dire examination of jurors and opening statement of prosecuting attorney. Rules on Appeal, rule 33(a) (2).

#### 11. Criminal law ⇐1110(1)

Where a record of what was said in discussions relating to subpoenaing of witnesses could not lead to reversal on ground of defendant's claim that he was forced to go to trial unprepared because he had not subpoenaed witnesses, defendant was not entitled to have included in the record a transcription of the discussions relating to subpoenaing of witnesses. Rules on Appeal, rule 33(a) (2); Pen.Code, § 1330.

#### 12. Criminal law ⇐1104(6)

Defendant who represented himself on trial and was lawfully imprisoned awaiting determination of appeal was not entitled as a matter of right to go about the state making appearances before courts to present legal arguments, and was not entitled to appear personally in proceedings which resulted in reporter's transcript for use on appeal.

#### 13. Criminal law ⇐1023(12)

Trial court's determination of objections to and certification of a transcript for use on appeal was not an appealable order.

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Caryl Chessman, in pro per.

Fred N. Howser, Attorney General, Frank Richards, Deputy Attorney General, W. E. Simpson, District Attorney, J. Miller Leavy and Robert Wheeler, Deputy District Attorneys, all of Los Angeles, for respondent.

SCHAUER, Justice.

Defendant has pending before this court an appeal from judgments of conviction of

17 felonies. Two of these judgments impose the death penalty. The appeal from the judgments, however, has not yet been submitted for decision and this opinion does not consider such appeal on its merits but is addressed exclusively to disposition of the mesne proceedings hereinafter specified.

In the subject proceedings defendant, who has chosen to represent himself throughout the litigation, has filed with this court his "Motion for order of Supreme Court to order Superior Court to augment, correct and properly certify record, to order a hearing in the Superior Court relative to this matter, and for the Supreme Court to agree to decide on appeal (or otherwise) certain undecided questions of law relative to the preparation of a reporter's transcript for use on appeal in a capital offense and the applicability of section 953e, C.C.P. to criminal cases," his "Motion to dismiss automatic appeal without determination," with written argument in support of each motion; he has noticed and briefed an appeal "from the final order of settlement and so-called certification of the reporter's transcript"; and he has filed a "List of inaccuracies and omissions in the record".

The burden of defendant's complaint is that the reporter's transcript on appeal was not prepared in the manner required by law, that it is not complete and accurate, and that no complete, accurate and legally prepared record can be obtained. The transcript was prepared in a situation for which the Rules on Appeal do not expressly provide. After a jury had found defendant guilty, the court reporter died without having completed his transcript. The transcript which has been filed with this court was in part prepared, pursuant to court order, by another reporter from the notes of the original reporter. We have concluded that the transcript before us, with certain augmentations hereinafter described, will permit a just and fair disposition of the appeal on its merits.

The official court reporter, Mr. Perry, prior to his death, made dictaphone records of part of his notes. A portion of these records had been transcribed before

Mr. Perry's death, and the transcription of the remainder was completed after his death, by a transcriber who had been employed by Mr. Perry for many years. Pursuant to court order another official court reporter, Mr. Stanley Fraser, read and transcribed the balance of Mr. Perry's notes in rough draft form. He was aided in this by voluminous notes which had been taken by the judge during the trial. The deputy district attorney who tried the case read the rough draft, and Mr. Fraser copied it in final form. A copy was sent to defendant, who was confined in San Quentin, and he submitted a written "Motion to augment and correct record" in which he requested a number of specific changes and made a number of general complaints that large parts of the proposed transcript were inaccurate and incomplete. The transcribing reporter, with the deputy district attorney who tried the case, checked these claimed inaccuracies against the original reporter's notes and found that some changes should and others should not be made. The trial judge then heard defendant's written objections to the transcript, allowed some and disallowed others. Mr. Fraser has certified that the transcript prepared by him is "a full, true and complete transcript of said shorthand notes of said Ernest R. Perry, deceased, upon said trial to the best of my ability." The trial judge has certified that "the objections made to the transcript herein have been heard and determined and the same is now corrected in accordance with such determination \* \* \* and the same is now, therefore, approved by me."

The trial judge directed preparation of the reporter's transcript in the manner above described in an effort to substantially comply with Rule 33(c) of the Rules on Appeal. That rule provides, "Where a judgment of death has been rendered and an appeal is taken automatically as provided by law, the entire record of the action shall be prepared." The "entire record" consists of reporter's and clerk's transcripts (the customary record on appeal from a judgment of conviction) containing both "normal record" (Rule 33(a)) and "additional record" (Rule 33(b)).

Rule 35(b) provides that "The reporter shall prepare \* \* \* the reporter's transcript \* \* \* and shall append \* \* \* a certificate that it is correct." Rule 36(a) provides that "The parties may present the appeal on an agreed statement" and Rule 36(b) provides that "If a transcription of any part of the oral proceedings cannot be obtained for any reason, the appellant, as soon as the impossibility of obtaining a transcript is discovered, may serve and file an application for permission to prepare a settled statement in place thereof." There is no express provision for a situation such as the present, where literal compliance with Rule 35(b) has become impossible without fault of any party and where defendant-appellant has not chosen to appeal on an agreed statement.

[1] It is defendant's position that he is entitled, as a matter of absolute right, to a reporter's transcript prepared in literal compliance with Rule 35(b), that in the absence of such a transcript this court cannot determine his appeal, and, hence, that he is entitled to a new trial. Prior to the adoption of the Rules on Appeal in 1943, an appellant had no such right to a transcript prepared in a particular manner. Furthermore, neither the death of a reporter nor impossibility of procuring a transcript is a ground for granting a new trial. Section 1181 of the Penal Code provides that "When a verdict has been rendered against the defendant, the court may, upon his application, grant a new trial, *in the following cases only:*" (Italics added.) It enumerates seven grounds, none of which encompasses the situation depicted here.

[2] Defendant cites many early cases for the proposition that if the record is not authenticated in accord with the applicable rule or statute the appellate court cannot consider it. These cases do not aid defendant; they so hold, but they further hold that because the record is not proper the appeal will be dismissed or the judgment of conviction affirmed. The rules in effect immediately prior to the adoption of the present Rules on Appeal required that "If a transcription of the phono-

graphic reporter's notes cannot, for any reason, be obtained, the appellant shall cause to be prepared and filed, in the place thereof, a statement of such of the proceedings as were or shall be ordered by the court to be transcribed." (Rule II, § 9, 213 Cal. xli.) If the appellant did not file such record his appeal could be dismissed. (Rule V, § 1, 213 Cal. xliii.) We do not believe that the 1943 Rules on Appeal were intended to so radically change the law that an appellant is now not only relieved of the burden of furnishing a statement on appeal where a transcription of the reporter's notes cannot be obtained, but also absolutely entitled to a transcription of those notes made and certified by the reporter who took the notes.

[3] Rather, where literal compliance with the rules has become impossible without fault of anyone, and we are confronted with a situation not expressly covered by the rules, we should inquire whether there is or can be made available a record on which this court can perform its function of reviewing the cause and determining whether there was error in the court below and, if so, whether such error requires reversal. If a record can be "prepared in such a manner as to enable the court to pass upon the questions sought to be raised" (3 Am.Jur. 212), then there is no rational likelihood or legally cognizable possibility of injustice to the appealing defendant even though a verbatim record certified by the official court reporter cannot be supplied.

[4] Defendant, as stated above, urges that the reporter's transcript filed with this court is not, and cannot be made, complete, accurate, and adequate for a fair disposition of his appeal. Concededly the reporter's transcript filed in this appeal is not a verbatim record of every word that was said in the trial court. But it is certified to be "full, true and correct \* \* \* to the best of [the transcribing reporter's] ability"; and the trial court determined that the transcribing reporter's ability was sufficient to produce an adequate record. Although reporters who live until their transcripts have been typed, whether by themselves or as is more usual

by their transcribers from their dictation, attach to the transcript a certificate, in the language of Rule 35(b), "that it is correct," reality requires us to recognize that such certificate means no more than that the transcript is correct to the best of the particular reporter's and the transcriber's abilities. Certainly it is to be expected that a reporter can read his own shorthand notes better or more easily than those of another reporter; but this does not mean that in no case can one good reporter read and transcribe with substantial accuracy the notes of another. It is essentially a question of fact to be determined in each case in which it may arise. Here the trial judge, aided by his own copious notes, has determined that the record is adequate. Conceivably, the respective and particular abilities of the reporters and transcribers in this case may have produced a record as complete and accurate as a record in some other case wholly taken, transcribed and certified by a single reporter. The minimum statutory requirements for court reporters (immediate transcription of material dictated at the rate of 150 words per minute for 5 minutes; Code Civ.Proc., § 270) obviously do not insure that all official reporters can produce altogether complete and accurate transcripts of lengthy trials wherein testimony and argument are rapidly presented over extended periods.

It should also be noted that the Rules on Appeal contemplate that no reporter is infallible, that errors may exist in a proposed transcript, that corrections may be proposed and that it shall be the duty of the trial judge to finally determine the record. (See Rule 12 relating to "Augmentation and correction of the record"; Rule 35(c), providing that "If a proposed correction is filed, the judge shall promptly determine the matter. After corrections have been made, the judge shall certify that all objections made thereto have been determined, and that the transcripts have been corrected in accordance with such determination"; and Rule 36(b), providing that "If a transcription of any part of the oral proceedings cannot be obtained for any reason, the appellant, as soon as



the impossibility of obtaining a transcript is discovered, may serve and file an application for permission to prepare a settled statement in place thereof.")

[5-7] The Rules on Appeal are intended to simplify and facilitate appellate procedure, not to provide for new trials on grounds which did not theretofore exist and which are not necessary to the fair administration of justice. On this appeal, as in every appeal, it is to be presumed that defendant has been accorded a fair trial and that the judgment of conviction is valid. We perceive no legal impropriety and no unfairness in placing on an appellant in the situation of Chessman the burden of showing either prejudicial error in the record or that the record is so inadequate that he is unable to show such error. Inconsequential inaccuracies or omissions in a record cannot prejudice a party; if in truth there does exist some consequential inaccuracy or omission, the appellant must show what it is and why it is consequential. The situation is similar to that in *People v. Botkin* (1908), 9 Cal. App. 244, 249, 98 P. 861, where the court said, "we know of no rule that permits us to presume that defendant did not have a fair trial because a portion of the record upon \* \* \* appeal has been destroyed without fault of either party."

[8] In the absence of a showing of prejudice in the record, or of prejudicial inadequacy in its content, we must give heed to the repeatedly declared policy of this state relating to criminal appeals. "After hearing the appeal, the court must give judgment without regard to technical errors or defects \* \* \* which do not affect the substantial rights of the parties." (Pen.Code, § 1258.) "Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." (Pen.Code, § 1404.) "No indictment \* \* \* is insufficient, nor can the trial, judgment, \* \* \* or other proceeding thereon be affected by reason of any defect

or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits." (Pen.Code, § 960.)

[9] Examination of the record in the light of defendant's claims discloses that it is adequate to permit us to ascertain whether there has been a fair trial and whether there has been any miscarriage of justice. The record is not, as defendant asserts, "unintelligible" in material part. It clearly shows (and there is no claim that it is insufficient or incorrect in this regard) the substance and the nature of the People's case and the substance and the nature of the defense of Chessman: Victims of the crimes testified for the People that certain criminal acts were committed and identified defendant as the person who committed them (except in one instance, a count of grand theft, where defendant was connected with the crime by evidence that the property was found in his possession); defendant denied that he committed the crimes and witnesses for him testified to alibis for some of them. The record appears to contain ample evidence to support the verdicts and there is no suggestion that this evidence was not actually received at the trial. Appraisal of the sufficiency of the evidence, insofar as any contention of the defendant is concerned, presents no problems of gradations of possible states of mind of defendant, but only the questions whether certain behavior (which the People's witnesses testified and the jury believed was behavior of defendant) constituted kidnaping for the purpose of robbery with bodily harm, first degree robbery, attempts at robbery and rape, violation of section 288a of the Penal Code, and grand theft.

The asserted "inaccuracies and omissions in the record" of which defendant complains are as follows: (a) The greater part of defendant's complaints consists of general claims that large portions of the transcript of testimony of witnesses are incomplete or inaccurate. Defendant does not claim that any different and more accurate transcription of the notes would show that the trial court erroneously admitted or ex-

cluded any evidence. Certainly no factual basis is shown, and none is even claimed, for concluding that any erroneously admitted or excluded evidence prejudicially affected the verdicts. Claimed inaccuracies concern conflicting testimony and the credibility of witnesses. Making available to this court the precise words of every witness would not enable it to upset the jury's determination that the People's witnesses, rather than defendant and his witnesses, spoke the truth. As in *People v. Botkin* (1908), supra, p. 249 of 9 Cal.App., page 861 of 98 P. "Under the condition of the evidence in this case [or any factual variation of the record suggested by defendant]

\* \* \* any views that we might have as to the credit that should be given to the evidence \* \* \* could not justify us in reversing the judgment founded on the verdict of the jury that heard and saw all the witnesses as they gave their testimony."

(b) Defendant asserts that the record is mistaken in showing that he did not cross-examine certain witnesses. The trial judge's determination to the contrary is supported not only by his own notes and the testimony of Mr. Fraser, the transcribing reporter, but also by the testimony of Mr. Al Mathews, deputy public defender who acted as "legal adviser" (not counsel) for defendant during the trial. (c) Defendant has specified some particular changes in the record which, he says, the trial judge should have allowed. The unimportance of these matters is apparent for, had the proposed changes been allowed, the effect of the record and the result of an appeal would have been in no way affected. (d) Defendant asserts that sarcastic statements of the prosecuting attorney during the trial have been omitted or "smoothed over." There is no claim that defendant objected to these statements or requested the court to admonish the prosecuting attorney and instruct the jury to disregard improper remarks, nor is there any claim that the remarks were so serious that their effect could not have been removed by admonishment. In only one instance was a change made in Mr. Fraser's transcription of statements of the prosecuting attorney. This change was *in the portion of the notes dictated by Mr.*

*Perry* but not typed by his transcriber until after his death. It was requested by the prosecuting attorney. In allowing it the trial judge said, "this is one of the matters that I do particularly recall because of the unusual character of the situation." Even had the correction not been allowed, defendant could not on appeal maintain that the statement amounted to prejudicial misconduct, for it was clearly invited by defendant. (e) Finally, defendant claims that in the transcription of the prosecuting attorney's closing argument "Objectionable, prejudicial matter has been weeded out \* \* \* Abusive references to the defendant have vanished." Defendant specifies only two instances of such asserted inaccuracies. He says, "Statements that 'five to life means nothing to Chessman—life means nothing to Chessman' are abandoned in the transcription." Defendant appears to be mistaken; a number of such statements appear in the transcript. And, defendant says, the transcript omits or modifies "gross misstatements as to the law, incurable by instruction, to the effect that life without possibility of parole doesn't mean that at all, and that the jury should and must return the death penalty because otherwise there was imminent danger the defendant again would be loosed by a lax administration of the law to prey upon society because the defendant was a cunning individual who knew the angles." Defendant appears to be mistaken in this claim also. The transcript contains a great deal of argument in accord with the quoted statements, and the language of the transcript is no more temperate than that quoted.

[10] Defendant is correct in his contention that he is entitled to augmentation of the transcript by inclusion of the voir dire examination of jurors and the opening statement of the prosecuting attorney. These are part of the "entire record" (that is, both the "normal" and the "additional" record) which, in substantial compliance with Rule 33(a) (2), should be included in the reporter's transcript. Defendant also asks inclusion of a motion "that he be allowed to exercise reasonable freedom of movement within the courtroom \* \* \* and the denial thereof by the trial court."

It appears from defendant's discussion of this matter that it will appear in a transcription of the voir dire examination of jurors.

[11] Defendant further asks for inclusion in the record of a transcription of what is indicated in the record as a "(Discussion as to subpoenaing witnesses)" and asserts that the transcript does not contain a "discussion between the trial court, counsel and the appellant, wherein it was shown by appellant, and conceded by the deputy district attorney, that an attorney, William Roy Ives, given the opportunity to prepare the case, would appear with or for defendant." Both these "discussions" took place after the cause was called for trial and before a jury was selected. Defendant does not claim that they were heard by prospective jurors. He says that a main point on which he will rely on appeal is that he was not allowed to subpoena defense witnesses. The record before us shows that defendant asked that two witnesses who resided out of the county be subpoenaed and that the trial judge properly refused to order their attendance because defendant's "Affidavit to substantiate necessity for issuance of foreign subpoenas" affirmatively showed that the desired testimony of these witnesses (the Chairman of the Adult Authority and the Classification and Parole Representative at Folsom) would not have been admissible. (See Pen.Code, § 1330.) Defendant does not explain what other witnesses he wished to call or what testimony he expected them to give. It appears that three days before the trial the deputy district attorney, with defendant's consent, gave to a deputy sheriff a list of 20 desired witnesses prepared by defendant and instructed the sheriff to serve subpoenas on the listed persons. Twelve of these people appeared and testified; two were served and their nonappearance is not explained; two others were the above-mentioned persons who resided out of the county; still another was present in court but did not testify. It further appears that throughout the trial defendant had the services of Mr. Al Mathews, deputy public defender, as "legal adviser" and the services of an investigator

for the public defender's office who interviewed 34 witnesses, and subpoenaed some of them, for the defendant.

A record of what was said in the "discussions" could not lead to reversal on the ground of defendant's claims that he was forced to go to trial unprepared because he had not subpoenaed witnesses and was not allowed a continuance to permit Mr. Ives to prepare, because of the following occurrence (shown by a portion of the record which was reported by an official reporter other than Mr. Perry, deceased): Forty-eight days before the trial began, defendant appeared for plea. He had previously been represented by counsel but at this time he said, "I wish to represent myself." The following colloquy took place:

"The Court: Are you a good lawyer?"

"The Defendant Chessman: I think so.

"The Court: Few lawyers say they are good.

"The Defendant Chessman: I think I am a good enough lawyer.

"The Court: You don't want to trust it to a lawyer?"

"The Defendant Chessman: I don't want to do it.

"The Court: What will probably happen, if we set this case down for trial, you will want a lawyer and then ask for a continuance. If you want to try your own case, there is no way we can tell you not to. You will have to try it or have somebody hired to represent you in plenty of time to try the case at the time it is set.

"The Defendant Chessman: I understand that.

"The Court: Because many times men with past experiences such as you have had—you know the tricks of the trade, and they get a lawyer at the very last minute. You really want to try your own case?"

"The Defendant Chessman: That is correct."

Defendant pleaded, the court set the case for trial, and said, "I want the record to show that we have advised Mr. Chessman that he must be ready for trial on the day that this case is set and that the court



will entertain no motion to continue the case, even if you have in the meantime decided to hire a lawyer \* \* \* I have told you why we object to this procedure is because of the advantage which shrewd defendants who have had courtroom experience take to stall the case because of their knowledge if they get a lawyer who isn't prepared, he can successfully get a continuance and it will not be granted in your case." The record further shows that defendant repeatedly refused to permit the public defender to represent him.

[12] Defendant urges that he should have been allowed to appear personally in the proceedings which resulted in the present reporter's transcript, and that he should now be allowed to appear personally before the trial judge in support of his position. Since the entry of the judgments of conviction defendant has been lawfully imprisoned awaiting determination of his appeal. He is presently lawfully confined in San Quentin. He was not and is not entitled as a matter of right to go about the state making appearances before courts to present legal arguments. Neither reason, public policy, nor any express provision of law requires defendant's personal presence at proceedings to determine the accuracy of a transcript. From a time before his trial began defendant has repeatedly claimed, as he does now, that in connection with his representation of himself he is entitled to rights and should be accorded privileges greater than those of a defendant who is represented by counsel. The judges of the superior court before whom he appeared carefully and repeatedly explained to him that his rights and privileges as a prisoner could not be enlarged by his decision to represent himself. In the trial court he was repeatedly offered and refused counsel, and he has refused to accept appointment of counsel to represent him before this court because counsel who volunteered to represent him could not agree to his "condition he can continue in pro. per. with any legal action or stipulation \* \* \* requiring co-signature of Chessman and [counsel]." In these circumstances he cannot complain that he has been prejudiced by the fact

that he has not, since his conviction, been allowed to appear personally in court.

We conclude that defendant has shown no tenable ground for being presently allowed to appear before the superior court and that the circumstances of this appeal, including the death of the reporter Perry, do not entitle defendant to a new trial as a matter of right. Defendant's request that the appeal be dismissed is apparently inadvertent; such action would result in the enforcement of the judgments without affording defendant a review of the merits on appeal on the present or any record.

[13] The trial court's determination of the objections to, and its certification of, the transcript, do not constitute an appealable order; the purported appeal therefrom is dismissed. It is ordered that the voir dire examination of jurors and the opening statement of the deputy district attorney be transcribed, certified and added to the record before us. Except for the augmentation of the record as above specified, the motions for an order to the superior court to "correct and properly certify record, to order a hearing in the Superior Court relative to this matter, and for the Supreme Court to agree to decide on appeal (or otherwise) certain undecided questions of law relative to the preparation of a reporter's transcript for use on appeal in a capital offense and the applicability of section 953e, C.C.P. to criminal cases," and the "Motion to dismiss automatic appeal without determination," are denied.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

"When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel" (Pen.Code, § 1239, subd. b), and the defendant is entitled to "the entire record of the action". (Rules on Appeal, Rule 33, subd. c.) In considering such an appeal, the Constitution directs this court to make "an examination of the entire cause, including the evidence." (Const. Art. VI, § 4½.) In

my opinion, under the circumstances shown by Chessman, the constitutional requirement cannot be carried out.

The Rules on Appeal allow the record to be prepared in either of two ways. They provide that "The reporter shall prepare an original and 3 clearly legible typewritten copies of the reporter's transcript \* \* \* and shall append to the original and each copy a certificate that it is correct." (Rule 35, subd. b.) When "completed, the clerk shall deliver one copy to the defendant or his attorney \* \* \*." Promptly thereafter, the original transcripts shall be delivered to the judge for his approval. After all offered objections have been determined and the corrections, if any, made the judge shall certify that fact. (Rule 35.)

When requested by the appellant, an appeal may be presented upon an agreed or settled statement. Rule 36 reads, in part, as follows: "If a transcription of any part of the oral proceedings cannot be obtained for any reason, the appellant, as soon as the impossibility of obtaining a transcript is discovered, may serve and file an application for permission to prepare a settled statement in place thereof. \* \* \* The judge shall decide the application within 5 days, and, if the showing is sufficient, shall make an order permitting the preparation of a settled statement \* \* \*." " \* \* \* in narrative form of all or such portions of the oral proceedings as \* \* \*. [the appellant may deem] material to the determination of the points on appeal. Where necessary for the purposes of accuracy, clarity or convenience, portions of the evidence may be set forth by question and answer, subject to the approval of the court in settling the statement." (Rule 7, subd. a)

The document filed as the reporter's transcript in this case is an approximate, but neither an exact nor complete, record of the proceedings before the trial court. It was prepared by a method which complies with neither Rule 35 nor Rule 36, but is a hybrid of each. According to the transcript of the proceedings at the time the objections made by Chessman to the document prepared by the substitute reporter

were heard and determined, the trial judge allowed certain corrections of it. He then approved the document as the best possible substitute for an exact and correct transcript, and one which approximates the requirements of both rules. As appears from his remarks, he knew that a settled statement under Rule 36 could be used only upon the request of the appellant, and he treated the transcription only " \* \* \* as the basis of establishing a transcript on appeal." (Emphasis added.)

The substitute reporter has not certified that the transcript is correct. His statement is that 1200 of the 1800 pages " \* \* \* constitute a full, true and correct transcript of said shorthand notes of \* \* \* (the deceased reporter) \* \* \* to the best of my ability." However, the rules cast responsibility for the correctness of the transcript upon the reporter. The only certification specified for the judge is that, following a hearing and determination of all objections made to the transcript, it has been corrected in accordance with such determination. But prior to the judge's approval, the reporter must certify that the transcript made by him "is correct." The document prepared by the substitute reporter as the basis for Chessman's appeal does not bear the certificate required by law and the action of the trial judge is no substitute for that missing prerequisite.

Manifestly the rules require the person who prepares the transcript to have primary knowledge that it is an accurate statement of the evidence presented during the trial, and to so state in writing. Such a certificate cannot be made by one who was not present at the trial and has no personal knowledge of what transpired. The substitute reporter has not stated, and could not certify, that his transcription of the notes taken by the deceased reporter is correct, and no one can vouch for the document as an accurate and complete record of the oral proceedings on the trial.

Problems relating to the proper authentication of the record on appeal are not novel. It has long been the rule that when

the trial court fails to comply with the statutory provisions requiring authentication of the bill of exceptions or the transcript of the record, such papers may not be considered upon appeal. *Malony v. Adsit*, 175 U.S. 281, 20 S.Ct. 115, 44 L.Ed. 163; *Campbell v. Read*, 2 Wall. 198, 69 U.S. 198, 17 L.Ed. 779. In those jurisdictions which require a seal for authentication of the record, upon the absence of the seal, courts have refused to hear the appeal. *Wells v. Long*, 6 Ark. 252; *Cowhick v. Gunn*, 3 Scam. 417, 3 Ill. 417; No. 4 Fidelity Bldg. & Sav. Union v. Byrd, 154 Ind. 47, 55 N.E. 867; *Jones v. Frost*, 42 Ind. 543. In *Oxford & Coast Line R. Co. v. Union Bank*, 4 Cir., 153 F. 723, it was held that the congressional act requiring a bill of exception to be authenticated by the signature of the trial judge must be strictly complied with, and the mere recital in the record that the judge signed the bill of exceptions is not sufficient.

Nor is the omission of the judge to sign the bill of exceptions supplied by his signature to an order allowing and settling the bill. *Dalton v. Hazelet*, 9 Cir., 182 F. 561. A certificate to the effect that the trial judge signed the bill of exceptions or his indorsement showing presentation of the bill to him cannot cure the omission of the signature on the bill of exceptions. *Cooper v. Malony*, 162 Mo. 684, 63 S.W. 372.

Following these principles, the courts of this state have repeatedly held that a record which lacks the authentication required by law may not be considered as the basis for an appeal. *People v. Armstrong*, 44 Cal. 326; *People v. Ferguson*, 34 Cal. 309; *Salinas v. Riverside Finance Co.*, 126 Cal. App. 675, 14 P.2d 1025; *People v. Lee*, 97 Cal.App. 321, 275 P. 815; *Lewis v. Lapique*, 26 Cal.App. 448, 147 P. 221; *People v. Schultz*, 14 Cal.App. 106, 111 P. 271. In *People v. Brecker*, 20 Cal.App. 205, 127 P. 666, the reporter annexed to the transcript a certificate that it was correct. However, the court declined to consider the record for the reason that it did not include the statutory requirement of certification under oath. The trial judge's certificate was "held to be a mere nullity, so far as any

effect it may have as an authentication of the record on appeal, where \* \* \* the phonographic reporter's certificate is wanting in one of the most vital of the requisites of a proper or legal authentication."

Because of the responsibility of the appellant in a civil case to present a properly prepared transcript, usually the appeal will be dismissed when the record has been improperly prepared. However, different considerations apply to the appeal of a defendant upon whom the death penalty has been imposed. Most courts passing upon the question of an appellant's rights have declared that, in the interests of justice, a new trial should be granted a defendant in a criminal case when the record has not been authenticated as required by law. *State v. Bess*, 31 La. Ann. 191; *State v. McCarver*, 113 Mo. 602, 20 S.W. 1058; *State v. Reed*, 67 Mo. 36; *Elliott v. State*, 5 Okl.Crim. 63, 113 P. 213, new trial should be granted in the same manner as the law provides for new trial on the ground of newly discovered evidence; *Bailey v. United States*, 3 Okl.Crim. 175, 104 P. 917, 25 L.R.A., N.S., 860; *Burden v. State*, 70 Tex.Crim. 349, 156 S.W. 1196; *Johnson v. State*, 16 Tex.App. 372; *Trammell v. State*, 1 Tex.App. 121; *Richardson v. State*, 15 Wyo. 465, 80 P. 1027, 12 Ann.Cas. 1048. In *Tegler v. State*, 3 Okl.Crim. 595, 107 P. 949, 139 Am.St.Rep. 976, the trial judge died before he could settle and sign a case-made. A statute authorizing the trial judge's successor in office to sign the case-made had not become effective, and it was held that the defendant was entitled to a new trial.

In this state, the reason for remanding the cause for a new trial rests upon two grounds. Not only is the appeal upon a properly authenticated record a matter of inherent right and justice, but section 1239 of the Penal Code requires this court to review the proceedings in which the death penalty has been imposed. For that purpose "the entire record of the action" must be prepared. But in the present case the transcript, to which the defendant is entitled as a matter of right (Rules on Appeal, Rule 33, subd. c) does not comply



with the requirements of law as to certification.

The law makes no provision for the hearing of an appeal upon a transcript which is the most nearly correct one obtainable under the circumstances, and no requirement has been laid upon a defendant to show wherein he would be prejudiced upon an appeal by a record which the attorney general only terms "substantially complete." Article VI, section 4½ of the California Constitution provides that no new trial shall be granted " \* \* \* unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." In the cases of *People v. Connors*, 77 Cal.App. 438, 246 P. 1072, and *People v. Adams*, 76 Cal.App. 178, 244 P. 106, the court said that in providing for the affirmance of a judgment unless the errors complained of have resulted in a miscarriage of justice, the people did not intend that this authorization should be used to cover up or excuse every disregard of any of the just rights of a citizen in the trial of a criminal prosecution.

It is pursuant to the constitutional mandate that the court shall examine "the entire cause, including the evidence," that the Rules on Appeal require an "entire record of the action" to be prepared. (Rule 33, subd. c.) In the absence of a complete and correct record, how can this court review all of the evidence?

It is unreasonable to place upon a defendant sentenced to death the burden of showing wherein omissions and inaccuracies in the record vitally affect his rights. This is particularly true of the evidence in the present case relating to the question of identification. Chessman asserts that portions of the cross-examination of three witnesses who identified him as the robber are not included in the transcript. He also claims that all of the cross-examination of another witness has been omitted. It may be that if the missing testimony were presented upon the appeal, Chessman's guilt would not be so clearly established as to enable this court to say that such errors

as may be relied upon as grounds for reversal did not result in a miscarriage of justice. When the case is a close one, errors which would not otherwise be held prejudicial may justify a new trial. *People v. Ford*, 89 Cal.App.2d 467, 471, 200 P.2d 867; *People v. Hale*, 82 Cal.App.2d 827, 834, 187 P.2d 121; *People v. Lynch*, 60 Cal.App.2d 133, 145, 140 P.2d 418; *People v. Angelopoulos*, 30 Cal.App.2d 538, 549, 86 P.2d 873. However, upon an incomplete record this court will not be in a position to consider the evidence and, with any certainty, deny relief to the appellant under this well established rule.

For these reasons, I would reverse the judgment and remand the cause for a new trial.

CARTER, Justice.

I dissent.

In the main, I agree with the basic concept expressed in the dissenting opinion of Mr. Justice Edmonds, but I would not go so far as to hold that in every case where the death penalty is imposed, the death or disability of the court reporter before the completion and certification of the record would justify the granting of a new trial. Should a case be presented where the reporter had transcribed all of his notes with the exception of routine testimony of character witnesses, or other evidence more or less collateral to the main issue, and no serious objection is made to the accuracy of the portion transcribed, I would be disposed to hold that there had been a substantial compliance with the statutes and rules applicable to the preparation of records in cases of this character. Experience of those who have participated in the trial of cases dictates that absolute perfection in the preparation of phonographic records is not to be expected. Some errors may exist in records prepared by the most capable and efficient reporters. In fact, any reproduction of the human voice dependent upon the skill and accuracy of a shorthand reporter may contain some errors. That is why a provision is made for the settlement and certification of a record by the trial judge in the event

objection is made to the accuracy of the record certified to by the reporter. But in a case of this character, where some 1200 pages of the reporter's notes had not been transcribed by him or dictated into a dictaphone, and the transcription of such notes is dependent upon the ability of another reporter to read the same, I cannot agree that a record prepared in such a manner can be said to constitute a substantial compliance with the provisions of the statutes and rules applicable to the preparation of records in cases of this character.

I would, therefore, reverse the judgment and grant defendant a new trial in this case.

Rehearing denied; CARTER, J., dissenting.



97 Cal.App.2d 781

**LAIRD v. STEINMANN et al.**  
Civ. 17170.

District Court of Appeal, Second District,  
Division 3, California.

May 26, 1950.

Rehearing Denied June 12, 1950.

Hearing Denied July 20, 1950.

Action by Lester J. Laird, against Edward Steinmann, Abe Goldberg, personally and doing business as Coverall Service & Supply Company to enjoin defendants from carrying on industrial laundry business in Los Angeles County, and to recover damages for breach of the contract by which defendants sold their industrial laundry business to plaintiff, including the good will and customer lists and agreed that they would not carry on a laundry business in the county of Los Angeles for a period of five years. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Wood, J., held that the evidence supported the trial court's finding that the laundry business carried on by defendants was similar to the business conducted by them at the time of the sale and competed with plaintiff in the operation of

plaintiff's business, that the agreement was not contrary to public policy or void or unenforceable and that plaintiff was entitled to an injunction.

Judgment affirmed.

#### 1. Appeal and error ⇨102, 103

Orders denying defendants' motion to strike an amended complaint and overruling defendants' demurrer to complaint were not appealable.

#### 2. Contracts ⇨350(1) Injunction ⇨128

In action to enjoin defendants from carrying on an industrial laundry business and for breach of sale contract wherein defendants agreed not to carry on the laundry business in the county for five years, evidence supported finding that the laundry business carried on by defendants was similar to business and good will which plaintiff purchased from defendants and competed with plaintiff in the operation of his business. Business and Professions Code, § 16601.

#### 3. Contracts ⇨117(2, 3)

Where vendors sold industrial laundry business including good will and customer lists and agreed, that they would not carry on a laundry business in a certain county for a period of five years, the agreement was not contrary to public policy or void or unenforceable. Business and Professions Code, § 16601.

#### 4. Injunction ⇨61(2)

Where vendors of industrial laundry business agreed that they would not carry on a laundry business in a certain county for five years, but engaged thereafter in an identical business at former location, purchasers were entitled to an injunction enjoining vendors from engaging in any phase of the industrial laundry business in the county for the period agreed on. Business and Professions Code, § 16601.

#### 5. Damages ⇨6

One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages cannot be measured with exactness.

**6. Damages**  140

Award of \$5200 for breach of contract of sale of industrial laundry business including good will and customer lists, whereby vendors agreed not to enter business for five years in certain county, but thereafter engaged extensively in such business for more than one year within county, was sustained by the evidence.

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Gendel & Chichester and H. Miles Ras-koff and Bernard Shapiro, all Los Angeles, for appellants.

Paul R. Hutchinson, Los Angeles, for respondent.

WOOD, Justice.

Prior to February 5, 1946, defendants Edward Steinmann and Abe Goldberg were owners of a laundry business known as the Red Shop Towel Service, in which business they laundered shop towels or wiping rags used by service stations, garages and industrial plants. On said date they sold the business, including the good will, to plaintiff for \$22,500. They agreed, as a part of the consideration for the agreement, that they would not carry on a laundry business in the county of Los Angeles for a period of five years after February 1, 1946. The agreement was in writing. Plaintiff paid the purchase price to defendants. At the time of said sale, and prior thereto, the plaintiff was operating a laundry business in Los Angeles known as California Overall Cleaning Company in which business he also laundered shop towels or wiping rags used by service stations, garages and industrial plants, and he also laundered coveralls, overalls and other work clothing. In November, 1947, defendants commenced the operation of a coverall and work clothing laundry in Los Angeles at the place where they had conducted the business which they sold to plaintiff.

[1] This is an action to enjoin defendants from carrying on an industrial laundry business in Los Angeles county, and to recover damages for breach of the con-

tract. Judgment was for plaintiff as follows: (1) enjoining the defendants from engaging in any phase of the industrial laundry business in Los Angeles county until February 1, 1951; and (2) for damages in the sum of \$5,200. Defendants appeal from the judgment. They also gave notice of appeal from an order denying their "motion to strike" the first amended complaint, and from an order overruling their demurrer to said complaint. Said orders are not appealable, and the purported appeals therefrom are dismissed.

[2] Appellants contend that their agreement not to carry on a laundry business is contrary to public policy, is void and unenforceable. Their argument is to the effect that even though they agreed not to carry on a laundry business and even though they received a large sum of money for their agreement the plaintiff is not entitled, under the agreement, to be protected with respect to the work clothing part of his laundry business which he was operating at the time the agreement was made, since he did not purchase any good will of a work clothing laundry business from defendants. Section 16601 of the Business and Professions Code provides: "Any person who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county \* \* \* in which the business so sold has been carried on, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein." Appellants argue also that the business of laundering shop towels or rags for use in industrial businesses or plants is not a business similar to that of laundering work clothing for use in industrial businesses or plants. The court found that the laundry business carried on by defendants (appellants) "is similar to the business conducted by them at the time of the sale to plaintiff and is similar to the business and the good will thereof which plaintiff purchased from defendants, and competes with plaintiff in the operation of plaintiff's business." The evidence supported said finding.



Mr. Clark, a witness called by plaintiff, owns a large industrial laundry in Los Angeles wherein coveralls, overalls, shop towels and machinists' aprons are laundered. He testified that he had been engaged in such business about 15 years; he had been an officer of an industrial laundry association; about all of the 8 or 10 owners of industrial laundries in Los Angeles were members of the association; the shop towel business consists of laundering standard size towels (usually about 18 inches by 18 inches) for industrial plants, which towels in most instances are owned by the laundry and are supplied by it to the industrial plants on a weekly or poundage rental basis; most of the industrial laundries engage in the shop towel supply and laundry business and in the overall and uniform supply and laundry business; generally the customers use both the towel and coverall services; a list of names of users of any kind of industrial laundry service is valuable in soliciting other kinds of industrial laundry service; a user of the coverall service is a potential user of the shop towel service, and a user of the shop towel service is a potential user of the coverall service; and in his opinion the coverall supply business and the towel supply business are very similar.

Plaintiff has been the owner and operator of the California Overall Cleaning Company since 1945. He testified that said company did all kinds of industrial laundry work including that of laundering and supplying shop towels; he had had experience in purchasing industrial laundry businesses in the Los Angeles area, and that the total amount of such purchases made by him was approximately \$300,000; the shop towel business of the type he purchased from defendants competes with the coverall type of supply business which he operates; some of the similarities in the two types of laundry business are that the customers—the gasoline stations, machine shops and manufacturing places—generally use both services, and “they [customers] prefer to do the business with the one company that handles everything”; where a customer has a number of employees, one of them usually takes

care of sending and receiving the industrial laundry; and trade lists of customers are of value because they are used to solicit all kinds of industrial laundry business.

Mr. Roth, who was called as a witness by defendants and who had been in the industrial laundry business 18 years, was asked by defendants whether, in his opinion, the shop towel business is considered separate and distinct from the coverall-overall business. He replied that he “wouldn't say that they were separated, distinct as separate businesses. \* \* \* They may be run under separate departments but they can also be run under one business.” Mr. Roth had started the California Coverall Cleaning Company in 1933, and he sold it to plaintiff in 1945. He testified on cross-examination that he started the coverall cleaning part of the business first, and then he started the shop towel part of the business in order to be able to compete with others who were giving both services; and that he wanted to get into the two phases of the business because they went together naturally.

Mr. Tubin, called as a witness by defendants, said that he was in the business of washing and renting shop towels and wiping rags, and he had been in that business for 15 years; that the coverall laundry business and the shop towel business are not similar; that when he started his business only one company was in both the coverall business and the towel business; that “when one did start, why, the others started it as competition for their own service.” On cross-examination he was asked if he had noticed a trend during the past 15 years to combine both the shop towel business and the garment business. He replied that has been the nature as time has gone on. He also testified that most of the leaders in the business now handle shop towels and garments, and that they were forced (by competition) to do that.

[3] Whether or not the work clothing laundry business conducted by the defendants was similar to the shop towel business purchased by plaintiff from defendants was a question of fact for the determination of

the trial court. As above stated, the court found that said businesses were similar. Under the provisions of section 16601 of the Business and Professions Code, as above shown, a person who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a certain area for a certain time. The agreement herein was not contrary to public policy or void or unenforceable.

[4] It is to be noted further that the defendants admitted that they did engage for some time (after they made said agreement and at their former location) in the wholesale laundering of shop towels for other retail suppliers. They did such laundry work from the fall of 1947 until about August, 1948. They assert, however, as alleged justification for engaging in such laundry work, that the laundering of shop towels was a small item with defendants. The court found that such business of laundering towels was identical with the business conducted by plaintiff at the time the contract was made. This conduct of the defendants was a further violation of their agreement. It was stipulated that a witness, called by plaintiff, would testify that since March, 1948, the defendants had been laundering work clothing for certain customers who had formerly been customers of plaintiff, that the weekly volume of such business was \$35, and that the name of one of those customers was included in the list of customers which was sold to plaintiff. The plaintiff was clearly entitled to the injunction which the court granted.

Defendants contend further that the record contains no basis for an award of damages in excess of \$1,575. They refer to the fact that there was no provision in the agreement for liquidated damages, and they assert "plaintiff would base his arguments upon the good-will value of the particular

business that changed hands." They argue that the evidence shows the "highest figure given for the value of a work clothing supply business" was the estimate of plaintiff that it was "about 45 times each weekly dollar of business." They also argue that the basis in the record for an award of damages was the evidence regarding the loss of business totaling \$35 per week, and the evidence regarding said estimate. They arrive at the \$1,575 by multiplying \$35 by 45.

[5, 6] The record does not show the items which were included by the judge in determining the amount of damages. Plaintiff paid defendants \$22,500 for their business, including good will, customer lists, towels, and three trucks. The value of the towels and trucks was about \$4,500. The value of the good will and lists was about \$18,000. Defendants agreed not to carry on such business for five years from February 1, 1946. They re-entered the industrial laundry business in the fall of 1947, and they continued in that business to the time of trial in November, 1948. It therefore appears that defendants engaged extensively in the industrial laundry business in violation of their agreement for more than a year. "One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness." *Zinn v. Ex-Cell-O Corp.*, 24 Cal.2d 290, 297-298, 149 P.2d 177, 181. The evidence was sufficient to support the award.

The judgment is affirmed. The appeals from the order denying "motion to strike" the first amended complaint, and from the order overruling the demurrer are dismissed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

97 Cal.App.2d 838

**TURESKY v. SUPERIOR COURT, IN AND FOR LOS ANGELES COUNTY.**

Civ. 17770.

District Court of Appeal, Second District,  
Division 1, California.

May 31, 1950.

Hearing Denied July 20, 1950.

Abraham Turesky brought a proceeding for a writ of mandate directing the Superior Court in and for the County of Los Angeles to hear and determine his petition for change of name. The District Court of Appeal, White, P. J., held that respondent court's established policy of requiring a person's residence in the state for one year before granting his petition for change of name is arbitrary, without warrant of law, and abuse of the court's rule making power.

Peremptory writ granted.

**1. Names ⇐20**

The common law right to change one's name has not been abrogated by statutes, and resort to legal proceedings to accomplish such change is unnecessary; purpose of statutory procedure therefor being simply to establish change of name as matter of record. Code Civ. Proc. §§ 1275-1279.

**2. Courts ⇐28**

A court owes duty to exercise jurisdiction conferred on it.

**3. Mandamus ⇐31**

A superior court judge, refusing without legal reason to proceed with trial of issue of either law or fact in action rightly pending in his court, may be compelled by writ of mandate to do so.

**4. Constitutional law ⇐70(3)**

Reasons assigned by superior court for establishing policy of requiring person's residence in state for one year before granting his petition for change of name should be addressed to legislature. Code Civ. Proc. §§ 1275-1279.

**5. Courts ⇐80(1)****Names ⇐20**

The policy of Los Angeles County Superior Court to require person's residence in state for one year before granting his petition for change of name is arbitrary,

without warrant of law, and abuse of court's rule making power. Code Civ. Proc. §§ 1275-1279.

Gilman, Gilman & Shearer, Los Angeles, Elizabeth Gilman, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

**WHITE, Presiding Justice.**

Petitioner seeks a writ of mandate directing the Superior court to hear and determine his petition for change of name. The admitted facts are that on February 15, 1950, petitioner filed a petition for change of name and procured an order to show cause in the Superior Court of Los Angeles County pursuant to sections 1275-1279, inclusive, of the Code of Civil Procedure; that all of the requirements of the aforesaid sections were complied with by petitioner. That on March 21, 1950, said petition came on regularly for hearing before respondent court. That upon evidence appearing that petitioner had not been a resident of the State of California for one year, the matter was continued upon respondent court's own motion to September 12, 1950, over petitioner's objection. That at the time and place of said hearing respondent court announced from the bench that a policy had been established by the judge formerly presiding in that department of the court to the effect that a year's residence in the State of California would be required before the court would act upon any petition for change of name, and for that reason the court refused to hear the petition.

By its answer respondent court alleges that "for many years it has been the established policy of Respondent Court to require residence in the State of California for the period of one year prior to granting a petition for change of name; that Respondent Court has followed that policy for the reason that within the knowledge and experience of said Court the following classes of persons attempt to change their names upon first arriving in the State:



"1. Persons who are fugitives from justice from other states;

"2. Persons who are attempting to evade their creditors;

"3. Persons who are attempting to evade family responsibilities.

"That the purpose of requiring a year's residence is to permit a reasonable length of time for law enforcement officers, creditors and dependents to ascertain the whereabouts of applicants for change of name."

[1] The statutes of this state have not abrogated the common-law right to change one's name, and resort to legal proceedings to accomplish such change is not necessary. The purpose of the statutory procedure is simply to establish a change of name as a matter of record wherever possible. The purpose and intent of our code sections relating to change of name are set forth in *In re Useldinger*, 35 Cal.App.2d 723, 726, 96 P.2d 958.

[2, 3] When a certain jurisdiction has been conferred upon a court, it is the duty of the court to exercise it, and without doubt a judge of the superior court may be compelled by a writ of mandate to proceed with the trial of an issue of either law or fact in an action rightly pending in his court when he refuses without legal reason so to do. *City of San Diego v. Andrews*, 195 Cal. 111, 120, 231 P. 726.

Section 594a of the Code of Civil Procedure provides that "the court may, of its own motion, postpone the trial, if at the time fixed for the trial the court is engaged in the trial of another action; or if, as provided in section 473 of this code, an amendment of the pleadings, or the allowance of time to make such amendment, or to plead, renders a postponement necessary." No such situation was present in the proceeding now engaging our attention.

[4, 5] The foregoing reasons assigned by respondent court for establishing the policy of requiring residence in the State of California for the period of one year prior to granting a petition for change of name may be praiseworthy, but should be addressed to the Legislature. In view of the common-law right to change one's name

and the purpose of our statutory provisions as heretofore set forth, it must be held that the foregoing "established policy" of respondent court is arbitrary, without warrant of law, and an abuse of the rule-making power of said court.

Let a peremptory writ of mandate issue, commanding respondent court to proceed with a hearing and determination of the petition for change of name filed by petitioner herein.

DORAN and DRAPEAU, JJ., concur.



97 Cal.App.2d 883

**BRAVO et al. v. SHARKEY et al.**

Civ. 7744.

District Court of Appeal, Third District,  
California.

June 5, 1950.

E. Bravo and another brought action against James J. Sharkey and another to quiet title to certain real property, wherein the defendants filed a cross-complaint to recover damages for alleged breach by plaintiffs of agreement to lease premises to defendant. A judgment granting plaintiffs' motion for a nonsuit as to cross-complaint was entered by the Superior Court, San Joaquin County, George F. Buck, J., and the defendants appealed. The District Court of Appeal, Peek, J., held that where agreement showed on its face that parties did not intend to enter into a lease of premises unless and until plans and specifications for remodeling of the existing building on the premises had been prepared and written approval thereof endorsed thereon by plaintiffs and defendants, the agreement was nothing more than an agreement to agree concerning a lease to be subsequently executed, and as such it could not be made basis of an action either in law or in equity.

Judgment affirmed.

**1. Landlord and tenant** Ⓒ22(2)

Where it appeared on face of agreement that parties did not intend to enter

into lease of premises unless and until plans and specifications for remodeling of existing building on the premises had been prepared and written approval thereof endorsed thereon by both plaintiffs and defendants, agreement was nothing more than an agreement to agree concerning a lease to be subsequently executed, and as such it could not be made basis of an action either in law or in equity.

## 2. Trial $\S$ 165

The rule that a trial court is justified in granting a motion for nonsuit only when, disregarding conflicting evidence and giving to plaintiffs' evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff, means that evidence must be sufficient to raise something more than mere surmise or conjecture.

## 3. Appeal and error $\S$ 882(3)

Where defendants' cross-complaint to recover damages for alleged breach by plaintiffs of agreement to lease premises to defendant was presented upon theory that the agreement was a full and complete contract and that terms thereof had been complied with by the parties, defendants could not assert for first time on appeal that strict compliance with terms of the agreement had been waived by the plaintiffs.

## 4. Appeal and error $\S$ 882(3)

A theory not before trial court cannot be raised for first time on appeal.

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Clifford A. Rohe, Sherman Oaks, and Harry J. Gross, Van Nuys, for appellants.

Joseph C. Tope, Stockton, Rutherford, Jacobs, Cavalero & Dietrich, Stockton, for respondents.

PEEK, Justice.

This is an action by plaintiffs to quiet title to certain real property. In addition to the usual averments it was alleged that

plaintiffs and defendants had previously entered into an agreement which "contemplated" the execution of a lease to the defendants of the property in question; that defendants by their acts abandoned and rescinded said agreement; that defendants have refused to deliver up said agreement for cancellation and that they threaten to place the same on record.

The defendants' answer denied generally the averments of plaintiffs' complaint but admitted the execution of the agreement which they alleged to be in full force and effect and under which they had acquired a valuable interest in said real property. By a separate cross-complaint defendants alleged that in reliance upon said agreement they had expended large sums of money and had fully performed their part of said agreement and that as a result of plaintiffs' failure to perform they had suffered substantial loss for which they prayed judgment.

At the outset of the trial, which was before the court sitting without a jury, it was stipulated that the property was owned in fee by plaintiffs and that if the court should find against defendants on their cross-complaint, a decree quieting plaintiffs' title should be entered.

Pursuant to said stipulation the cause proceeded to trial and at the conclusion thereof plaintiffs' motion for a non-suit was granted. Defendants have now appealed from the judgment accordingly entered on the grounds that (1) the lease entered into between the parties was a present binding contract notwithstanding that further acts were contemplated, and (2) that the court erred in granting plaintiffs' motion for non-suit since there was evidence of substantial compliance on their part.

An examination of the agreement in question shows that it contains certain preliminary recitals to the effect that plaintiffs are the owners of certain real property situated in the city of Stockton; that defendants, together with "personal business associates" are "desirous" of leasing said property for a stated rental providing plaintiffs "proceed as soon as is

reasonably possible to remodel said premises according to plans and specifications to be forthwith prepared by First Parties (plaintiffs) and submitted to and agreed upon by First and Second Parties," and prepared for occupancy by defendants and their associates, either as individuals or as a corporation to be subsequently formed and that plaintiffs agreed to have plans and specifications immediately prepared embodying details of "remodeling and construction agreed upon" by the parties and to proceed with such work of "remodeling and leasing" the premises to the defendants and their associates.

After enumeration of the foregoing the agreement provided that plaintiffs were to employ an architect to prepare plans and specifications "which must be submitted to and agreed upon by Second Parties before the commencement of remodeling", and after approval thereof proceed to remodel the premises in accordance therewith. A copy of the approved plans and specifications was to be annexed to the agreement and made a part thereof. The agreement then makes a general statement of the manner and extent of the remodeling to be done and the allocation, as between the parties, of the costs thereof. It is then stated that the reason for such remodeling was to enable plaintiffs to "turn over and lease" to defendants, or a corporation to be thereafter formed, the building ready for use and occupancy. The agreement next provides that the "term of the lease which the parties agree to sign" shall be ten years with an option of renewal by defendants exercised in writing "at least one (1) year before the expiration of the present lease, and the parties agree to execute said lease as soon as the same can be drawn up and presented for execution by Gumpert & Mazzer, attorneys for the parties hereto." The agreement provided further that the rental agreed to be paid in "said lease" by second parties shall be a specified per cent of gross sales and that "said lease" shall contain a minimum guaranteed rental. Also that "said lease" shall contain an absolute covenant against assignment except to the corporation to be formed by second parties. The

agreement in addition provided that "The lease to be signed shall, with regard to all pertinent subject matter and detail, be identical with the percentage lease prepared by Harry A. Mazzer for M. A. Sanguinetti and Charles Senderov, executed on January 18, 1946." Lastly, the agreement provides for a deposit of \$5,000 by defendants, "with the understanding that in the event the parties, after reasonable effort, are unable to agree on plans and specifications, this Agreement and the lease agreed to be executed by the parties hereto shall ipso facto, \* \* \* become null and void."

[1] It is apparent from the foregoing summary of the agreement that it is not as defendants contend, a contract wherein the parties have agreed in writing upon the essential terms thereof and hence have created a binding lease even though some further act is contemplated by them. Therefore it does not come within the rule enunciated in the case of *Gavina v. Smith*, 25 Cal.2d 501, 154 P.2d 681, and like cases cited and relied upon by defendants. Here, as in *Kerr Glass Corporation v. Elizabeth Arden Sales Corporation*, 61 Cal.App.2d 55, 141 P.2d 938, it is clear on the face of the agreement that the parties did not intend to enter into a lease of the premises unless and until plans and specifications for remodeling of the existing building on the premises had been prepared and the written approval thereof endorsed thereon by plaintiffs and defendants. Additionally the agreement herein provided that in the event the parties were unable to agree upon such plans and specifications the agreement of itself would become null and void and the deposit returned.

In the *Kerr Glass Corporation* case the agreement there in question contained the following provision, 61 Cal.App.2d at page 56, 141 P.2d at page 938: "Said building shall be constructed generally in accordance with the preliminary leasing plans and outline specifications therefor which are attached hereto, approved in writing by both the lessor and the lessee, and by reference made a part hereof the same as if set forth in full herein, and the final



plans and specifications hereinafter referred to. The final plans and specifications shall be prepared by the lessor within a reasonable period of time, and shall be approved in writing by both the lessor and the lessee before the commencement of the construction of said building, and upon said final plans and specifications being approved by the parties hereto as aforesaid, they shall become a part of this lease by reference the same as if set forth in full herein, and neither party to this lease shall unreasonably withhold its approval thereof."

The reviewing court in affirming the order of the trial court sustaining defendants' demurrer without leave to amend, stated: "It is apparent that approval of the final plans and specifications was an essential prerequisite to a binding contract between the parties. Upon its face additional terms were to be agreed upon before they were to be bound by it." Such is the precise situation presented in the present case. Therefore in light of the rule so stated the agreement now before this court can be said to be nothing more than an agreement to agree concerning a lease to be subsequently executed and as such it cannot be made the basis of an action either in law or in equity. *Autry v. Republic Productions, Inc.*, 30 Cal.2d 144, 180 P.2d 888; see also *Restatement Contracts*, Volume 1, section 26.

[2] Defendants' second contention is likewise without merit. When the Supreme Court in *Blumberg v. M. & T. Incorporated*, 34 Cal.2d 226, 209 P.2d 1, 3, said "A trial court is justified in granting a motion for nonsuit '\* \* \* when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff", it meant that the evidence must be sufficient to raise something more than mere surmise or conjecture.

[3, 4] The record herein discloses initial discussion by the parties during the year 1946 and the preparation of preliminary plans for the remodeling of a two-story building then existing on the premises. No specifications were ever prepared in accordance with such preliminary plans or discussions. Thereafter the parties apparently changed their minds and in the following year began negotiations relative to an entirely different project—the erection of a new three-story building, and the preliminary plans for remodeling were discarded. Following this change, new and different plans were prepared and discussions were had concerning increased rentals for a lease on such a building. Finally, although plans and specifications for such a new structure were ultimately completed and fixturation plans by appellants were submitted in 1948, the negotiations were broken off when the parties failed to agree upon the rental to be charged and the failure of defendants to disclose their associates, following which the \$5,000 deposit was returned to appellants. Obviously such circumstances cannot support defendants' contention that the court erred in granting plaintiffs' motion for nonsuit, for the reason that the strict compliance with the terms of the agreement was waived. In the first place no issue of waiver was presented to the trial court upon defendants' cross-complaint. From the pleadings it would appear that appellants' case was presented upon the theory that the agreement herein summarized was a full and complete contract and that the terms thereof had been complied with by the parties hereto. The rule is too well established to warrant citation of authority that a theory not before the trial court cannot be raised for the first time on appeal.

By reason of our conclusion upon the points hereinbefore discussed, consideration of appellants' further contentions is unnecessary.

The judgment is affirmed.

ADAMS, P. J., and SPARKS, J. pro tem., concur.

97 Cal.App.2d 721

**McNICHOLS v. NELSON VALLEY  
BUILDING CO. et al.**  
Civ. 4057.

District Court of Appeal, Fourth District,  
California.

May 24, 1950.

Hearing Denied July 20, 1950.

Action by Harold McNichols against Nelson Valley Building Company, a corporation, and others, to recover realty alleged to have been conveyed to defendant by plaintiff under duress or business compulsion.

The Superior Court for Fresno County, Philip Conley, J., rendered a judgment for the defendants, and the plaintiff appealed. The District Court of Appeal, Mussell, J., held that the complaint stated a cause of action.

Judgment reversed.

**1. Quieting title** ☞34(5)

Complaint which alleged that plaintiff opened escrow for purchase of a motel in return for certain lots and agreed to furnish title insurance, and which alleged that defendants fraudulently began action for dissolution of alleged partnership when no obligation of plaintiff or partnership existed and filed notice of lis pendens with result that plaintiff was required to make a settlement by deeding other realty to defendants in order to remove cloud on title to lots so he could complete escrow agreement on time stated a cause of action for recovery of the realty under doctrine of duress or business compulsion.

**2. Payment** ☞82(3)

Where by reason of peculiar facts, a reasonably prudent man finds that in order to preserve his property or protect his business interests, it is necessary to make a payment of money which he does not owe and which in equity and good conscience receiver of money should not retain, he may recover the money.

**3. Threats** ☞10

Ordinarily, it is not legal duress to threaten to or actually take advantage of the usual remedy by suit for enforcement of a debt or obligation.

Jerrell Babb, Los Angeles, for appellant.

Ralph Robinson, Fresno, for respondents.

MUSSELL, Justice.

Plaintiff appeals from a judgment for defendants after demurrer sustained to the second amended complaint without leave to amend. The action is for the recovery of real property alleged to have been conveyed to defendants by plaintiff under duress or business compulsion. Plaintiff prays for the recovery of the real property or its value, and in addition, seeks damages for certain costs and expenses incurred by reason of the acts of the defendants. The sole question for our determination is whether the complaint states facts sufficient to constitute a cause of action.

It is alleged in the complaint, in substance, that the plaintiff, who was then the owner of certain real property described as lots 1 to 21, inclusive, Tract No. 1063, Flora Gardens, Fresno County, opened an escrow in the city of Los Angeles wherein he agreed to purchase a motel in Pacoima, California. As a part of the purchase price thereof, plaintiff agreed to transfer to the motel owner 10 of the lots situated in Fresno; that plaintiff agreed, among other things, to furnish a policy of title insurance covering the Fresno property; that the escrow agreement contained a provision that the transaction be completed on or before the 25th day of April, 1949; that on the 3rd day of March, 1949, the defendants unlawfully and fraudulently commenced an action in the superior court of Fresno County against the plaintiff herein entitled "complaint-dissolution of partnership"; that at the time of the filing of said action, the defendants unlawfully and fraudulently caused to be prepared and recorded a notice of lis pendens which notice clouded the title of plaintiff's property in Fresno to such an extent that the escrow holder refused to furnish a policy of title insurance as required by the escrow agreement; that upon the said refusal of the escrow holder, plaintiff demanded of defendants that they immediately release

of record the *lis pendens* notice; that the defendants refused to release it without compensation and demanded that plaintiff convey to them four of the Fresno lots; that these lots had a market value of \$6,000; that plaintiff, in order to complete said escrow agreement and to protect himself against any damage suit that would arise out of his failure to complete his part of the escrow agreement on or before the 25th day of April, 1949, and under unlawful compulsion and duress on the part of the defendants toward plaintiff, did deed to the defendants four of the Fresno lots; that the four lots aforesaid were conveyed by plaintiff to defendants without consideration, against his will and under duress; that at the time the defendants filed the complaint for dissolution of partnership, they knew that there was no partnership, as alleged, and that plaintiff was not indebted to defendants, or any of them in any manner whatsoever; that the defendants fraudulently and unlawfully recorded the *lis pendens*, knowing that when recorded, it would cloud plaintiff's title to the Fresno property and thereby put defendants in a position to force plaintiff into a quick and involuntary settlement with them in order to complete the escrow agreement; that the defendants unlawfully and fraudulently compelled the plaintiff, without his consent, to execute a stipulation reciting, in substance, that the partnership dissolution action had been completely settled out of court and that it should be dismissed with prejudice to the commencement of any other or further action by the plaintiff or the defendants; that the stipulation was recorded in the County of Fresno on the 25th day of April, 1949; that by reason of the wrongful recording of the *lis pendens* and the failure of the defendants to release it, plaintiff was not able to close the Los Angeles escrow within the time provided, and on May 2, 1949, an action was brought against plaintiff for damages for his failure to complete the escrow within the time specified; that as a result of the filing of said action, plaintiff has incurred expenses in connection with the defense thereof.

[1] It is apparent that the complaint is sufficiently drawn to state a cause of action under the doctrine of duress or business compulsion.

[2] The general rule with regard to duress of this character is as stated in *Young v. Hoagland*, 212 Cal. 426, 431, 298 P. 996, 998, 75 A.L.R. 654, that where, by reason of the peculiar facts, a reasonably prudent man finds that in order to preserve his property or protect his business interests, it is necessary to make a payment of money which he does not owe, and which in equity and good conscience the receiver should not retain, he may recover it. It is there said, quoting from 20 California Jurisprudence, page 964: "The underlying principle (that money paid under compulsion may be recovered) is said to be that, by the performance of or threat to perform some unlawful act whereby plaintiff will suffer loss, the defendant has induced the plaintiff, under circumstances sufficient to control the action of a reasonable man, to pay money which he would not otherwise have paid.' It has frequently been held that payment of an illegal claim to a public officer upon the threat of the latter to seize and sell the property of the plaintiff under process held by said officer is a payment made under compulsion and may be recovered back. 'In such cases the parties cannot treat on equal terms, and the one on whom the demand is made is not bound to submit to the seizure of his property, and then seek his remedy for trespass, but he may pay the illegal demand and then recover it back.' 21 R.C.L., p. 159."

In *Oswald v. City of El Centro*, 211 Cal. 45, 292 P. 1073, 71 A.L.R. 899, the Board of Trustees of the city, as a condition for granting an extension of time for the performance of a contract for street improvements, required the contractor to execute a lease to the city of valuable property for a long term at a nominal consideration, and it was held that the lease was lacking in a valid consideration, and, being the product of compulsion and coercive method, was against public policy and therefore void.



In *Myers v. City of Calipatria*, 140 Cal. 295, 35 P.2d 377, 379, the court said: "What constitutes the compulsion or coercion which the law recognizes as sufficient to render a payment involuntary is often a question of difficulty. It may be said in general that there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment from which the latter has no other means of immediate relief than by advancing the money." *Bucknall v. Story*, 46 Cal. 589, 13 Am.Rep. 220."

In *Wake Development Co. v. O'Leary*, 118 Cal.App. 131, 4 P.2d 802, the judgment creditor caused an execution to be levied on real property in which the judgment debtor had no interest, thereby casting a cloud upon the real owner's title and causing the latter to pay the judgment creditor a sum of money to obtain a release in order to prevent the loss of a sale of said property. The action was brought by the owner against the judgment creditor to recover the money on the ground that it was paid under compulsion. The judgment in favor of the plaintiff was sustained and the court said, 118 Cal. App. on page 134, 4 P.2d on page 803: "It is well settled that, where payment is made under circumstances which amount to compulsion or coercion sufficient to render the payment involuntary, recovery of the money may be had." (Citing cases.)

[3] It is argued that the filing of a suit to enforce a claim or an alleged claim cannot in any sense be duress. While this court has held that it is not legal duress to threaten to or actually take advantage of the usual remedy by suit for the enforcement of a debt or obligation, *C.I.T. Corporation v. Hawley*, 34 Cal.App.2d 66, 93 P.2d 216, the complaint before us contains an allegation that there was no debt or obligation existing at the time of the filing of the suit for dissolution of the partnership.

In *Steffen v. Refrigeration Discount Corp.*, 91 Cal.App.2d 494, 205 P.2d 727, the plaintiff brought an action to recover

unearned interest paid under duress. The plaintiff had borrowed sums from the defendant upon which interest had been calculated for a period of four years. Notes were given for the principal sum, plus the interest, which notes were secured by mortgages on real and personal property. The notes contained a provision that in case of default in the payment of any installment, the whole sum of principal and interest should become due at the option of the holder. Plaintiff fell into arrears and defendant, taking advantage of these acceleration provisions, declared the full amounts of the three notes to be due and payable. Faced with the threat of foreclosure of the security for all three notes, plaintiff arranged to sell one of the parcels of real property and opened an escrow for the purpose, paid off, or made arrangement to pay off, the full amount on the notes and brought suit for the unearned interest. The court held that in each case the unearned interest was paid under duress and said, 91 Cal.App.2d on page 498, 205 P.2d on page 729: "The test of duress is, at its harshest, what would have influenced the conduct of a reasonable man, *Young v. Hoagland*, supra, 212 Cal. 426, 431, 298 P. at page 996, 75 A.L.R. 654, and many courts have relaxed the rule to make the test the state of mind induced in the particular person. 17 Am. Jur., Duress and Undue Influence, Sec. 11, pp. 883-885. Taking the harsher test of the effect on the mind of the average reasonable man we cannot say that the evidence does not support the court's finding that the overpayments herein recovered were made under duress. *Whether the individual acted as a reasonably prudent person is ordinarily a question for the trier of the facts.* *Young v. Hoagland*, supra, 212 Cal. 426, 431-432, 298 P. 996, 75 A.L.R. 654." (Italics ours.)

We conclude in the instant case that the question of whether plaintiff acted as a reasonably prudent person under the circumstances was a question for the trier of facts and that the court erred in sustaining the demurrer herein without leave to amend.

The question of whether there were in fact any legal or equitable grounds for filing the action for dissolution of partnership and recording the notice of lis pendens, and whether the stipulation was signed under duress or business compulsion were likewise questions of fact for the trial court.

The judgment is reversed.

GRIFFIN, Acting P. J., and SHEPARD, J. pro tem, concur.



97 Cal.App.2d 763

In re DENNY'S GUARDIANSHIP.

DENNY v. FINE.

Civ. 14355.

District Court of Appeal, First District,  
Division 2, California.  
May 26, 1950.

Proceeding in the Guardianship of Edward Thomas Denny, Jr., a minor, upon petition of Edward Thomas Denny for letters of guardianship, opposed by Mary Carolyn Fine. The Superior Court, County of San Mateo, Edmund Scott, J., denied petition and petitioner appealed. The District Court of Appeal, Nourse, P. J., held that petitioner was entitled in guardianship proceeding to make his full proof that appointment of a guardian of the person of his minor son was necessary or convenient.

Order reversed.

#### 1. Guardian and ward ⇨13(4, 8)

Where a foreign divorce decree awarded father custody of minor son, and mother subsequently obtained custody of son under false pretenses that she would return son to father, and mother started proceedings to obtain legal custody of son, father was entitled in a guardianship proceeding pending mother's custody proceeding, to make full proof that appointment of

guardian of his minor son was necessary or convenient, and therefore refusal of trial court to allow father to offer such proof was reversible error. Probate Code, § 1405.

#### 2. Guardian and ward ⇨13(1)

Although granting of petition of guardianship is to some extent discretionary, judicial discretion cannot be fairly exercised when interested party is denied right to present his proof. Probate Code, § 1405.

#### 3. Guardian and ward ⇨1

The legal relationship of guardian and ward is not in all respects identical with that of parent and child, even when one parent is entitled to the child's exclusive custody, because other parent can always secure an order changing custody upon a showing of changed circumstances while a guardian, once appointed can only be removed for reasons specified in probate code, and change of circumstances is not one of grounds there enumerated. Probate Code, § 1580.

#### 4. Parent and child ⇨2(4)

Because a guardianship creates new and different legal rights, a petition for guardianship is not the most appropriate method by which to enforce one parent's present right to custody of a child as against other parent, for habeas corpus would restore custody without creating a new and different legal relationship.

#### 5. Guardian and ward ⇨13(1)

The probate court's discretion in determining whether the appointment of a guardian is necessary or convenient is not exclusively controlled by single fact that a petitioning parent has the legal right to minor's custody.

Melbert B. Adams, Bruce E. Clark, Palo Alto, for appellant.

Jones, Lane & Weaver, Stockton, for respondent.

NOURSE, Presiding Justice.

The petitioner and appellant sought letters of guardianship of his minor son aged

five years. The trial court denied his petition.

The petitioner and respondent were married in 1941. They had two children. In 1946 respondent went to Nevada to get a divorce taking the oldest child, a girl, with her and leaving the younger, a boy, the subject of this controversy, with the father. By special agreement, and at the instance of respondent, the latter procured a condition in the Nevada decree that she should have custody of the daughter, and petitioner should have custody of the son. The respondent married another and made her home in Tracy. The appellant later remarried and retained his home in San Mateo County.

This condition continued for about three years when the respondent, under the false pretense that she would return the son to petitioner, procured the latter's consent to let the son visit her in Tracy. She refused to return him and started a suit in San Joaquin County to obtain legal custody. That action was transferred to San Mateo County and was pending at the time of the hearing of this proceeding.

Appellant proved a *prima facie* case for letters of guardianship and offered to make further and fuller proof, but the offer was denied by the trial court. Respondent made no counter showing relying wholly upon her asserted invalidity of the Nevada decree, and her surreptitious possession of the minor. All the authorities without exception support appellant's demand. He rested on a decree of the Nevada court awarding him custody of the minor and this decree was procured at the instance of respondent. If there was any fraud or imperfections in those proceedings they were all of the respondent's own choosing and she cannot now attack the decree. *Estate of Davis*, 38 Cal. App.2d 579, 585, 101 P.2d 761, 102 P.2d 545; *Hensgen v. Silberman*, 87 Cal.App. 2d 668, 671, 197 P.2d 356. There are so many other cases of our appellate courts directly in point that it is sufficient to refer only to the recent ones of *Foster v. Foster*, 8 Cal.2d 719, 68 P.2d 719; and *In re Kyle*, 77 Cal.App.2d 634, 176 P.2d 96, where earlier decisions are cited.

This court heard the Kyle matter on habeas corpus. The facts were the same as appear here—a Nevada divorce, an award of custody of the minor to the father, and the surreptitious “stealing” of the child by the mother. She made the same defenses as the respondent makes here. We ordered that the child be restored to the rightful parent before the mother could invoke the processes of the court and the same practice should be followed here.

[1,2] Under section 1405 of the Probate Code a guardian of a minor is to be appointed “whenever necessary *or* convenient.” The petitioner was entitled to make such proof but he was denied that right. Though granting of the petition is to some extent discretionary, judicial discretion cannot be fairly exercised when the interested party is denied the right to present his proof. The petitioner here should be permitted to show that the appointment of a guardian for the minor was either necessary or convenient and the decision of that question cannot be wholly governed by a rejection of the Nevada decree.

Order reversed.

GOODELL and DOOLING, Justices.

[1] We concur in the order of reversal on the single ground that appellant was entitled to make his full proof that the appointment of a guardian of the person of his minor son was “necessary or convenient.” Prob.Code sec. 1405. We do not concur in the statement that the proof of appellant's right to the present custody of his son establishes even *prima facie* that an order should be made placing the minor under his guardianship.

[3] The legal relationship of guardian and ward is not in all respects identical with that of parent and child even when the parent is entitled to the child's exclusive custody. The other parent can always secure an order changing custody upon a showing of changed circumstances, *Foster v. Foster*, 8 Cal.2d 719, 68 P.2d 719, while a guardian, once appointed, can only be removed for the reasons specified in section 1580 of the Probate Code and



changed circumstances is not one of the grounds there enumerated.

[4,5] Because a guardianship creates new and different legal rights a petition for guardianship does not seem to us to be the most appropriate method by which to enforce one parent's present right to custody against the other parent. Habeas corpus or a motion for an order pendente lite in the pending custody proceedings would restore the custody to the father without creating a new and different legal relationship. We are satisfied that the probate court's discretion in determining whether the appointment of a guardian is "necessary or convenient" is not exclusively controlled by the single fact that a petitioning parent has the legal right to the minor's custody.



97 Cal.App.2d 846

**GLOGAU v. HAGAN et al.**

Civ. 211.

District Court of Appeal, Second District,  
Division 1, California.

June 1, 1950.

Motion by J. A. Hagan, and others, defendants and appellants, against Jeanette Glogau, plaintiff and respondent, for diminution, augmentation and alteration of the record on appeal. The District Court of Appeal, Drapeau, J., held that the clerk's transcript should be prepared according to the rules on appeal, and any request for correction should be filed and heard by the judge who tried the case.

Motion denied.

#### 1. Appeal and error ☞939

Where neither party files request for correction of transcript it will be presumed by reviewing court that trial court used entire record shown in clerk's transcript at time of its decision. Rules on Appeal, rule 8.

#### 2. Appeal and error ☞660(2)

Diminution, augmentation and alteration of record on appeal should have been sought in trial court by proper request for correction of clerk's transcript, and not by motion to district court of appeal before preparation of transcript or hearing by trial judge. Rules on Appeal, rule 8(b).

#### 3. Appeal and error ☞660(2)

Upon proper request for correction of clerk's transcript, trial court has power to delete unnecessary, redundant, or improper matter, and determine what papers were used upon hearing. Rules on Appeal, rule 8(b).

Jesse A. Hamilton, Los Angeles, for appellants.

Abraham Gottfried and Norman Newmark, Los Angeles, for respondent.

DRAPEAU, Justice.

Appellants present to this court a motion to delete and add to the clerk's transcript on appeal, with respect to a number of items. Ninety-one items are requested deleted, and three items added. The items requested deleted appear in respondent's designation of additional documents to be included in the clerk's transcript. Rules on Appeal, Rule 5(b).

In support of the motion appellants' counsel has filed an affidavit, deposing, in part, as follows:

"This affiant states that there are contained in the requests on behalf of the appellant for the preparation of the record and in the requests on behalf of the respondent many duplications of items; that there are many items asked for which can be transmitted in the original form without copying and should be transmitted; that there are many items in the respondent's request pertaining to matters which cannot and will not be raised by the appellants upon their appeal, and that their inclusion in the request is redundant and serves only to make the record, when completed, so bulky and voluminous as to be unintelligible and to cause to the appellants the payment

of excessive costs of paying for and preparing the record on appeal.

"This affiant states that the designations as they now stand consist of approximately 150 separate and different items, and that many of the same contain entries duplicating each other; that discussions have been carried on for the past month between attorneys for appellant and respondent, in an endeavor to stipulate on a simplified Clerk's transcript, that such attempted negotiations terminated on April 21, 1950, when Abraham Gottfried informed affiant that he did not believe such a stipulation could be reached."

The Rules on Appeal present an orderly and scientific method of preparing the clerk's transcript.

Within 10 days after filing notice of appeal, the appellant shall serve on the respondent and file with the clerk a notice designating what appellant requires included in the transcript. Rule 5(a).

Within 10 days after service of appellant's notice, the respondent may serve and file a notice designating additional papers or records. And respondent shall pay the clerk the cost thereof. Rule 5(b).

The record on appeal in this case is at this point. Neither clerk's nor reporter's transcript has been prepared.

Rule 5(d) requires the clerk to prepare the transcript, when the cost thereof has been arranged for.

Rule 8 requires the clerk to mail notice of the completion of the transcripts. Within 10 days thereafter either party may file request for correction of such transcripts.

[1] If no such request is filed, it will be presumed that the trial court used the entire record shown in the clerk's transcript at the time of its decision. Redsted v. Weiss, 71 Cal.App.2d 660, 163 P.2d 105.

If request for correction is made, the matter is set for hearing and determination by the judge who tried the case. Rule 8(b).

[2, 3] Therefore, in this case, the forum of petitioner is the Superior Court, upon a proper request for the correction of the clerk's transcript when it is made. If un-

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necessary, redundant, or improper matter is included in the clerk's transcript, the Superior Court has the power to delete it. Redsted v. Weiss, supra.

And the trial court shall determine what papers were "used" upon the hearing. Thomas v. Thomas, 66 Cal.App.2d 818, 153 P.2d 389.

The motion is denied.

WHITE, P. J., concurs.

DORAN, J., concurs in the judgment.



# FEDERAL OIL CO. v. BROWER et al.

Civ. 17365.

District Court of Appeal, Second District,  
Division 1, California.

May 29, 1950.

Rehearing Denied June 21, 1950.

Hearing Granted July 27, 1950.\*

Action by Federal Oil Company, a corporation, against Nelle P. Brower, and others, and Hilo Oil Company, a limited partnership, and others, for determination to whom plaintiff should pay certain royalty claims. The two groups of defendants interpleaded their respective claims, and the Superior Court of Los Angeles County, Ingall W. Bull, J., entered a decree for Nelle P. Brower, and Hilo Oil Company, and others appealed. The District Court of Appeal, White, P. J., held that defendants who recovered and who were lessees were entitled to exclusive possession of surface and to their share in any oil lawfully acquired by driller through operation conducted upon surface of leased lands.

Judgment affirmed.

## 1. Landlord and tenant 37

The interest created by any lease depends upon intention of parties thereto.

## 2. Mines and minerals 73

Agreement by lessee under oil and gas lease to bottom all wells within tract leased

\* Subsequent opinion 224 P.2d 4.

and not to drill within 100 feet of two avenues bounding tract without lessor's consent, did not result in a reservation by lessor of an interest entitling him to use any portion of surface for purpose of drilling for oil on adjacent lands or to lease unused 100-foot strip of surface for that purpose.

### 3. Mines and minerals ☞81

Where provision of oil and gas lease not to drill well in a 100 foot strip did not reserve any surface to reduce oil to possession in lessor, second lessee, who was granted right to construct slant wells from the 100 foot strip to remove oil from adjacent realty, was liable to original lessees for royalties from oil produced, notwithstanding that producing interval of second lessee's well was located under adjacent realty.

### 4. Mines and minerals ☞78(1)

Royalty rights do not arise by reason of location of producing interval of well, but because it belongs to grantor of rights and is produced through drilling operations within boundaries of realty belonging to one to whom royalty rights were granted.

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Marvin A. Freeman, Beverly Hills, for appellants.

Reynolds, Painter & Cherniss, Thomas Reynolds, Los Angeles, for respondents.

WHITE, Presiding Justice.

This is an appeal from a judgment declaring that respondents are the owners of a certain oil and gas overriding royalty interest and that appellants have no interest therein. The facts are not in dispute. The question assertedly presented is whether the right of respondents to receive a royalty on oil "produced, saved, and/or sold from" a parcel of land includes the right to receive a royalty on oil recovered through a well located on the surface of such parcel but the producing interval of which well is located beneath adjacent land and entirely without the boundaries of such parcel.

In 1940 Ronald C. Smith and Security-First Company, as lessors, entered into an oil and gas lease with O. J. Rohde as lessee. This lease will be hereinafter referred to as the "Smith lease". By a partial assignment from Rohde, Federal Oil Company succeeded to the lessee's interest so far as it pertained to a parcel of land of approximately 16½ acres, hereinafter referred to as the "16½-acre parcel." On February 18, 1941, Federal, by a written instrument entitled "Overriding Royalty Interest", transferred to respondents' predecessors a 1-⅓ royalty interest in "the gross proceeds received from the sale of all of the gross oil which may be produced, saved, and/or sold at any time from" the 16½-acre parcel. Thereafter this royalty interest was transferred to respondents. Federal drilled and is now operating five wells upon the property and is paying the prescribed royalty to respondents. The producing intervals of these wells are all within the boundaries of the 16½-acre parcel.

On November 30, 1946, Ronald C. Smith and Security-First Company, the lessors in the "Smith lease", entered into agreements whereby they leased to Hilo Oil Company a 100-foot strip of land *included within and part of the 16½-acre parcel* for the purpose of using such land for the surface installation of oil wells to be slant-drilled northwesterly to points outside the boundaries of the "Smith lease" (and hence outside the 16½-acre parcel) and underlying the city of Culver City, so that oil might be extracted from the Culver City land pursuant to a subsurface lease given by Culver City to Hilo Oil Company. The lease from Culver City and the lease of the 100-foot strip from Smith and Security-First Company were assigned to Federal. Federal slant-drilled a well from surface installations on the 100-foot strip parcel into the adjacent land of Culver City. This well, known as "Culver City No. 1", leaves the land embraced in the original Smith lease before reaching any productive zone. Its producing interval is located entirely under and within the lands described in the Culver City lease.



In assigning its Culver City lease to Federal, Hilo reserved a royalty of 16½% of all oil, etc. produced, saved and sold from any wells bottomed under the land described in the Culver City lease. The assignment contained the further provision that Hilo should indemnify and hold Federal harmless from any claims to the Culver City oil based upon ownership of any royalty interest in the oil produced pursuant to the original Smith lease.

The complaint filed in this action by Federal Oil Company set forth the foregoing facts, and alleged that the defendants (and appellants) Hilo Oil Company, the individual partners thereof, and certain assignees thereof, have demanded that plaintiff pay to them the aggregate of 1-⅓ per cent overriding royalty in the production of the Culver City No. 1 well and that plaintiff not pay such royalty to the other defendants, respondents herein.

Each group of defendants, i. e., those claiming as overriding royalty owners from Federal under the Rohde assignment of a portion of the original Smith lease, and those claiming by virtue of the royalty reserved by Hilo in its assignment to Federal of the 100-foot strip lease, filed answers pursuant to a stipulation that the two groups of defendants "interplead" their respective claims. It was further stipulated:

"That all of the defendants and plaintiff agree that the final adjudication between the said two groups of defendants as to which of the said two groups of defendants is entitled to the said aggregate of one and one-third per cent (1-⅓%) overriding royalty interest and to the monies theretofore accrued and thereafter accruing in pursuance thereof shall for all purposes have the same legal effect as an adjudication between plaintiff and the said two groups of defendants, and shall be deemed to be such an adjudication between plaintiff and each of the said two groups of defendants, and between plaintiff and both of the two groups of defendants."

The matter was presented to the trial court upon a written "stipulation of facts" incorporating as exhibits the documents hereinbefore and hereinafter referred to.

Appellants state the question presented to be as follows:

"Does an overriding royalty interest in oil, gas and hydrocarbons produced, saved and/or sold from Blackacre entitle the grantee thereunder to that interest in oil, gas and hydrocarbons extracted from the reservoir rock under and within the confines of Whiteacre solely by reason of the fact that the surface installations of the well so extracting said substances are located on Blackacre, when said oil, gas and hydrocarbons are extracted from Whiteacre by means of a well 'whipstocked' or 'slant-drilled' from said surface installations located on Blackacre so that said well's productive interval or perforated area is located entirely under and within Whiteacre; and more particularly when the lease under which is created said overriding royalty interest in Blackacre expressly provides (1) that all wells drilled thereunder shall be bottomed under and within the confines of Blackacre and (2) that lessee shall not use that portion of the surface of Blackacre subsequently granted by lessor for the surface installation of said whipstocked well."

The argument of appellants is that the oil must be deemed to be "produced from" the lands in which the "producing interval" of the well is located, irrespective of the location of the surface of the well; that by its decision the trial court has given to respondents an interest which no predecessor in title granted or could have granted, since the original lessors had no right or interest in oil under adjacent lands and no right to extract the same.

Respondents agree that the sole question is "whether the 1-⅓% royalty interest \* \* \* should be awarded to the appellants or to the respondents." They base their claim to the disputed interest upon the following points: 1. That the royalty owners are entitled to protection against drainage of the oil pool underneath the 16½-acre parcel. 2. That the operating lessee (Federal) is a trustee for the royalty holders. 3. Under the express language of the assignment the royalty holders are entitled to their share of the proceeds derived from the sale of all oil cap-

tured and sold on the 16½-acre parcel. 4. The lessee is bound by an express covenant in the assignment to "protect" the royalty holders. 5. To deprive the royalty holders of their interest would open the door to fraud.

Appellants quote extensively from *Alphonzo E. Bell Corp. v. Bell View Oil Syndicate*, 24 Cal.App.2d 597, 76 P.2d 167 (hearing denied by Supreme Court), wherein it was held that the common right of surface owners to capture oil does not include the right to trespass upon neighboring lands by means of a slant-drilled well and extract oil by means of a producing interval located beneath the neighboring land. It is then argued that since neither lessor nor lessee had such right when the royalty assignments were made to respondents' predecessors, they could not have granted nor intended to grant an interest in oil obtained by means of a slant-drilled well. It follows, argue appellants, that the royalty instrument creating an interest in oil produced, saved or sold from the land should not be deemed to create an interest in oil extracted from beneath adjacent land. Concededly, "The common supply, or common right, or correlative right is expressly limited to the right of each individual surface owner to take from the oil strata lying beneath his properties, oil, gas, and other hydrocarbons intercepted by wells sunk beneath his own property, in such a manner as not to commit waste." *Alphonzo E. Bell Corp. v. Bell View Oil Syndicate*, supra, 24 Cal.App.2d page 599, 76 P.2d page 174.

We are of the view that appellants' argument, however logical it might be considered to be so far as concerns the usual meaning of the words "produced \* \* \* from", is inapplicable to the peculiar situation created by the transactions of the lessor and lessee as disclosed by the instruments in this particular case.

[1] The interest created in any case depends upon the intention of the parties, *Callahan v. Martin*, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871; *La Laguna Ranch Co. v. Dodge*, 18 Cal.2d 132, 135, 138, 114 P.2d 351, 135 A.L.R. 546. The assignment

of the "overriding royalty" by Federal Oil Company to respondents' predecessors reads, so far as here pertinent, as follows:

"\* \* \* does hereby sell, set over, transfer, assign and convey \* \* \* the total amount of one and one-third (1-1/3%) per cent \* \* \* of the gross proceeds received from the sale of all of the gross oil which may be produced, saved, and/or sold at any time from the real property \* \* \* held under lease by Assignor by virtue of a partial assignment of an original oil and gas lease (the Smith lease) \* \* \*

"To have and to hold forever unto the assignee so long as oil and gas and/or other hydrocarbon substances shall be produced, in paying quantities from said well (sic) upon the aforesaid premises and under the aforesaid lease, or any modification or substitution therefor. \* \* \*

"The assignor will not sell, encumber, assign or convey its estate, or any part thereof or any interest therein without first making adequate provision for the protection of the interest holders and submitting a copy of the assignment, conveyance or other instrument utilized for such purpose to the Division of Corporations of the State of California." (Emphasis added.)

The instrument created an interest similar to that involved in *La Laguna Ranch Co. v. Dodge*, supra, where it was said, 18 Cal.2d page 138, 114 P.2d page 354: "Similarly, while the operating lessee may assign an interest in his *profit a prendre* which is intended to make the assignee a tenant in common of his entire leasehold estate, he may, on the other hand, intend to retain in himself the operating rights contained in the *profit a prendre*, conveying to the assignee merely a fractional share of the oil and gas produced in the form of an overriding royalty." Such interest is not unlimited, but is limited to the duration of the existing lease. But here we find express language that the interest of the assignee is to endure so long as oil is produced upon "the aforesaid premises" and under "the aforesaid lease", or any "modification or substitution."

Turning now to the original Smith lease, we find the following provision:

"The possession by Lessee of said land shall be *sole and exclusive*, excepting only that the Lessor *reserves* the right to occupy said land or to lease the same for agricultural, horticultural or grazing uses, which uses shall be carried on subject to, and with no interference with, the rights or operations of the Lessee hereunder."

[2] The lessor granted the exclusive right to occupancy of the surface for the purpose of drilling for and recovering oil. He reserved no interest in the surface for such purpose. We cannot agree with the assumption by appellant that the agreement of the lessee to bottom all wells within the tract and the agreement that lessee could not drill within 100 feet of Jefferson or Duquesne Avenues without the consent of the lessor, resulted in a reservation by the lessor of an interest entitling him to use any portion of the surface for the purpose of drilling for oil on adjacent lands or to lease the unused 100-foot strip of the surface for that purpose. Had such been the intention of the parties, apt language could have been used. The lessee was not excluded from the 100-foot strip; he could use it if necessary in his operations, but could not place a well thereon. The lessor's right to occupy it was solely for agricultural, horticultural or grazing purposes and subject to the lessees' needs.

[3] Thus we see that by the second lease, of the 100-foot strip, the lessors purported to convey an estate or interest which they did not own. To avoid this difficulty they secured from Federal, the lessee of the entire surface, a "consent" to the leasing of the 100-foot strip. Then, through instruments executed by Hilo Oil Company, Federal acquired the lease of the 100-foot strip as well as the right to extract oil from beneath the Culver City lands. The net result is nothing more than a "modification" of or "substitution" for the original lease pursuant to which the respondents were entitled to receive a royalty. The lessee is bringing oil to the surface of the land pursuant to a modified

lease, to which, by the terms of the royalty assignment, the respondents' interest attaches.

The owner of the ground owned the right to exploit the surface of his land for the production of oil. While he had no interest in oil at rest under, or seeping through, adjacent lands, he did have the sole right to exploit his own surface for the purpose of lawfully reducing oil to possession. When he leased the land, he parted with this right, reserving to himself only the right to use the surface for agricultural purposes, and that subordinated to the needs of the lessee. This entire right, to use the surface to reduce oil to possession since it was not reserved, must have passed to the lessee. The lessee, who was entitled to the exclusive possession of the surface (subject only to agricultural rights, which in turn were subject to his needs) consented to what amounted to no more than a modification of his lease whereby (by means of conveyances simultaneously executed) he was granted permission to exploit the surface for the purpose of removing oil from beneath adjacent lands. Prior to this, and before he acquired such right, he could exclude the lessor and all others from exercising the same.

[4] We hold, therefore, that under the instruments and the facts here presented, respondents are entitled to their share in any oil lawfully acquired by Federal through drilling operations conducted upon the surface of the leased lands. The objection made by appellants that whatever the rights of the respondent royalty owners may be, they are not entitled to be protected by giving them a royalty in oil belonging to somebody else, is answered by the statement that the royalty rights do not arise by reason of where the producing interval of the well is located, but by reason of the fact that it belongs to respondents' assignor, Federal Oil Company, and was produced through drilling operations within the boundaries of the Smith lease. It is not being taken from appellants, the Hilo Oil Company partners. Their loss results from their contract to indemnify



Federal Oil Company against the claims of respondents.

For the reasons stated, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



97 Cal.App.2d 665

**COSLER v. NORWOOD.**

Civ. 17509.

District Court of Appeal, Second District,  
Division 2, California.

May 22, 1950.

Action by Lorraine Cosler against Winifred Norwood for an accounting and partition. The Superior Court, Los Angeles County, Carl A. Stutsman, J., entered a judgment for defendant and plaintiff appealed. The District Court of Appeal, McComb, J., held that evidence sustained finding of trial court that plaintiff owned a one-fourth interest in the realty and defendant owned three-fourths interest therein, and the fact that the parties held the realty as joint tenants did not estop defendant from claiming more than a one-half interest since the deed of joint tenancy was only one item of evidence to be considered by the court in connection with other probative facts produced by the parties.

Judgment affirmed.

**1. Partition** ⚡63(3)

In joint tenant's action for partition and accounting, evidence sustained trial court's finding that plaintiff owned a one-fourth interest in the realty and defendant owned three-fourths interest therein.

**2. Appeal and error** ⚡989

When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence contradicted or uncon-

tradicted which will support the finding of fact.

**3. Estoppel** ⚡32(1)

**Partition** ⚡63(3)

Where joint tenant brought action for partition and accounting, the fact that the realty was taken in the name of the parties as joint tenants would not estop defendant from claiming more than a one-half interest therein, and the deed of joint tenancy was only one item of evidence to be considered by the court in connection with other probative facts produced by the parties.

**4. Witnesses** ⚡342

Refusal to allow plaintiff's witness to testify that defendant's reputation "for truth was bad", was proper. Code Civ. Proc. § 2051.

**5. Witnesses** ⚡343

When it is sought to impeach a witness by attacking his reputation for truth, honesty or integrity, the question must be directed to his general reputation in the community in which he lives or is generally known, and such evidence is properly excluded where the reputation is confined to the vicinity of his place of business or among members of a restricted group of persons.

**6. Witnesses** ⚡343

Evidence that witness knew defendant's reputation for truth among the people who knew defendant at a cafeteria where she had worked, was an insufficient foundation for admission of answer to question as to defendant's reputation for truth.

**7. Appeal and error** ⚡970(3)

**Trial** ⚡60(1)

Whether a sufficient foundation has been laid to warrant a witness in expressing an opinion as to the general reputation of a party for truth, honesty and integrity, is a matter committed to the sound judgment of the trial court whose ruling will not be disturbed upon appeal in the absence of a showing of an abuse of discretion.

D. L. Di Vecchio and Laurence Berger,  
Los Angeles, for appellants.

Lillick, Geary & McHose, John C. McHose, Seth Martin Hufstедler, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant in an action for an accounting and partition, plaintiff appeals.

*Facts:* Plaintiff and defendant purchased a duplex for \$27,000, the title being taken in the names of the parties as joint tenants with the understanding that each should pay half of the purchase price. Plaintiff paid a total of \$6,750 on the total purchase price and defendant paid the balance. They moved into the house and defendant paid for the furniture located in it. They resided in the duplex until July 19, 1948, when plaintiff moved from the residence and filed the present action for an accounting.

The trial court decreed that plaintiff owned a one-fourth interest in the real property and that defendant owned a three-fourths interest therein, appointed a referee with authority to sell the property, and ordered the method of distributing the proceeds to the respective parties.

*Questions:* First: *Was there substantial evidence to sustain the trial court's findings as to the respective interest of the parties in the real property here involved?*

[1,2] This question must be answered in the affirmative. Defendant gave direct testimony as to each and every fact set forth above. Therefore under the often repeated rule, that when a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact (Estate of Isenberg, 63 Cal.App.2d 214, 217, 146 P.2d 424), we are bound by the trial court's findings in accordance with the above evidence.

[3] There is no merit in plaintiff's contention that since the title to the real property was taken in the names of the parties as joint tenants defendant is estopped to claim that she has more than one-half interest in the property. Plaintiff by seeking a partition and an accounting put in issue the interest of each of the parties to the real property in question. Therefore the deed of joint tenancy was only one item of evidence to be considered by the court in connection with other probative facts produced by plaintiff and defendant.

[4,5] Second: *Did the trial court err in not permitting a witness on behalf of plaintiff to testify as to defendant's reputation for truth, honesty, veracity and integrity?*

This question must be answered in the negative. Plaintiff called a witness and offered to prove by her that defendant's reputation "for truth was bad." Objection to such offer was properly sustained. The rule is established that a witness may be impeached by evidence of a bad reputation for truth, honesty or integrity in the community in which he lives or is generally known. Sec. 2051, Code Civ.Proc. When it is sought to impeach a witness by attacking his reputation for truth, honesty or integrity, the question must be directed to his general reputation in the community in which he lives or is generally known. Such evidence is properly excluded where the reputation is confined to the vicinity of his place of business or among the members of a restricted group of persons. (People v. Markham, 64 Cal. 157, 162 et seq., 30 P. 620, 49 Am.Rep. 700)

[6,7] In the present case plaintiff's attempt to lay a foundation for the admission of the impeaching testimony merely showed that the witness knew defendant's reputation for truth among the people who knew her at a cafeteria where she had worked.\* Clearly such evidence was not a sufficient foundation for admission of an answer to

\* The witness testified: "Q. You did not know her reputation among the people who knew her at the Broadway Cafeteria? A. Not as to honesty, no."

"Q. Well, the phrase was, 'truth, hon-

esty, and integrity.' That is what the law allows us to ask you. Do you mean to answer that you knew her reputation for truth, but not for honesty? Is that what you are getting at? A. Yes."

the alleged impeaching question. Whether a sufficient foundation has been laid to warrant a witness in expressing an opinion as to the general reputation of a party for truth, honesty or integrity is a matter committed to the sound judgment of the trial court whose ruling will not be disturbed upon appeal in the absence of a showing of an abuse of discretion. (*People v. Love*, 29 Cal.App. 521, 525, 157 P. 9.)

In the present case it is obvious that this rule is applicable and that there is no showing that the trial judge abused his discretion.

Affirmed.

MOORE, P. J., and WILSON, J., concur.



97 Cal.App.2d 735

**ALTERAUGE v. LOS ANGELES TURF CLUB et al.**  
Civ. 17571.

District Court of Appeal, Second District,  
Division 2, California.  
May 25, 1950.

Action by John J. Alterauge against the Los Angeles Turf Club, a corporation, Security Police Force, Pat Dietz and others, a co-partnership doing business as John Doe Company, and Richard Roe Company a corporation, for wrongful arrest. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered judgment for plaintiff for \$300 compensatory damages against all defendants, \$2,000 exemplary damages against the Turf Club and \$750 against the latter's agents and defendants appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained jury's finding but that judgment granting plaintiff \$2,000 against Turf Club as vindictive damages would be reversed since there was no evidence that arrest was made by or with consent or

knowledge of the board of directors or of the governing officers or vice-principals of the corporation or of a subsequent ratification by such board or officials of the action of the agents.

Judgment as modified affirmed.

**1. False Imprisonment ☞10**

Ordinarily, owner of property, in exercise of his lawful right to protect it, may detain a person who seeks to interfere with or injure such property a reasonable length of time for purpose of investigation in a reasonable manner.

**2. False Imprisonment ☞31**

In action against turf club, and detective agency employed to keep race track under surveillance, for wrongful arrest, evidence sustained finding that plaintiff was not detained for a reasonable time and in a reasonable manner for the purpose of investigation. Business and Professions Code, §§ 19400 et. seq., 19561.

**3. False Imprisonment ☞40**

In action against turf club, and detective agency employed by club to keep race track and grounds under surveillance, for wrongful arrest, instruction that probable cause is a suspicion founded on circumstances sufficiently strong to warrant a reasonable man in belief that charge is true and that if turf club or their agents had reasonable grounds to believe plaintiff was violating its rules then there was proper cause for detention of plaintiff for a reasonable time and in a reasonable manner for purpose of investigation, was proper. Business and Professions Code, §§ 19400 et seq., 19561.

**4. False Imprisonment ☞36**

In action against turf club, and detective agency employed to keep race track and grounds under surveillance, for wrongful arrest, award of \$300 damages and \$750 punitive damages was not excessive. Civ.Code, § 3294.

**5. Damages ☞91(1)**

An award of punitive damages is authorized in addition to actual damages where the defendant has been guilty of oppression, fraud, or malice, express or implied. Civ.Code, § 3294.



**6. Damages** ⇨94

In fixing amount of punitive damages, juries have even wider discretion than they have with respect to compensatory damages. Civ.Code, § 3294.

**7. Corporations** ⇨498

A corporation may become liable in exemplary damages for an act of one of its employees, done in ill will or in actual malice or under circumstances of fraud or oppression, only when done with knowledge or under express direction of its superior officials having power to bind corporation, or if done without such knowledge or direction and thereafter ratified by such officials.

**8. Corporations** ⇨498

Where there was no evidence that wrongful arrest of plaintiff was made by or with consent or knowledge of board of directors of turf club a corporation, or of governing officers or vice-principals of turf club, nor any proof of a subsequent ratification by such board or officials of the action of the agents employed to keep race track and grounds under surveillance, plaintiff was not entitled to recover vindictive damages for wrongful arrest. Business and Professions Code, §§ 19460, 19461; Civ.Code, § 53.

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Victor Ford Collins, Los Angeles, for appellants.

C. Ransom Samuelson, Long Beach, for respondent.

MOORE, Presiding Justice.

Respondent sued for "wrongful arrest." He was awarded \$300 compensatory damages against all defendants, \$2,000 exemplary damages against the corporation and \$750 against the latter's agents. A motion for a new trial having been denied, the

matter was transferred to this court on appeal.

The corporate defendant operates Santa Anita Park, a race track which engages in pari-mutuel wagering pursuant to the California Horse Racing Act. Business and Professions Code, sections 19400 et seq. At the time herein mentioned the club employed the Security Service Agency, a copartnership composed of appellants Williams and Rhyn, who in turn employed appellant Marshall and Dietz to perform the actual service of policing the club's grounds, including the placing of respondent under surveillance.

Respondent having paid for his admission to the clubhouse on January 5, 1946, remained until the end of the seventh race. Then, feeling ill, he withdrew and seated himself in an automobile on the parking lot. He was there approached by Dietz and Marshall who stated to him that they were track detectives in the employ of the Turf Club and demanded to know the name of the owner of the automobile in which he sat. Upon his refusal to give the information, they requested him to accompany them to the inside of the clubhouse. He declined to do so saying that he preferred to remain in the car. "No," said the two men, "you are going into the place, we have got to take you." Thereupon they pulled him out, tearing his coat, and forced him to accompany them to the office of the clubhouse where he was searched for evidence of bookmaking. He was questioned by Messrs. Patton and Pugh, employees of Security Service, detained for about 15 minutes and then released with instructions never to return to the track.

In demanding a reversal, appellants contend that the evidence is insufficient to justify any verdict against them. They assert that under rule 355<sup>1</sup> of the Racing Board it was their duty to police the grounds of

1. Authorized by sec. 19561, Business and Professions Code. "An Association conducting race meetings under license from the Racing Board shall properly police its grounds, including the stable area, and shall eject therefrom known undesirables, touts, persons under suspension or ruled

off, persons of lewd or immoral character, and persons guilty of boisterous or disorderly conduct or other conduct detrimental to racing or the public welfare. The Association shall report to the Racing Board each day a list of persons ejected, showing reasons for ejection."

the club and to eject therefrom known undesirables and persons of immoral character as well as others whose presence is forbidden by the rule; that in the performance of such duties they were privileged to detain respondent for a reasonable investigation by reason of the fact that his presence there was interfering with their valuable property right, to wit, their license to operate a track. Such contention they assert is based upon sections 19460 and 19461, Business and Professions Code, which provide that their club license might be suspended or revoked in the event that the Racing Board should "believe that any condition of its license has not been complied with."<sup>2</sup> They assert also that they are required by section 53, Civil Code, to exclude from the Turf Club's premises any person of immoral character. Under authority of such statutes appellants contend that by virtue of the uncontradicted evidence of respondent's having been convicted of various crimes and having served in the penal institutions of several states it was their duty to exclude him from the Club's grounds or imperil its license for conducting the race course.

[1, 2] It is true that ordinarily the owner of property in the exercise of his lawful right to protect it may detain a person who seeks to interfere with or injure such property a reasonable length of time for the purpose of investigation in a reasonable manner. *Collyer v. S. H. Kress & Co.*, 5 Cal.2d 175, 180, 54 P.2d 20. But was respondent detained and investigated in a reasonable manner? The jury decided that he was not, and by denying the motion for a new trial, the court below held that the jury's verdict was justifiable. It is true that respondent had committed a number of crimes; had been arrested several times beginning in his boyhood for misdemeanors and for felonies, but he had entered the

premises of the club as a peaceable and law-abiding citizen. He had done nothing unlawful while on the grounds, but at the time of his arrest was languidly reposing in an automobile out of the presence of all patrons of the club and at some distance from its gambling paraphernalia. Having been removed by force from the automobile he was compelled to visit the Security office without being advised as to the purpose of the visit; conducted thither by force and threats without a warrant, without being accused of a wrongful act and without being placed formally under arrest. He was there "frisked" for guns and weapons, his wallet examined and vainly searched for evidence of bookmaking. He was suspected of the latter solely by reason of the testimony of Dietz to the effect that respondent had been wandering about the clubhouse talking with another gentleman and not going to the betting windows. Dietz had not seen plaintiff take a bet or do any other act in violation of the rights of the club. There was no good reason to detain and investigate him by reason of his personal history. His record was known to the Security office. One of its investigators had worked at Hollywood Park in September, 1945, and had there detained respondent and questioned him for 45 minutes concerning his background but had taken no action toward evicting him from that race course. Also, he had visited Santa Anita only a few days previous to the date involved herein at which time he was trailed by one Patton who testified that he overheard a conversation wherein respondent stated that he desired to do some bookmaking at Santa Anita.

[3] It is thus seen that appellants knew previously all facts concerning which they questioned him on January 5. If they had been in good faith and desired merely the exclusion of respondent from the club

2. Section 19460, Business and Professions Code: "All licenses granted under this chapter are subject to all rules, regulations and conditions from time to time prescribed by the board and shall contain such conditions as are deemed necessary or desirable by the board for the purposes of this chapter."

Section 19461, Business and Profes-

sions Code: "All licenses granted under this chapter are subject to suspension or revocation by the board in any case where the board has reason to believe that any condition of its license has not been complied with or that any law or any rule or regulation of the board has been broken or violated."

grounds, they could have informed him at the time of his first visit of the management's determination to forbid his presence there. Knowing his record prior to the visit and having had an opportunity to forbid his presence at the race course, his detention was unreasonable. Not only were the facts fully developed but the jury were correctly instructed that probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true and that if the defendants or their agents had reasonable grounds to believe that plaintiff was violating its rules then there was proper cause for the detention of the plaintiff for a reasonable time and in a reasonable manner for the purpose of investigation.

In addition to the fact that respondent was taken forcibly from the automobile, it was established that he was pulled along the walk until they arrived at the front of the clubhouse. There he consented to visit the Security office. He was never taken before a magistrate or at any place arraigned under any form of accusation, but was forbidden to return.

In view of such proof it cannot be said that the jury acted arbitrarily in awarding damages to respondent or that the trial court abused its discretion in denying a new trial. He was not only the victim of a wrongful arrest and detention but he was the victim of an unjustified battery for all of which the compensatory damages awarded were not unreasonable. Reasonable and civil treatment of respondent necessitated a previous demand upon him not to enter the club grounds. Instead of doing this they subjected him to indignities that humiliated him, made him nervous and to suffer from ulcers. Their conduct was reprehensible. Their knowledge of him was complete. They gained nothing new by dragging him from the automobile and to the office. Fair treatment of him would have compelled appellants to advise respondent where he sat in the machine to leave the grounds and not to return. Their assault upon and detention of him were unreasonable and such implied finding by the

jury left no course open to them but to award him a just compensation.

[4-6] It cannot be said that \$300 was an unreasonable sum. Neither was there error in allowing respondent to recover \$750 against the four agents of the Turf Club as punitive damages. Such an award is authorized "in addition to the actual damages" where "the defendant has been guilty of oppression, fraud, or malice, express or implied." Civ.Code, sec. 3294. The proof of their having previously learned from respondent his personal history and his wayward career, their manner of approach and pulling him out of the automobile and forcing him to visit their office to be detained, searched and admonished not to return—such proof was sufficient support for the jury's implied finding of oppression and that no act of respondent justified such treatment. The trial court is the constitutional arbiter of such issues and its determination will not be upset in the absence of a clear showing that its consideration of the issues was arbitrary, indifferent or fraudulent. In fixing the amount of punitive damages juries have an even wider discretion than they have with respect to compensatory damages. *Scott v. Times-Mirror Company*, 181 Cal. 345, 367, 184 P. 672, 12 A.L.R. 1007.

[7,8] While no specific attack is made on the award of \$750 as against the operatives, appellants have assigned as prejudicial error that part of the judgment granting respondent \$2000 against the Turf Club as vindictive damages and contend that it cannot be liable for such damages since there is no proof of its authorization or ratification of the wrongful arrest. In this they are correct in view of the prevailing rule in this state. *McInerney v. United Railroads*, 50 Cal.App. 538, 549, 195 P. 958; 19 C.J.S., Corporations, § 1286, p. 964. There is no evidence that the arrest was made by or with the consent or knowledge of the board of directors or of the governing officers or vice-principals of the corporation; nor is there proof of a subsequent ratification by such board or officials of the action of the agents. The language of Mr. Justice Richards in the *Mc-*



Inerney case, *supra*, is the final word upon the subject. Since it has not been modified by statute or decision in the 30 years that have elapsed since its publication, that part of the judgment for respondent's recovery of \$2000 from the corporate defendant will be reversed.

It is therefore ordered that the judgment be modified by striking therefrom the following words and figures, to wit, "together with the sum of \$2,000.00 from the said defendant, Los Angeles Turf Club, Inc., a corporation," and that as thus modified the judgment is affirmed.

McCOMB and WILSON, JJ., concur.



97 Cal.App.2d 741

**BOWLINE v. GRIES.**

Civ. 4053.

District Court of Appeal, Fourth District,  
California.

May 25, 1950.

Action by Arnold Bowline against A. J. Gries to recover sum alleged to be unpaid balance due for drilling of a water well for the defendant. The Superior Court, Kern County, R. B. Lambert, J., entered judgment for the plaintiff and the defendant appealed. The District Court of Appeal, Sheppard, J. pro tem., held that plaintiff could not recover since he did not plead and prove that he was a licensed contractor either at the time the contract was made or when it was performed.

Judgment reversed.

**1. Licenses** ⇨11(5)

Purpose of contractor's license law is to protect general public respecting structural improvements to realty wherein special skill, training and ability are required. Business and Professions Code, § 7026, 7031, 7049.

**2. Evidence** ⇨20(1)

It is well known that prior to enactment of contractor's license law thousands of people had been bilked by persons claiming special engineering skill in building various kinds of permanent improvements, including water wells. Business and Professions Code, §§ 7026, 7031, 7049.

**3. Licenses** ⇨11(5)

Words "any structure, project, development or improvement" within contractor's license law include all sorts of structures which become a part of the realty. Business and Professions Code, § 7026.

**4. Licenses** ⇨11(5)

Words "structure, project, development or improvement" within contractor's license law include the drilling of a water well. Business and Professions Code, § 7026.

**5. Administrative law and procedure** ⇨330  
**Statutes** ⇨219

Where doubt exists as to the meaning of a statute, construction placed thereon by administrative body charged with enforcement of act is entitled to respect.

**6. Licenses** ⇨11(5)

Word "contractor" within contractor's license law includes a person whose principal contracting business is the drilling of water wells. Business and Professions Code, §§ 7001, 7002; § 7056, as added by St.1939, c. 37.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Contractor".

**7. Licenses** ⇨19(3)

Under provision of contractor's license law that its requirements do not apply to any construction or operation incidental to construction and repair of irrigation and drainage ditches of regularly constituted irrigation districts, reclamation districts, or to farming, dairy, agriculture, horticulture or stock or poultry raising, exemption of "farming" does not exempt "well drilling". Business and Professions Code, §§ 7026, 7031, 7049.

**8. Licenses** ⇨39.44

Where well driller did not plead and prove that he was a licensed contractor ei-

ther at time contract was made to drill water well for defendant or when it was performed, he could not recover for balance due for drilling of well. Business and Professions Code, §§ 7026, 7031, 7049.

Werdel & DiGiorgio, Bakersfield, for appellant.

Burum, Young & Wooldridge, Joseph Wooldridge, Bakersfield, for respondent.

SHEPARD, Justice pro tem.

Action for balance unpaid on contract to drill water well.

Plaintiff sued to recover \$900 alleged unpaid balance for the drilling of a water well. Judgment was for plaintiff. Defendant appeals.

13 January, 1947, plaintiff agreed by written contract to drill a water well on defendant's land. The contract recites that the plaintiff "contractor is skilled in the practice and possesses the appliances for doing such work", and "all tools, machinery, labor and fuel required for said work is to be furnished by contractor". The well was drilled to a depth of 900 feet. The price was \$6 per foot, totaling \$5400. \$4500 has been paid. Plaintiff did not have a contractor's license at the time the well was drilled.

There are only two questions presented on this appeal. One, was plaintiff a "contractor" under section 7026 of the Business and Professions Code at the time of the performance of the contract to drill the well? Two, was he exempted by reason of the provisions of section 7049 of said code from its requirements that he have a license?

The sections of the code specially applicable to the questions at issue are as follows:

"Section 7026. 'Contractor': Defined. The term contractor for the purposes of this chapter is synonymous with the term 'builder' and, within the meaning of this chapter, a contractor is any person (exceptions not contended to be applicable to case at bar) who \* \* \* undertakes to or offers to undertake to or purports to

have the capacity to undertake to or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith."

"Section 7049. Ditch work and agricultural or fire prevention work. This chapter does not apply to any construction or operation incidental to the construction and repair of irrigation and drainage ditches of regularly constituted irrigation districts, reclamation districts, or to farming, dairying, agriculture, viticulture, horticulture, or stock or poultry raising, or clearing or other work upon land in rural districts for fire prevention purposes, except when performed by a licensee under this chapter."

"Section 7031. Allegation and proof of license in action on contract. No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

[1,2] The underlying purpose of the contractor's license law is to protect the general public respecting structural improvements to real property wherein special skill, training and ability are required. It is well known that prior to the enactment of the law thousands of people had been bilked by persons claiming special engineering skill in building various kinds of permanent improvements, including water wells. Anyone with even a casual experience in drilling of water wells is aware that special engineering skill and knowledge is necessary therefor, especially in the depths common to the arid regions of California. Roscoe Moss Co. v. Jenkins, 55 Cal.App.2d 369, 130 P.2d 477.

[3] The use of the word "builder" at the commencement of section 7026, supra,

at first glance, appears slightly confusing when discussing the well drillers. However, the whole section, read together, makes the meaning quite clear that any "structure, project, development or improvement" includes all sorts of structures which become a part of the realty.

[4] In our view, the drilling of a water well fairly and reasonably comes within the generally understood meaning of the words above quoted. These words are words of general significance and from a reading of the entire act we are convinced were added by the legislature to be sure that the subject is thoroughly covered and to prevent evasion by some individual who might claim that the more specific words preceding the hereinabove quoted words were not sufficiently broad. In our opinion any one of these words would have been sufficient to cover well drilling. In *Western Well Works, Inc., v. California Farms Co.*, 60 Cal.App. 749, 214 P. 491, 493, the court held that within the meaning of the mechanics' lien law "a well is a structure". In *Kana-wha Oil & Gas Co. v. Wenner*, 71 W.Va. 477, 76 S.E. 893, 43 L.R.A.,N.S., 559, the court held that an oil well, within the purview of the mechanics' lien laws is "a structure". In *Ylijarvi v. Brockphaler*, 213 Minn. 385, 7 N.W.2d 314, 318, the court said: "the rules applicable to building and construction contracts apply to those for drilling or boring wells." In *Helm v. Chapman*, 66 Cal. 291, 292, 5 P. 352, a pit dug in a mining claim was held to be "a structure" within the meaning of section 1185 of the Code of Civil Procedure, using the words "building, improvement, or structure". In *Silvester v. Coe Quartz Mine Co.*, 80 Cal. 510, 22 P. 217, a mine is a "structure" within the meaning of the statute on mechanics' liens.

From an examination of the act, it appears that this phase of our law is enacted with the same general purpose of democratic self-government that has become so firmly entrenched in other parts of our lives and is evidenced in the laws governing the practice of law, medicine, dentistry, cosmetology, nursing, barbering, architecture,

accountancy, veterinary medicine, pharmacy, optometry and funeral directors and embalmers.

With this thought of self-government in mind, a reference to sections 7001 and 7002 of the Business and Professions Code makes the use of the term "contractor" significant, as found therein. It seems reasonable that the term "contractor", as it is used in said sections 7001 and 7002, is the same "contractor" as is required under the act to be licensed, in other words, that all members of the "Contractors' State License Board" shall be "contractors" licensed under the act and actively engaged in the contracting business. Additionally, we find that one member of the Board is required to be a "general engineering contractor", and in section 7056 we find that a general engineering contractor is defined to be one whose "principal contracting business is in connection with fixed works for any or all of the following divisions or subjects: *Irrigation*, drainage, water power, *water supply* \* \* \*." Laws 1939, c. 37. (Italics ours.) We think it cannot be questioned that water wells, with their metal casings, as universally used in California are "fixed works for \* \* \* irrigation \* \* \* water supply \* \* \*". § 7002. Therefore, it appears that the legislature recognized that a person whose principal contracting business is the drilling of water wells (i. e. fixed works for irrigation or water supply) would be a licensed contractor.

In addition to the foregoing on the subject of whether or not a well driller is a contractor, we find that section 7059 specifically authorizes the classification "contractors" in a manner consistent with established uses and procedure in the construction business, this to be done by the registrar with the approval of the board. We also find that in accordance with this authority the registrar has in section 732 of its rules and regulations classified "well drilling", and has defined a well drilling contractor, and for many years last past has required of well drilling contractors a license in accordance with the requirements of the sections first in this opinion quoted.



[5] One of the commonly recognized rules in aid of construction is that where doubt exists as to the meaning of a statute, the construction placed thereon by the administrative body charged with the enforcement of the act is entitled to respect. *City of Pasadena v. Railroad Commission*, 192 Cal. 61, 218 P. 412; *Bodinson Mfg. Co. v. California Employment Commission*, 17 Cal.2d 321, 109 P.2d 935; *Hoyt v. Board of Civil Service Com'rs*, 21 Cal.2d 399, 132 P.2d 804.

[6] In this connection, while it is entitled to little weight, it is interesting to note that at one time the plaintiff herein did have a license under the contractors' license law for the purpose of well drilling, but about a year or two before entering into this contract he "forgot to send the check in on the right date. I just never renewed it." It is apparent, therefore, that he was fully aware of the provisions of the contractors' license law and had previously considered himself bound thereby.

The second question is whether or not section 7049 furnishes plaintiff with an exemption from the necessity for a license.

A close examination of section 7049 shows that it has been divided into two distinct and separate clauses, one of which says that "This chapter does not apply to any construction or operation *incidental to* the construction and repair of irrigation and drainage ditches of regularly constituted irrigation districts, reclamation districts," and the last clause of which says "*or to* farming, dairying, agriculture" etc. It is immediately apparent from looking at this that the words "*or to*", italicized by us above, apparently segregate the last clause from the first clause and carry the subject of the last clause back to the words "This chapter does not apply \* \* \*." In carrying this analysis farther, we think it is clear that irrigation and water supply are ordinarily *incidental* to farming. It would appear, therefore, that unless the wording is construed to detach "incidental" from farming and apply it only to certain work of irrigation and reclamation districts, there would be a clear hiatus in the legislative reasoning.

With respect to the underlying purposes of the act, also, we think that it is reasonable to suppose that the special engineering skill and knowledge required in well drilling would prevent any ordinary lay person from being able to judge whether or not another person might be able to accomplish properly the task of drilling, fitting casings, developing, bailing, cleaning, etc. On the other hand, in the matter of ordinary current farming operations, it is reasonable to suppose that the farmer is competent to observe a man's work and know its value and to protect his own interests and that the legislature had these thoughts in mind in language which literally exempts "farming" but does not exempt well drilling, i. e., matters "incidental" to farming.

[7] We are satisfied that well drilling is of itself a well recognized profession requiring great skill and engineering ability and that it is definitely not farming.

"If it be conceded that sufficient water could in the future be obtained on the land in question, by artesian well-boring, which, if used in irrigating the same, would render any considerable part of it fit for agricultural purposes, and this the evidence utterly fails to show, the question would then remain as to whether the development of water in this way could be considered an ordinary farming process. We have no hesitation in answering this question in the negative. An attempt to so develop water has nothing whatever to do, like the clearing land of timber, or even surface water, with the preparation of the soil for agricultural purposes. It is in no proper sense of the word 'farming.' It is more in the nature of a speculative and very costly effort to discover an element which, when discovered, and, by artificial methods, combined with the soil, will render it amenable to ordinary farming processes. The question as to whether water in sufficient quantities will be found several hundred feet below the surface of any particular land, and, if found, whether the supply will continue, must always be more or less uncertain of determination, and especially uncertain in land of the character of, and situated as, the land in controversy. However liberally the

words 'ordinary farming processes' may be construed, we are satisfied that they cannot be held to include such a method for the development of water." *Robinson v. Eberhart*, 148 Cal. 495, 499-500, 83 P. 452, 454.

[8] It is apparently conceded that if the plaintiff is a contractor and if he is not exempted from the necessity of having a license, then he cannot recover in this action since he did not plead and prove that he was a licensed contractor either at the time the contract was made or when it was performed. *Loving & Evans v. Blick*, 33 Cal. 2d 603, 204 P.2d 23. From the foregoing it is clear that plaintiff's action cannot be maintained.

The judgment is reversed.

GRIFFIN, Acting P. J., and MUSSELL, J., concur.



97 Cal.App.2d 726

**PEOPLE ex rel. PAGANINI v. TOWN OF CORTE MADERA et al.**

No. 14232.

District Court of Appeal, First District,  
Division 2, California.

May 25, 1950.

The People of the State of California, on relation of Charles E. Paganini, filed a complaint in quo warranto against Town of Corte Madera (a municipal corporation), Cyrus W. Makemson and others, for annulment of proceedings for annexation of uninhabited territory to the town. The Superior Court of the State of California, in and for the County of Marin, Charles E. Paulsen, J., rendered a judgment nullifying the annexation proceedings and defendants appealed. The District Court of Appeal, Goodell, J., held that the Annexation of Uninhabited Territory Act of 1939 did not authorize town to annex in one proceeding three parcels of land which were not con-

tiguous to each other, notwithstanding they were contiguous to the town.

Judgment affirmed.

#### 1. Quo warranto ☞49

A complaint in quo warranto may be drawn either by charging in general terms that an office or franchise is being usurped, or by alleging specific grounds or defects relied upon to show usurpation.

#### 2. Appeal and error ☞768

Where complaint in quo warranto proceedings for annulment of proceedings by town for annexation of uninhabited land, some of which belonged to plaintiff, set forth steps taken by town council and alleged non-contiguity of parcels as respected each other, and in briefing case on appeal by city, plaintiff's principal point of attack, and in support of judgment nullifying annexation proceedings, was that parcels were separated, District Court of Appeal in determining whether demurrer to complaint was properly overruled would treat case as one where specific objections were raised by complaint, and not as one where complaint charged in general terms that town officials unlawfully usurped and exercised franchise of municipal government in matters affecting plaintiff's land. *Gen.Laws, Act 5162, § 1 et seq.*

#### 3. Municipal corporations ☞33(1)

The Annexation of Uninhabited Territory Act of 1939 used the word "territory" as meaning only a unified, solid area, lying contiguous to a boundary of municipality seeking to annex uninhabited territory, and Act did not authorize town in same proceedings to annex several parcels of land which were not contiguous to each other, notwithstanding they were contiguous to the town. *Gen.Laws, Act 5162, §§ 2, 6, 7; St.1913, pp. 587, 588, 590, 592, §§ 1 et seq., 2-5, 6.*

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Territory".

#### 4. Statutes ☞223.2

In attempting to reach true meaning of legislation courts may compare with other legislation which is in *pari materia*.

5. Statutes  $\Leftrightarrow$  223.2

Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.

6. Quo warranto  $\Leftrightarrow$  24

Where town in same proceedings purported to annex three parcels of uninhabited land which were contiguous to town but which were not contiguous to each other, so that annexation was not within power of town under annexation of Uninhabited Territory Act of 1939, owner of one parcel could attack proceedings by quo warranto regardless of whether owner protested before town council effectively, ineffectively, or not at all, and irrespective of conclusiveness of finding of town council that protest was insufficient. Gen.Laws, Act 5162, § 1 et seq.

John B. Ehlen, San Francisco, for appellants.

Fred N. Howser, Attorney General, Clarence A. Linn, Deputy Attorney General, Freitas, Keating & Freitas, San Rafael, for relator.

GOODELL, Justice.

This is an appeal from a judgment in quo warranto, annulling proceedings for the annexation of certain territory.

On June 3, 1946, pursuant to the "Annexation of Uninhabited Territory Act of 1939", Stats.1939, p. 1567, 2 Deering's General Laws 1944, Act 5162, the council of the Town of Corte Madera by resolution initiated proceedings to annex three separate parcels of uninhabited territory, each of which was contiguous to the town as then bounded, but no one of which was contiguous to either of the others. One of these parcels, containing 15 acres, is owned entirely by Carton Label Lithograph Company, of which the relator is president. August 5, 1946 was fixed as the time when the owners of the property proposed to be annexed could appear and protest. At that

time a written protest was presented by the relator on behalf of his company.

No protests were filed as to the other two parcels, and the council at once adopted ordinance 142 approving their annexation. The council deferred action respecting the company's property (at its request) and continued the matter from time to time until April 7, 1947, when they adopted ordinance 147 approving its annexation, which action precipitated this litigation.

The complaint alleges the foregoing facts, and further, that the 15-acre parcel differs from the other two in certain respects. By reference it incorporates a copy of ordinance 147, and it alleges, also, that a copy thereof had been filed with the Secretary of State. It concludes with the allegation that the purported annexation of the company's property "was null and void, but that the defendants have nevertheless unlawfully usurped and exercised the franchise of municipal government" in matters affecting it. The prayer is for a nullification of the proceedings.

Appellants filed a general demurrer which was overruled, with 15 days allowed for answer. Notice of overruling was given but appellants stood on their demurrer and declined to answer. The judgment which followed recited the default and nullified the proceedings.

This court had occasion in *People ex rel. Stephenson v. Hayden*, 9 Cal.App.2d 312, 49 P.2d 314, 315, to consider the question of pleading in quo warranto cases. We held there that a complaint which pleaded in general terms that defendant was "usurping, intruding into, and unlawfully holding and exercising the office of Supervisor \* \* \*" was sufficient.

[1] "It was a peculiarity of both the common-law writ of quo warranto and information in the nature of quo warranto that the ordinary rules of pleading were reversed and the state was bound to show nothing". 22 Cal.Jur. p. 220. It seems to be settled law in this state that a complaint in quo warranto may be drawn in either of two ways, i. e., by charging in general terms that an office or franchise is being usurped, "or by alleging specific grounds or defects



relied upon to show usurpation", 22 Cal. Jur. 220-1.

[2] It appears that respondents elected to proceed on the latter theory, for in their complaint they set forth the steps taken by the council and then allege the non-contiguity of the three parcels. In briefing the case their principal point of attack on the proceedings and in support of the judgment nullifying them, is that the three parcels are separated. Accordingly we shall deal with the case as one where specific objections were raised by the complaint. See *People ex rel. Skelton v. City of Los Angeles*, 133 Cal. 338, 340-341, 65 P. 749.

Appellants attack the complaint because of the weakness of the allegation that a written protest was filed, without further allegations to show that it measured up to the requirements of the act.

Section 6 of the act provides that "At any time not later than the hour set for hearing objections to the proposed annexation, any owner of property within the territory proposed to be annexed may file written protest against the proposed annexation. Such protest shall state the name or names of the owner or owners of the property affected thereby and the description and area of such property in general terms. At the time set for hearing protests the legislative body of such municipal corporation shall proceed to hear and pass upon all protests so made and if it be found that protest is made by the owner or owners of one-half of the value of the territory proposed to be annexed according to the last equalized assessment roll, no further proceedings shall be taken in connection with the proposed annexation."

Section 7 reads: "If it be found that protest is not made by the owner or owners last above mentioned, the legislative body of such municipal corporation must by ordinance approve or disapprove such annexation."

Appellants cite *American Distilling Co. v. City Council of City of Sausalito*, 34 Cal. 2d 660, 665, 213 P.2d 704, 707, a case arising out of the same act of 1939, where the court says: "If the protests were insufficient the city council was then authorized and re-

quired by section 7 to enact an ordinance either approving or disapproving the annexation."

[3] Appellants argue that the bare allegation of the filing of a written protest is meaningless in view, (1st) of the specifications of § 6 respecting the qualifications of the protestants, and, (2nd) of the finding by the council that the protest was insufficient. Attached as an exhibit to the complaint and made a part of it by apt words of reference, is a copy of ordinance 147 which approved the annexation of the relator's property. That ordinance contains the finding that the protest was insufficient. Therefrom it is argued that the face of the complaint shows the infirmity of the relator's position. Section 6 of the act points the way to a blocking of annexation by mere protests or remonstrances provided they are voiced by landowners who can qualify as to valuation of holdings, under the requirements of that section. It does not follow, however, that such machinery is exclusive or that it is a prerequisite to an attack on the proceedings by quo warranto, which is the appropriate remedy for an attack on the proceedings as a whole after annexation. 22 Cal. Jur. pp. 210-11; *American Distilling Co. case*, supra, 34 Cal.2d at page 666, 213 P.2d 704. If the intent of the act is that "territory" can be annexed only if and when it is in one piece, and an attempt is made to annex several non-contiguous pieces, that ground must be available in a quo warranto proceeding. It is the respondents' chief ground herein, and we think it is well taken.

Section 2 of the act provides that "Any such territory so proposed to be annexed to a municipal corporation must be contiguous thereto." That is all. Appellants argue that this means simply that the territory (whether in one or more pieces) must touch or abut onto the existent municipality, and that each of these three separate parcels does so. Appellants argue, further, that courts cannot write into a statute language which the legislature did not see fit to write therein and that, if we construed § 2 as prohibiting the annexation of separated parcels we would be doing just that.

[4] In attempting to reach the true meaning of a given piece of legislation courts are permitted to compare it with other legislation dealing with the same subject, or which, in other words, is *in pari materia*.

[5] "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed". 23 Cal.Jur. 778. This brings us naturally to a comparison of this act with other annexation statutes.

The act of 1913, Stats.1913, p. 587, provides for annexation of inhabited territory upon petition of electors in territory proposed to be annexed, which territory may be either: (a) one body, secs. 2 to 4, or (b) two or more bodies, which must be submitted as separate propositions. Sec. 6. People v. City of Lemoore, 37 Cal.App. 79, 80, 174 P. 93.

Section 2 of the 1913 act uses the word "territory", just as does § 2 of the 1939 act. Section 6, however, of the 1913 act provides that "Nothing in this act contained shall be construed to prevent the submission to the electors of any municipal corporation as separate propositions to be voted upon separately at one and the same election therein, of the questions of the annexation to any such municipal corporation of *two or more bodies of outside territory, each of which is contiguous to such municipal corporation, but no one of which is contiguous to any of the others.* \* \* \*" (Emphasis added.)

When, in 1939, the legislature came to draft the act now involved, it had before it a model which had been in effect for 25 years. The fact that the 1913 act deals with inhabited land and elections, while the 1939 act deals with uninhabited land and no elections, would not, in itself, be a point of differentiation. The language of the 1913 act, which made it perfectly clear that *non-contiguous bodies were nevertheless annexable*, was "ready-made", and in 1939 all the legislature had to do was to appropriate from the 1913 law so much of its language as fitted the 1939 act. This was not done,

and we think it was indeed "significant", 23 Cal.Jur. 778, of an intent to exclude from the 1939 act the annexation of areas non-contiguous to one another. The omission of that or similar language points to a construction that when the legislature in 1939 used the word "territory" it meant only a unified, solid area, lying contiguous to one of the boundaries of the municipality.

Incidentally, it might be remarked that the language of § 6 of the 1913 act permitting the annexation of separated bodies of land is not to be found in any other piece of annexation legislation.

There is another reason why, in our opinion, separated parcels were not contemplated. Section 5 of the 1939 act provides for the publication of a copy of the resolution giving notice of the intention to annex, in a newspaper published in the town, "and if there be no such newspaper \* \* \* a copy of the resolution shall be posted not less than ten days before the hearing in at least three conspicuous places within the territory proposed to be annexed."

If, as in this case, three separated bodies of outside "territory" are proposed for annexation, and as a jurisdictional prerequisite there must be notices posted in at least three conspicuous places, where do they go? Should one be posted on each of the three separated bodies of land? Should all three be posted on one of them, and if so, on which one? In other words, does not the language "within the territory" naturally mean within one undivided area? These questions are not satisfactorily answered by appellants.

The same considerations apply with equal force to § 3 of the act, under which the annexation proceedings may be initiated by written petition "containing a description of the uninhabited territory sought to be included in such municipal corporation, signed by the owners of not less than one-fourth of the area of the land in such territory \* \* \*." If parcels non-contiguous to one another may be included in the "uninhabited territory" sought to be annexed, may the owners of parcel A file a petition asking that parcel A, together with parcels B and C not contiguous to parcel

A be annexed in one proceeding? The act cannot reasonably be construed to give it such a meaning.

Appellants cite the recent City of Burlingame case [*City of Burlingame v. San Mateo County*], 90 Cal.App.2d 705, 203 P.2d 807, but that case is not in point because it concerned a strip of land 100 feet wide in the form, roughly, of a horseshoe or loop. It appears, 90 Cal.App.2d at page 709, 203 P.2d at page 810, that "Both the beginning and the end of the strip joined into the municipal corporation of Burlingame. Every other portion of the strip is immediately accessible to and from Burlingame's boundary without the necessity of crossing any unincorporated territory or any territory incorporated into another municipal corporation." Thus there was no question, as there is here, of separated parcels.

[6] The main question in this case is whether the act of 1939 contemplates the annexation of separated parcels in one proceeding. Clearly the municipality could annex three separated parcels by three separate proceedings, but if that were done the jurisdictional steps (publication or posting and opportunity to protest) would be different in each instance and would be addressed to different "territory". The point which appellants stress so strongly, that the complaint did not show the form or content of relator's protest and the fact that the council found such protest to be insufficient does not reach, and therefore does not influence, the main point that the three parcels are non-contiguous. Admittedly they do not touch one another. The demurrer admits that, the default does likewise, and the decree contains the finding that all the allegations of the complaint are true—including, of course, the allegation of non-contiguity. The provisions of §§ 6 and 7 of the 1939 act respecting written protests is only *one* method of attacking the proceedings. It is the one effective way of killing the proposed annexation at the very threshold, within the statutory framework of the proceedings *before the council*. But if the attempted annexation goes beyond the statute in such a basic and fundamental respect as

non-contiguity, certainly a landowner is not foreclosed from attacking the proceeding by quo warranto whether he protested before the council effectively, ineffectively, or not at all, and irrespective of the conclusiveness of the council's finding of an insufficient protest.

For the reasons already given we are satisfied that the demurrer was properly overruled.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



97 Cal.App.2d 814

**SCHLAGETER ESTATE CO. v.**

**KOONTZ et al.**

Civ. 7751.

District Court of Appeal, Third District,  
California.

May 29, 1950.

Action by Schlageter Estate Company, a corporation, against Walter A. Koontz, also known as W. A. Koontz, and J. W. Meeks, also known as "Red" Meeks, and others, to restrain defendants from removing improvements from the leased premises and from damaging crop growing upon the property wherein defendants filed a cross-complaint. The Superior Court of Madera County, Stanley Murray, J., rendered judgment for plaintiffs, and the named defendants appealed. The District Court of Appeal, Van Dyke, J., held that proposal letter by plaintiff and acceptance thereof prior to expiration of former lease constituted new written lease, not merely a continuance of old lease and that under terms of new lease defendants were entitled to remove only a portable house and not other improvements placed by defendants upon the leased premises.

Affirmed.

**I. Appeal and error ☞1009(2)**

In action to permanently restrain lessees from removing improvements and dam-



aging crop, judgment for owner was affirmed although evidence supported merely finding that lessees threatened to remove improvements from leased land, but not finding that they threatened to damage the crop.

## 2. Landlord and tenant ⇨22(2)

Proposal letter by owner and acceptance thereof by lessees prior to expiration of old lease, prescribing a different term, reserving an increased rent, including additional land and containing all necessary elements of a lease constituted a new written lease but was not merely a continuance of old lease although formal lease contemplated was to contain same general terms and conditions as old lease and formal lease was never executed.

## 3. Landlord and tenant ⇨24(1)

To create a valid lease there must be merely a definite agreement as to the extent and boundary of the property leased, a definite and agreed term, a definite and agreed price of rental, and the time and manner of payment.

## 4. Contracts ⇨32

Where parties have agreed upon all essential facts, there is a binding contract, notwithstanding the fact that a more formal contract is to be prepared and signed later.

## 5. Landlord and tenant ⇨157(4)

A provision in lease authorizing lessees to remove improvements placed by them on property was a "special term and condition" and not a "general term and condition" within lease incorporating by reference "general term and conditions" of former lease.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "General Term and Condition" and "Special Term and Condition".

## 6. Landlord and tenant ⇨47

The phrase "general terms and conditions" within lease incorporating by reference general terms and conditions of prior lease referred to covenants of quiet enjoyment, covenant for peaceful surrender, covenant against waste and the like.

## 7. Landlord and tenant ⇨157(4)

Under new lease covering 560 acres previously leased and additional 60 acres, and providing that lessees should spend certain amount leveling the additional 60 acres, installing various improvements and that "all improvements" with the exception of a portable house should become the property of lessor, although new lease incorporated by reference general terms and conditions of former lease and former lease authorized lessees to remove all improvements placed by them on land, lessees were entitled to remove only the portable house.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "All Improvements".

Everett L. Coffee and Roy E. Wolfe, Madera, for appellants.

Green, Chandler & Green, Madera, for respondent.

VAN DYKE, Justice.

Appellants Walter A. Koontz and J. W. Meeks appeal from a judgment rendered by the Superior Court in Madera County, which judgment determined that the respondent Schlageter Estate Company, a corporation, was the owner of certain personal property consisting of pumps, well casing and pipes which had been placed upon the property of respondent by appellant Koontz during the term of a lease.

Under date of January 5, 1946 the respondent leased to the appellant Koontz approximately 560 acres of land in Madera county for a term of one year ending January 5, 1947, at a rental of \$5,500.00. That lease contained a provision that Koontz might remove such improvements as he might have cause to place upon the property. Koontz went into possession under this lease and while he was still in possession, and prior to the expiration of the term, respondent sent him a letter dated October 29, 1946. This letter proposed a further lease. It stated that the respondent corporation was willing to rent to him for a two year period the 560 acres which he then had under lease and approximately

60 acres in addition thereto. The proposed rental for the whole acreage was \$7,000.00 per year and the proposal contained the following matter: "It is agreed that you are to spend approximately Five Thousand Dollars (\$5,000.00) on leveling the additional Sixty (60) acres, installing ditches, pumps and various other improvements, and all improvements, including pumps, are to become the property of the Schlageter Estate Company on the termination of lease, with the exception of a portable house, which you contemplate placing on the premises." The letter contained this additional proposal: "The formal lease is to contain the same general terms and conditions as former leases \* \* \*." The letter closes as follows: "Please indicate your acceptance on the enclosed copy of this letter and return to us." This letter was received by appellant Koontz, and thereafter he wrote upon the enclosed copy the following: "Accepted This 18 day of November, 1946, W. A. Koontz." He then returned the copy to the respondent.

Notwithstanding the reference in the letter to a formal lease the parties never executed such a document. Appellant Koontz continued to possess the property he had been in possession of under the first lease and also entered into possession of the additional acreage referred to in the letter. Apparently appellant Meeks had some interest under Koontz but his rights are dependent upon the rights of Koontz.

Koontz expended substantially more than \$5,000.00 upon the whole property. He did leveling work upon the additional acreage, and drilled wells upon the land embraced in the first lease. He cased the wells and laid pipe from the pumps. Shortly before the expiration of the two years referred to in the letter he wrote to respondent, saying: "In regard to the improvements we placed upon the Estate Company's land beyond what the lease called for we are going to remove."

Thereupon the respondent began this action in the Superior Court asking that Koontz and Meeks be restrained permanently from removing any pumps, pipe lines or any other improvements from the prem-

ises. Additional relief was asked in the way of restraint from damaging or selling the improvements, and from plowing up or otherwise damaging the alfalfa growing upon the property.

Respondent alleged that the proposal letter and the acceptance thereof constituted a written lease, and that Koontz had possessed the property under its terms. Answering and cross-complaining appellants challenged this construction of the writings and alleged that the proposal letter and the acceptance plus the first lease constituted "a lease of the premises therein described." They alleged that Koontz had placed upon the premises described in the first lease certain improvements consisting of pumps, pipe and casing. They sought judgment permitting removal of the pumps, pipe and casing, contending that the second lease contained by reference to the first lease that covenant therein providing for such removal. Koontz asked general damages for respondent's wrongful withholding of the improvements.

After the trial the trial court found that the letter and acceptance constituted "the written lease of the premises", and that Koontz had occupied the property from January 15, 1947 under the terms of the lease contained in the letter and the acceptance. The court found that Koontz had placed upon the leased property certain pumps, well casing and pipe. The court further found that threats had been made to remove the property and to sell the same; and that Koontz had further threatened to commit waste by plowing up the alfalfa. The court specifically found that the covenants in the first lease permitting removal of improvements constituted no part of the second lease evidenced by the letter and the acceptance. Responsive to these findings of fact the court by its judgment decreed respondent to be the owner of the improvements and permanently restrained appellants from removing them. The court further restrained appellants from attempting to damage or sell or encumber these improvements and from committing waste with respect to the alfalfa or other growing crops.

[1] Although complaint is made justifiably that there was no evidence in support of the findings that appellants in any way were threatening to damage or had damaged the crops, yet that part of the judgment does no harm if the other findings mentioned are correct, and since we have concluded that they are, no further attention will be paid to the claim that the court should not have restrained waste. Appellants state the issue presented by their appeal puts in question the title to the improvements made by Koontz on the property described "in the first lease, the 560 acres." They base their claim of title on two grounds; contending the first lease and the letter and acceptance constitute a single lease for the second term, they argue that the provision in the first lease permitted removal of improvements placed on the 560 acres during that second term; next they claim title to these same improvements by the construction they place upon that sentence in the letter reading, "It is agreed that you are to spend approximately Five Thousand Dollars (\$5000.00) on leveling the additional Sixty (60) acres, installing ditches, pumps, and various other improvements, and all improvements, including pumps, are to become the property of the Schlageter Estate Company on termination of lease, with the exception of a portable house, which you contemplate placing on the premises."

[2] These contentions we think cannot be sustained. The letter and acceptance cannot be considered as a continuance or renewal of the first lease for the following reasons: A different term was prescribed, a different and increased rent was reserved, additional land was included and all the necessary elements of a lease are contained in the letter and acceptance. This proposition finds support in the following cases: *Levin v. Saroff*, 54 Cal.App. 285, 289, 201 P. 961, 963; *Gavina v. Smith*, 25 Cal.2d 501, 154 P.2d 681.

[3, 4] In the *Levin* case the court said: "To create a valid lease, but few points of mutual agreement are necessary: First, there must be a definite agreement as to the extent and boundary of the property leased;

second, a definite and agreed term; and, third, a definite and agreed price of rental, and the time and manner of payment. These appear to be the only essentials. \* \* \* where the parties have agreed upon all essential facts there is a binding contract, notwithstanding the fact that a more formal contract is to be prepared and signed later. \* \* \* The mere fact that a written lease was in contemplation does not relieve either of the contracting parties from the responsibility of a contract which was already expressed in writing."

[5, 6] True, reference is made to the first lease and parts thereof so referred to are incorporated by such reference. Thus reference is made to "the five hundred sixty acres you now have under lease." So we look to the first lease for the particular description therein contained. Reference is also made to the "general terms and conditions" of the former lease. And appellant contends that this reference incorporates into the new lease that sentence in the first lease reading: "The party of the second part may remove such improvements as he may have cause to place on the property." This contention cannot be sustained. The provision for removal of improvements found in the first lease did not constitute a general term or condition thereof, and the provision of the second lease that a formal lease, to be executed, would contain the same *general* terms and conditions as former leases did not refer to the removal of improvements. That provision of the first lease was a special and not a general term and condition. The word "general" means "pertaining to \* \* \* all of the members of a class, kind or order \* \* \* as a general law" and its antonyms are "particular, specific, precise, \* \* \* special." Webster's New International Dictionary. General terms and conditions of leases therefore are those generally contained in all leases, that is, such things as covenants of quiet enjoyment, covenants for peaceful surrender, covenants against waste, and the like. As stated in *Bondy v. Harvey*, 2 Cir., 62 F.2d 521, 523: "The phrase 'all the usual and formal clauses' we think was intended to state generally such clauses as the forfeiture, peaceful possession, warranty,



surrender, re-entry, and other clauses which are familiar in leases." The provision for removal of improvements of whatsoever kind and character and howsoever annexed or affixed to the premises is certainly not a general term or condition of leases nor was it a general term or condition of the first lease between the parties hereto. On the contrary it was special. The first lease was for one year. It required no improving of the property whatsoever. The shortness of its term and the absence of any requirement for improvement rendered it quite reasonable that anything placed upon the property by the tenant appropriate to the intended use of the property could be taken away by him. On the contrary the second lease was for a longer term and did provide specially, as a part of the compensation for the use of the property, that improvements to the sizeable extent of \$5000.00 must be placed thereon. And it further specifically provided, by all fair intentment, that when so placed the improvements could not be removed. We hold that whatever the parties intended by the stipulation that a formal lease, to be executed, would contain the same general terms and conditions of the earlier lease, they did not intend thereby to affect in any way the precise stipulation in the later lease concerning improvements.

We are thus brought to the interpretation of the provisions about the improvements contained in the second lease and to the claim of appellants that regardless of the effect or lack of effect of the provisions of the first lease, the second lease by its own terms permitted the removal of improvements placed upon the 560 acres contained in the first lease, and that the provisions against removal were limited to such improvements as might be placed upon the sixty acres.

Appellants contend that the hereinbefore quoted sentence refers solely to improvements that might be placed upon the 60 acres including the funds expended in leveling the same. The sentence does not so expressly declare and we think it cannot be so construed or interpreted. The purpose of the sentence was to express the covenant that in addition to the cash rental reserved,

the tenant was to expend upon the property an additional \$5,000.00, to consist specifically of leveling the additional 60 acres, and generally of installing upon the leased property ditches, pumps and various other improvements which, when so installed, would become the property of the lessor. Such was the construction given by the trial court of a sentence that admittedly is not as clear as it might have been, and we think this construction was reasonably logical and correct. If we turn to the grammatical construction of the sentence we find further support for the interpretation of the trial court. The sentence is compound, two complete sentences being joined by the conjunction "and". The first sentence reads "It is agreed you are to spend approximately Five Thousand Dollars (\$5,000.00) on leveling the additional Sixty (60) acres, installing ditches, pumps and various other improvements." The subject of the sentence is "you", the predicate, "are to spend", the object, "approximately Five Thousand Dollars (\$5,000.00)." The rest of the sentence states what the money is to be spent for. It is to be spent on leveling the sixty acres, on the installation of ditches, of pumps and of various other improvements. The leveling is to be done on the new acreage added to land covered by and farmed under the first lease. But nothing in the sentence requires Koontz to put any pumps, pipe or casing on this sixty acres rather than on the balance of the land.

[7] The second sentence of this compound sentence is clear, positive and all embracing in its terms. Its subject is "all improvements." This subject cannot be limited to the improvement placed on the sixty acres without incorporating into the sentence something the parties did not put there.

We conclude that the trial court's interpretation of the contract of lease between the parties hereto was correct and that being so it follows that the judgment herein must be and it is hereby affirmed. The appeal from the order denying defendants' motion for a new trial is dismissed. C.C.P. sec. 963.

ADAMS, P. J., and PEEK, J., concur.

In re SCHLUTTIG'S ESTATE.

CLEMENTS v. McGRATH, Attorney General of United States.

Civ. 16941.

District Court of Appeal, Second District,  
Division 3, California.

May 26, 1950.

Rehearing Denied June 27, 1950.

Hearing Granted July 20, 1950.\*

Proceeding in the matter of estate of Bertha Schluttig, deceased, upon petition of Bertha Clements, and Erich Ziesche, executor, for a determination of the persons entitled to residue of estate. The Alien Property Custodian filed copies of orders vesting in him any interest in decedent's estate to which alien heirs might be entitled. The Superior Court of Los Angeles County, George A. Dockweiler, J., entered a decree declaring that alien heirs were ineligible to take property under the will, and J. Howard McGrath, Attorney General of the United States, as successor to Alien Property Custodian appealed. During pendency of appeal appellant moved for leave to produce additional evidence and motion was granted. The District Court of Appeal, Vallée, J., held that newly produced evidence made a sufficient showing so that if it had been made to trial court by timely application for a motion for new trial it would have been granted, and therefore a new trial would be required.

Decree reversed and cause remanded with directions.

Wood, J., dissented.

1. Appeal and error ⇨891

In any case where an appellant makes an application for taking of new and additional evidence for purpose of securing a reversal of a judgment, appellant's showing should at least be such as to convince reviewing court that if it had been made to trial court by timely application for a new trial the trial court would probably have granted the motion. Rules on Appeal, rule 23, (b).

2. Wills ⇨378

In probate of a will, where trial court determined that aliens legatees in Germany and Austria, were ineligible to take under will, because reciprocal rights of inheritance did not exist in Germany and Austria at date of testator's death, and that Amer-

ican citizens had no right to payment in United States of proceeds of estate in either of these countries, and the United States Attorney General, as successor to Alien Property Custodian appealed, and pending appeal appellant was granted leave to produce additional evidence, evidence produced before referee, that both Germany and Austria, before and after death of testator, allowed American citizens to participate as heirs in their will, was sufficient to entitle appellant to a new trial. Probate Code, §§ 259, 1231; Rules on Appeal, rule 23(b); Code Civ.Proc. § 956a.

3. Trial ⇨377(2)

The power to take new and additional evidence is a broad one and principal objective is to permit a final disposition of cause without further proceedings in trial court, but this ceases to be a controlling objective where the interest of justice requires a new trial. Code Civ.Proc. § 956a.

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Harold I. Baynton, Acting Director, Office of Alien Property, Washington, D. C., Valentine C. Hammack, Sp. Asst. to the Atty. Gen., David L. Bazelon, Asst. Atty. Gen., of the United States, Ernest A. Tolin, U. S. Atty., Clyde C. Downing, Asst. U. S. Atty., Los Angeles, Irving Jaffe, Asst. U. S. Atty., James L. Morrisson, Joseph Laufer, Lillian C. Scott, Joseph W. Bishop, Jr., J. Roger Wollenberg, all of Washington, D. C., for appellant.

Moore, Howorth & Trinkaus, Henry T. Moore and Walter R. Trinkaus, all of Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by the Attorney General of the United States, as successor to the Alien Property Custodian, from a decree determining that Bertha Clements is the owner and entitled to distribution of the residue of the estate of Bertha Schluttig, deceased, and that all of the nonresident alien heirs named in decedent's will are ineligible to take under the will.

Bertha Schluttig, a citizen of the United States and resident of California, died testate April 3, 1945, in Los Angeles, leaving

\* Subsequent opinion 224 P.2d 695.



an estate consisting entirely of personal property situated in California. By her will she bequeathed the residue of her estate to her "nieces and nephew," share and share alike. Bertha Clements, respondent, is the only residuary legatee who is a citizen and resident of the United States. The other residuary legatees are citizens and residents of Germany or Austria. The will was admitted to probate on May 2, 1945. The Alien Property Custodian filed copies of orders vesting in him any interest in decedent's estate to which the alien heirs might be entitled.

On September 22, 1947, respondent filed a petition under Probate Code section 259 for a determination of the persons entitled to the residue of the Schluttig estate, alleging that the residuary legatees, other than herself, were ineligible to take. Section 259, as it read on April 3, 1945, provided that the right of non-resident aliens to take real or personal property, or the proceeds thereof, by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States, is dependent "upon the existence of a reciprocal right upon the part of the citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries." Appellant was the sole objector to the petition.

At the trial evidence was received with respect to whether on April 3, 1945, the date of death of Bertha Schluttig, the reciprocal rights required by Probate Code section 259 existed in Germany and Austria. It is not necessary to narrate this evidence. It consisted largely of certain laws, promulgated during the Nazi regime after 1932, which it was claimed restricted rights of inheritance and succession because of race, religion, "anti-social conduct" (based upon the Nazi concept thereof),

and opposition to the Nazi ideology, and expert testimony with respect thereto.

The trial court found, among other matters, that reciprocal rights of inheritance did not exist in Germany and Austria on April 3, 1945, and that American citizens had no right to receive payment within the United States of proceeds of estates in either of these countries. The Attorney General appeals from the decree which followed.

During the pendency of the appeal, appellant moved for leave to produce additional evidence pursuant to Rule 23(b), Rules on Appeal. The affidavits indicated that appellant, after the exercise of due diligence, had been unable to obtain certain court records and other material evidence at the time of trial due to chaotic postwar conditions existing in Germany and Austria. The affidavits stated that since the trial appellant had obtained additional evidence which established: (1) Germany granted and recognized at all times before the war, during the war, and after the cessation of hostilities, the right of citizens and residents of the United States to inherit estates located in Germany upon the same terms and conditions as residents and nationals of Germany. (2) Prior to the outbreak of war such estates were actually delivered to the American heirs residing in this country. (3) Following the outbreak of war, the right of citizens and residents of this country to inherit estates located in Germany was at all times fully recognized, and administrators or curators were appointed by German courts to conserve and protect their inheritances. The motion was granted and the Honorable Allen W. Ashburn, judge of the Superior Court of Los Angeles County, was appointed referee for the sole purpose of taking the new and additional evidence.

The evidence received by the referee was voluminous, comprising some 400 pages of transcript and considerable documentary evidence. Among these were: (a) Approximately 106 certificates of inheritance, all certified by German courts in 1948 or later. (Certificates of inheritance are issued by district courts of Germany



having probate jurisdiction. They are granted upon application of an interested party and with notice to all concerned. Thereafter, an investigation, based upon evidence, is conducted by a probate judge for the purpose of determining heirship in the particular estate. The decision of the probate judge is represented by the certificate of inheritance.) The certificates introduced were issued between August, 1937, and August, 1945, and apparently determine that some 140 residents of the United States were beneficiaries of German estates. The certificates refer to persons taking under a will and by succession as "heirs." Some of the certificates seem to indicate that the "heirs" received their interest under a will, others by succession; in other certificates the nature of the devolution is not indicated. More than 25 of the certificates of inheritance naming nonresident heirs residing in the United States were issued during the war years of 1942, 1943 and 1944. (b) 37 decrees or orders appointing absentee curators or administrators for beneficiaries of German estates residing in the United States, covering a period from January, 1941, to December, 1944. (c) A number of extracts from German probate court cases of decedents who died between December, 1941, and July, 1944, showing the issuance of certificates of heirship naming nonresident heirs residing in the United States and elsewhere, appointment of absentee curators or administrators of the nonresident heirs, and in some instances the settlement of the estate and distribution of the heir's share to the curator or administrator in his behalf. (d) Section 154 of the Weimar Constitution of 1919, which guaranteed the right to inherit in accordance with the civil law. (e) Absentee Administration Decree of 1939. (f) Copies of reports filed by curators and other persons in possession of property belonging to or claimed by American nationals, offered for the purpose of showing that pursuant to German laws the administrators and curators reported enemy property and that such property was not confiscated during the war. (g) Enemy Property Decree of 1940-1941.

Dr. von Lewinski, a former practicing lawyer of Berlin, Germany, specializing in probate practice, testified as an expert on German law. The substance of his testimony was that both before and after the war, and specifically on April 3, 1945, citizens of Germany and of other nations inherited in Germany on an equal basis; under the foreign exchange control law of 1938 and until the outbreak of the war (December 8, 1941) actual payment of inheritances from German estates in which he represented the American heirs was made to American heirs in the United States; United States citizens were given "preferred" treatment in the securing of licenses for the transfer of inheritances under the foreign exchange control law; the procedure therefor was outlined; following the outbreak of war, however, actual payment to heirs in the United States was not possible, but under the law issuance of certificates of inheritance proceeded in the same manner as before and curators or administrators were appointed by the German courts to conserve and protect the interests of nonresident heirs until such time as actual payment was possible; he was of the opinion that no law or policy of the Nazis denied an American the right to inherit; he knew of no case in which the right of an alien enemy to inherit had been denied by any court. He also testified that he handled some 300 cases in Germany involving American citizens or residents who were heirs to German estates; in about 200 of them (identifying some by names, dates and amounts of inheritance transmitted) the inheritances were actually transmitted to American citizens, among whom were several of the Jewish faith, in the United States prior to and until December 8, 1941; during the war he was appointed curator or administrator for American citizens residing in the United States in several estate cases; while nothing was done by the courts for a while after 1945 because they were not then functioning due to the exigencies of the war, there would have been no change in the procedure when the courts resumed their functions.

Dr. Desiré Rakonitz, a former Hungarian lawyer, testified as an expert on International Law and Austrian law. The gist of his testimony was that under the Austrian General Civil Code foreigners had the same inheritance rights as those of Austrian citizens, that under international law the imposition of German laws upon Austria after its acquisition by Germany in 1938 had "no force, validity, or any kind of effect," and that the Austrian law in force both before and at the time of the acquisition of Austria by Germany prevailed at all times while Austria was occupied by the German Reich. He further testified that during the war years, whenever an American citizen became an heir to an Austrian estate, the probate court appointed a curator for the heir to safeguard his rights.

Otto A. Hoecker, a member of the San Francisco bar, testified that between 1932 and June, 1941, he personally handled about 25 cases involving American citizens who were heirs of German estates; "in each and every case" these American heirs received their inheritances "in full" from Germany; some were of the Jewish faith. He outlined the procedure he followed to obtain these inheritances for his clients. He testified and named certain estates in which his clients—American citizens who were heirs to German estates—had received payment in the United States, the latest date of receipt of money from a German estate being May 30, 1941.

The evidence produced before the referee in large part clearly constituted newly-discovered evidence. The bulk of it was not available until after the appeal was taken. It is material and relevant to the issues. We are not in a position, nor are we able, to judge of the effect or value of this evidence in connection with the evidence introduced at the time of trial, or to determine the credibility of the witnesses who testified, or to resolve conflicts between this evidence and that produced at the trial. A motion for a new trial can be made in a proceeding to determine heirship and interests in an estate. Prob.Code, sec. 1231. It may be safely said that had the evidence

produced before the referee been tendered as newly-discovered evidence to a trial court under similar circumstances a motion for a new trial would have to be granted.

[1-3] In any case where an appellant makes an application for the taking of new and additional evidence for the purpose of securing a reversal of a judgment, his showing should at least be such as to convince the reviewing court that if it had been made to the trial court by timely application for a new trial the court would probably have granted the motion. In re Estate of Culver, 81 Cal.App.2d 640, 645, 184 P.2d 738; 16 Cal.L.Rev. 500, 518. The showing of the appellant in this respect was sufficient, but it is not the sole test as to whether new and additional evidence should be taken. When we granted the motion of the Attorney General of the United States we took into consideration his contention that such evidence would not only require a reversal of the judgment, but also a direction to the trial court to enter judgment in his favor. We also regarded the case as exceptional upon its facts, and because the questions involved are of wide public interest. The power to take new and additional evidence is a broad one. The principal objective of the practice is to permit of a final disposition of the cause without further proceedings in the trial court. This, however, ceases to be a controlling objective "where the interest of justice requires a new trial." Code Civ.Proc., sec. 956a. Our decision therefore is that upon the facts stated, and in view of the other considerations mentioned, a new trial is required in the interest of justice.

The decree is reversed and the cause remanded, with directions to the probate court to retry the petition of Bertha Clements for determination of the persons entitled to the residue of the estate of Bertha Schluttig, and all issues raised by the objections and exceptions of appellant thereto, in their entirety. Appellant to bear respondent's costs on this appeal.

SHINN, P. J., concurs.

WOOD, Justice.

I dissent. I voted to deny the application to produce additional evidence on appeal. In my opinion the judgment should have been reviewed upon the record made in the trial court.



97 Cal.App.2d 808

**ELLIS v. ELLIS.**  
Civ. 4041.

District Court of Appeal, Fourth District,  
California.

May 26, 1950.

Divorce action by Garnett Clare Ellis against Arthur Lee Ellis. The defendant filed a cross complaint. The Superior Court, Kern County, W. L. Bradshaw, J., gave plaintiff a divorce. Plaintiff appealed from that portion of the judgment decreeing that the homestead property was separate property of defendant. The District Court of Appeal, Griffin, Acting P. J., held that where defendant filed application with federal government for a homestead on certain realty, and three year period of residence required for defendant to complete his homestead right did not mature until after granting of interlocutory decree of divorce, right of defendant in and to the homestead land was his separate property.

Portion of judgment from which appeal was taken affirmed.

**Husband and wife** ⚭252

Where during marriage, husband filed application for homestead under Federal Homestead Act, and husband and wife went on realty, resided thereon, made improvements to it and husband and wife separated before statutory residence time to perfect homestead expired and wife was granted an interlocutory decree of divorce prior to making of final proof or issuance of a patent

by federal government, right of husband in and to homestead land was his separate property. 43 U.S.C.A. § 162.

Dorris, Fleharty & Phillips, Bakersfield,  
for appellant.

Dorsey, Campbell & Bultman, Bakersfield,  
for respondent.

GRIFFIN, Acting Presiding Justice.

Plaintiff brought this action for divorce on the ground of extreme cruelty. She alleged that she and defendant were married in 1926; separated on February 5, 1948; that they had one child 12 years of age; and that they acquired certain community property consisting of homestead land in the process of being patented, valued in excess of \$10,000, a dwelling house in Taft, plus furnishings valued at \$4,000, and two old automobiles valued at \$850. A divorce, maintenance for the support of the child, and equitable division of the community property was sought.

Defendant answered, admitted the Taft property and automobiles to be community property and of the value alleged, and also alleged that there were certain improvements and equipment on the homestead property valued at \$2,500, which were community property. He denied specifically that the land being homesteaded was community property. By way of cross-complaint he sought a divorce and alleged that plaintiff owned 13 acres in Kern County which was her separate property, but that it had been improved by the use of community funds such as by building a small house thereon, putting in a well and building other small buildings. He alleged that the homestead property would not be proved up until the latter part of 1948, and that its worth was about \$1,400. He asked for equitable distribution of the community property.

After trial, the court gave plaintiff the divorce, custody of the child, \$40 per month maintenance for him, and found that since the marriage of the parties they acquired community property consisting of the Taft house and furnishings, and awarded the



property to plaintiff. The household furniture, machinery and equipment located on the homestead was awarded to defendant. It found that the property described was the only community property of the parties and then specifically found that the homestead property, together with the improvements thereon, was defendant's separate property and that plaintiff had no community interest therein. Judgment was entered accordingly. Plaintiff now appeals from that portion of the judgment in which it is decreed that the homestead property was the separate property of defendant and that plaintiff had no community interest in it.

The facts, in this respect, are that plaintiff and defendant lived upon the property inherited by plaintiff for some years, improved it and ran some cattle on it in connection with an adjoining lease. In 1945, they bought a small house located on rented land in Taft and furnished it. Defendant was then working for wages. This was their entire income plus some revenue from the rental of plaintiff's ranch property, and such sums as she made while employed as a waitress. In 1945, defendant filed an application with the Federal Government for a homestead upon 280 acres. It was barren land. On August 4, 1945, they moved an old house from plaintiff's ranch onto the property, in which they lived. They later drilled a well and subsequently built another small house thereon, improved the property with some growing crops and stocked it with a few cattle taken from the herd on plaintiff's ranch, which cattle were subsequently sold to pay for the well drilling. The parties lived together on the ranch until their separation which, as the court found, occurred on February 5, 1948. During the previous five months plaintiff remained away from the home except on week-ends for the purpose of school convenience for the child. Plaintiff furnished some evidence that the value of the homestead was \$11,250.

Defendant testified that the three-year period of residence required to complete his homestead right would not mature until August 4, 1948, and that final proof must be made before August 4, 1950.

Respondent and appellant agree in their briefs that the question now before this court is whether the trial court erred in finding that the homestead land with the improvements thereon was the sole and separate property of the defendant, i. e., where, during marriage, a husband files application for a homestead under the Federal Homestead Act, and the husband and wife go upon the land, reside thereon, make improvements to it, and the husband and wife separate before the statutory residence time has expired to perfect the homestead and the wife is granted an interlocutory decree of divorce prior to the making of final proof or issuance of a patent by the Federal Government, is the right of the husband in and to the homestead land his separate property or may it be found to be community property and subject to distribution as community property under an interlocutory decree of divorce?

Apparently, the trial court based its finding, in this respect, on its belief that under the law, from the facts stated, the homestead property was not then subject to distribution as community property and that it had no jurisdiction to award any portion of it to plaintiff. Counsel for defendant claims that the question was decided in *Minium v. Minium*, 53 Cal.App. 55, 199 P. 1104, 1105. In that case, however, the homestead entry was not made by the husband until after he and his wife were separated. Counsel for appellant there contended that since the entry was made during the existence of the marriage, although the title was not perfected until after its dissolution, the perfected title, when issued, related back to its inception, and therefore the property was regarded as having been acquired during coverture and was community property. In affirming the judgment the appellate court (hearing denied by the Supreme Court) held that this position was not maintainable in this state for the reason that the grant of the homestead by the United States to the defendant was a gift or donation, and therefore it became his separate property under Civil Code secs. 162-164, and said: "In the federal cases it seems to be assumed that the homestead

is a gift from the government." (Citing cases, including *Noe v. Card*, 14 Cal. (576, 577.) It was there pointed out that the rule in Texas (citing *Yates v. Houston*, 3 Tex. 433, and other such cases) supports a contrary position, i. e., that property thus acquired is community property, and held that this state specifically disapproves that rule.

In the cases of *Kromer v. Friday*, 10 Wash. 621, 39 P. 229, 32 L.R.A. 671, and *Ahern v. Ahern*, 31 Wash. 334, 71 P. 1023, 96 Am.St.Rep. 912, it was held that where the entryman is a married man at the time of filing his application for a homestead, and he and his wife reside on the property and do the work necessary to acquire title thereto, such homestead, when patent is issued, is community property; and that for the purpose of fixing the relative rights of an entryman and his wife it is regarded as having been acquired by *purchase*. The *Ahern* case was directly overruled in *Teynor v. Heible*, 74 Wash. 222, 133 P. 1, 46 L.R.A.,N.S., 1033.

In *Buchser v. Mörs*, 9 Cir., 202 F. 854, 121 C.C.A. 212, one of the latest cases arising from the state of Washington, it was held that where the entry was made when the marital relationship did not exist and such condition continued until final proof was made, it then should be held to be the separate property of the spouse who finally acquires the patent to the land. See, also, *Fuller v. Ferguson*, 26 Cal. 546; *Wilson v. Castro*, 31 Cal. 420, 421; *Hood v. Hamilton*, 33 Cal. 698; *Estate of Lamb*, 95 Cal. 397, 30 P. 568; *Estate of Boody*, 119 Cal. 402, 51 P. 634; *Harris v. Harris*, 71 Cal. 314, 12 P. 274; *Morgan v. Lones*, 80 Cal. 317, 22 P. 253; *Wadkins v. Producers' Oil Co.*, 130 La. 308, 57 So. 937, 2d., 227 U. S. 368, 33 S.Ct. 380, 57 L.Ed. 551.

In *Estate of Boody*, *supra*, where the property was "settled upon" prior to the marriage but the patent was not granted until after the marriage, it was held that the property was the separate property of the husband.

In *Wadkins v. Producers' Oil Co.*, *supra*, the entry to the land was made after marriage and before patent issued the wife died.

It was held that such property was not community property.

In *McCune v. Essig*, 199 U.S. 382, 26 S. Ct. 78, 50 L.Ed. 237, the court, in effect, held that the rights and interests of the spouses in land acquired from the United States by patent are governed by federal law until the title thereto is completed by the issuance of a patent and thereafter the state laws control the determination of whether the land is separate or community property. See, also, *Buchser v. Buchser*, 231 U.S. 157, 158, 34 S.Ct. 46, 58 L.Ed. 166; *Hutchinson Investment Co. v. Caldwell*, 152 U.S. 65, 14 S.Ct. 504, 38 L.Ed. 356; 11 Am. Jur., Community Property, p. 192, sec. 29; *Delacey v. Commercial Trust Co.*, 51 Wash. 542, 99 P. 574, 130 Am.St.Rep. 1112; *Bernier v. Bernier*, 147 U.S. 242, 13 S.Ct. 244, 37 L.Ed. 152.

Under the authorities collected in 3 Cal. Jur. 10-year Supp. p. 512, sec. 32, and *McKinney's New California Digest*, Vol. 12 (Husband and Wife) p. 406, sec. 64, this general rule is applicable in California. However, exception to this rule is claimed in the case of *Bastjan v. Bastjan*, 215 Cal. 662, 12 P.2d 627, involving a desert claim. In that case, however, the *patent* had been *issued prior to the separation and divorce* and our Supreme Court held that since the property had been purchased with community funds it was community property. The decision in that case is based on *Morgan v. Lones*, 78 Cal. 58, 20 P. 248, where *final title was acquired during marriage by purchase* from the government. The *Minium* case is not overruled in the *Bastjan* case and in fact is not even mentioned.

In *Meyer v. Meyer*, 82 Cal.App. 313, 255 P. 767, the husband, prior to marriage, filed a desert claim. After marriage he changed the application, on the same property, to a homestead claim which, *at the time of trial*, had *not been perfected*. The court held that the finding that the property was his separate property was proper. This distinction should be noted in the many cases cited by plaintiff. In 3 Cal.Jur. 10-year Supp. (Community Property) p. 512, 513, sec. 32, it is held that the entryman acquires no title until he has complied with the law

and earned his patent and he acquires only a right of possession as against trespassers and does not acquire an equitable title or equitable interest in the property until he has complied with all the statutory conditions essential for obtaining a patent.

The statute, U.S.C.A. Title 43, § 162, permits the *entryman* only by perfection of conditions precedent, to secure a patent and apparently his interest is separate property, at least up to the time the patent issues. *Wadkins v. Producers' Oil Co.*, supra. The federal rule is followed in many other community property states. (11 Am.Jur. (Community Property) p. 192, sec. 29; *Hall v. Hall*, 41 Wash. 186, 83 P. 108, 111 Am.St. Rep. 1016; *Teynor v. Heible*, 74 Wash. 222, 133 P. 1, 46 L.R.A.,N.S., 1033; *Baker v. Saxon*, 1918, 24 N.M. 531, 174 P. 991; U.S. C.A. Title 43, § 161, note 12, and cases cited.

It is expressly provided in the Federal Homestead Act that the entryman shall make no agreement with any person by which title would inure in whole or in part to any person except himself. See, U.S. C.A. Title 43, § 162; *Cascade Public Service Corporation v. Railsback*, 59 Wash. 376, 109 P. 1062; and *Nilson v. Hamilton*, 53 Utah 594, 174 P. 624, wherein it is held that an agreement to transfer (made before final proof) is illegal and contrary to public policy, and no legal or equitable rights of any kind pass to the grantee. It has been definitely held that the patent, if issued at the expiration of the homestead period, must be, subject to certain exceptions not here applicable, issued to the person making the entry and must vest the entire title in him. *Shiver v. U. S.*, 159 U.S. 491, 16 S.Ct. 54, 40 L.Ed. 231; *Guaranty Savings Bank v. Bladow*, 176 U.S. 448, 20 S.Ct. 425, 44 L.Ed. 540; *Wagstaff v. Collins*, 10 Cir., 97 Fed. 3, 38 C.C.A. 19; *Oregon Short Line R. Co. v. Quigley*, 10 Idaho 770, 80 P. 401; *McCune v. Essig*, supra.

Plaintiff cites McKay's work on Community Property, 2d Ed. p. 200, wherein the *Minium* case is criticized; *California Law Review* Vol. IX, p. 267, "Community Property in Public Lands"; and 126 Am.St. Reports 117, and the authorities there cited,

in support of her contention. Among those cases is *Ahern v. Ahern*, supra, which has been specifically overruled, as above noted, by *Teynor v. Heible*, supra. In the latter case the entry was made after marriage. Before the statutory period for the issuance of the patent had run, the entryman's wife died and he remarried. In an action to determine the community interest of each wife, the court said: "If a community interest is impressed on the land by the fact of marriage at the time of its entry, as is held in the fourth group of cases, and if a community interest is also impressed by the fact of marriage at the time of the making of final proof and the issuance of the patent, as is held in the first group, then this land was impressed with the interests of two distinct communities, the one in favor of the issue of the first wife and the other in favor of the second wife. A rule that leads to such incongruous results is certainly not to be commended." [74 Wash. 222, 133 P. 3]

We conclude that the trial court was authorized to hold that the 280 acres here involved was not, at the time of the separation, or at the time of trial, community property subject to distribution to the respective parties.

In view of this conclusion and the finding of the trial court it becomes unnecessary to determine the additional question whether the conduct of the parties, in commingling their separate funds with community property rendered the entire interest in the homestead land community property or whether there was sufficient evidence to establish a previous understanding of the parties that the rights acquired under it were to be community property. Under the theory here adopted defendant was not necessarily estopped from claiming that the homestead rights, which had not been finally perfected at the time of trial, were not community property.

That portion of the judgment from which this appeal has been perfected is affirmed.

MUSSELL, J., and SHEPARD, J. pro tem, concur.



97 Cal.App.2d 747

**ABEL v. O'HEARN.**

Civ. 14187.

District Court of Appeal, First District,  
Division 1, California.

May 26, 1950.

Hearing Denied July 20, 1950.

Action by Cecil Abel against Valrie, also known as Valarie and Valerie, Bernhard McMahan to recover certain realty which plaintiff alleged was conveyed to defendant as his performance under a partnership agreement which defendant failed to perform. On death of Mrs. McMahan, Maurice O'Hearn, administrator of her estate, was substituted as defendant and cross-complainant. The Superior Court, in and for the County of San Mateo, A. R. Cotton, J., rendered judgment for the defendant and plaintiff appealed from the whole of that judgment excepting that part decreeing that defendant take nothing by his cross-complaint. The District Court of Appeal, Schottky, J. pro tem., held that evidence sustained finding that deceased purchased disputed realty for her residence and that it was never intended to be and did not become a part of partnership assets.

Judgment affirmed.

**1. Appeal and error ⇨930(1), 1010(1)**

Before an appellate tribunal is justified in reversing a judgment on ground of insufficiency of evidence, it must appear from record that, accepting full force of evidence adduced together with every inference favorable to prevailing party which may reasonably be drawn therefrom, it still appears that law precludes prevailing party from recovering judgment and evidence must be construed most strongly against losing party and every favorable inference and presumption which fairly may be deduced from evidence resolved in favor of prevailing party and prevailing party's evidence must ordinarily be accepted as true and contradictory evidence must be disregarded.

**2. Appeal and error ⇨1010(1)**

Appellate tribunal is merely concerned in determining whether there is substantial evidence to support findings of trial court.

Cal.Rep. 217-218 P.2d—53

**3. Appeal and error ⇨719(8)**

In action by limited partner to recover certain realty allegedly conveyed to general partner as limited partner's performance, on ground that general partner failed to perform her obligations, where limited partner stated that although he disagreed with trial judge's finding that none of general partner's representations, statements or promises were false or fraudulent, no appellate attack was made on that finding, statement was an admission that record supported finding that there was no fraud or misrepresentation on part of general partner.

**4. Partnership ⇨370**

In action by limited partner to recover certain realty allegedly conveyed to general partner as limited partner's performance, on ground that general partner failed to perform her obligations, evidence sustained finding that limited partner paid general partner a certain sum for a one-third interest in the profits of a limited partnership and that realty was not intended to and did not become a part of the partnership assets.

**5. Evidence ⇨419(11)**

The true consideration for an agreement may always be shown. Code Civ. Proc. § 1962.

**6. Evidence ⇨461(1), 465**

In action by limited partner to recover certain realty allegedly conveyed to general partner as limited partner's performance of agreement, on ground that general partner failed to perform her obligations, parol evidence as to negotiations between limited and general partner including successive drafts of partnership contract, was properly admitted to not only show circumstance under which contract was made but also to prove that parties intended and understood language in sense contended for. Code Civ.Proc. §§ 1856, 1860, 1962.

**7. Deeds ⇨19**

A deed unaffected by fraud in its inception conveys title, and is not rendered void or subject to rescission on account

of a failure of consideration and what is done after its conveyance has no effect on its validity where performance is not required as a condition.

#### 8. Covenants ⚡104

The remedy for a breach of a personal covenant not amounting to a condition is generally an action for damages.

#### 9. Trial ⚡404(1)

In action by limited partner to recover certain realty allegedly conveyed to general partner as limited partner's performance of agreement on ground that general partner failed to perform her obligations, trial court's finding that there was ample consideration for payments made by limited partner to general partner included finding, sustained by evidence, that there was not a total failure of consideration at the time that the action was commenced.

#### 10. Appeal and error ⚡219(2)

Where plaintiff proposed no amendments to findings prepared by defendant, and made no objection to them, although failure to do so would not cure a failure to find on a material issue, plaintiff could not raise for first time on appeal question of uncertainty or that findings were not sufficiently explicit.

#### 11. Partnership ⚡370

In action by limited partner to recover certain realty allegedly conveyed to general partner as limited partner's performance of partnership agreement, on ground that general partner failed to perform her obligations, evidence sustained finding that parties were not mutually mistaken in believing that realty could be used for manufacturing purposes.

#### 12. Appeal and error ⚡1047(3)

##### Evidence ⚡208(6)

In action by limited partner to recover certain realty allegedly conveyed to general partner as limited partner's performance of agreement, on ground that general partner failed to perform her obligations, a striking out of limited partner's exhibits which were excerpts from general partner's answer to original complaint offered by limited partner as admissions against interest was error but in

view of evidence in record supporting trial court's finding that limited partner was aware of fact that a manufacturing business could not be carried on in place where realty was located, error was not prejudicial.

#### 13. Evidence ⚡208(1, 6)

##### Witnesses ⚡379(7)

Statements or admissions of a party made in another pleading, in same action, are admissible either as admissions against interest or for purpose of impeaching testimony of a party who has been a witness and fact that pleading in which purported admission is made has been superseded by later pleading and further fact that issues in action are determined by final pleadings does not change rule as to admissibility of such pleading containing an admission.

#### 14. Partnership ⚡275

Ordinarily death of a partner causes dissolution of a partnership but if partnership agreement so provides, business may be continued after death of a member. Corporations Code, § 15031.

#### 15. Partnership ⚡370

Where agreement provided that in event of death of general partner prior to dissolution of limited partnership, limited partnership should continue, and heirs, executors, trustees or assignees of general partner should be vested with all rights of general partner, and complaint filed by limited partner sought restitution of realty conveyed to deceased general partner, but did not allege dissolution of partnership nor seek such dissolution, no issue was raised by pleadings with respect to limited partner's right to dissolution of limited partnership.

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George M. Naus, Ben K. Lerer, San Francisco, for appellant.

Samuel L. Fendel, Sol Silverman, James A. Toner, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff, Cecil Abel, commenced an action against Valrie Bernhard McMahan to recover certain real property in Atherton

in San Mateo County, which property, the plaintiff alleged, was conveyed to defendant as his performance under a partnership agreement. Plaintiff further alleged that since defendant had failed to perform her obligation to manufacture and distribute certain "soft" dolls and children's books, said property was held in constructive trust for plaintiff. The original complaint was filed October 26, 1945. An amended complaint was subsequently filed, to which defendant filed an answer and cross-complaint. On July 20, 1947, two days before the day originally set for trial, Mrs. McMahan died, and shortly thereafter a supplemental and second amended complaint was filed which substituted Maurice O'Hearn, administrator of her estate, as defendant and cross-complainant. The case went to trial in September, 1948, and the trial court rendered judgment in favor of defendant. Plaintiff appeals from the whole of said judgment excepting that part decreeing that defendant take nothing by his cross-complaint.

Plaintiff's complaint seeks restitution. It traces \$65,400 of the \$77,400 paid by plaintiff into the Atherton property as an identified product of the money and seeks restitution under four counts: First, on a charge of fraud; second, on a charge of mutual mistake; third, on a charge of failure of consideration through a continuing and total breach of the obligation to manufacture and sell the soft dolls; and, fourth, by reason of the dissolution of partnership through Mrs. McMahan's death, restitution of the land as capital contributed by appellant.

The trial court found as follows:

"2. That on the 2nd day of December, 1944, plaintiff and cross-defendant and Valerie Bernhard McMahan made and entered into a certain Agreement of Limited Partnership, \* \* \* by which said plaintiff and cross-defendant acquired from said Valerie Bernhard McMahan, for a valuable consideration, a certain one-third interest in the profits of, and became a limited partner in said copartnership.

"3. That it is not true that the parties to the aforesaid Limited Partnership

agreed that plaintiff should contribute, as capital thereto, money in an aggregate of \$60,000.00, or in any other amount.

"4. That it is not true that any of the alleged representations, statements or promises set forth in plaintiff's supplemental and second amended complaint were false or fraudulent.

"5. That plaintiff conducted an investigation and obtained advice and counsel with respect to the representations, statements or promises allegedly made by said Valerie Bernhard McMahan.

"6. That the real property situated in San Mateo and particularly described in plaintiff's supplemental and second amended complaint was acquired by Valerie Bernhard McMahan as her sole property with her own funds; and that neither said plaintiff nor the aforesaid co-partnership acquired or has any right, title or interest therein.

"7. That plaintiff and Valerie Bernhard McMahan were not mutually mistaken in believing that the aforesaid real property could be used for manufacture purposes.

"8. That plaintiff knew at all times that said realty could not be used for manufacturing purposes.

"9. That at all times the truth of any representations, statements or promises allegedly made by said Valerie Bernhard McMahan was readily ascertainable by said plaintiff.

"10. That there was ample consideration for the payments made by said plaintiff to Valerie Bernhard McMahan in that (a) for the sum of \$60,000.00 plaintiff obtained a one-third interest in the profits of a Limited Partnership and became a limited partner therein, and (b) for the sum of \$17,400.00 plaintiff became the creditor of Valerie Bernhard McMahan in the sum of \$2,000.00 for money loaned to her to liquidate some of her debts, and received the promissory note of said Valerie Bernhard McMahan in the sum of \$15,400 dated January 15, 1945.

"11. That no sums of money were contributed by said plaintiff as capital contributions to the Limited Partnership of plaintiff and Valerie Bernhard McMahan.



"12. That the real property described in plaintiff's supplemental and second amended complaint was conveyed to Valerie Bernhard McMahan as an individual by a deed absolute and unconditional.

"13. That the Limited Partnership agreement entered into by and between plaintiff and Valerie Bernhard McMahan provides that the title to the real property described in plaintiff's supplemental and second amended complaint shall vest in Valerie Bernhard McMahan free and clear of all liens or encumbrances, and contains no provision for any interest in, or use of, said real property by the Limited Partnership.

"14. That no issue is raised by the pleadings herein with respect to plaintiff's right to a dissolution of the Limited Partnership, or for an accounting or for the appointment of a receiver for such purpose, nor is there any claim for any such relief contained in plaintiff's supplemental and second amended complaint.

"15. That no issue is raised by the pleadings herein with respect to plaintiff's possible status as a creditor of the Estate of which defendant is administrator, in that there is neither allegation nor proof of any presentment or filing of any creditor's claim by plaintiff against said Estate.

"16. That the provision of the receipt-agreement dated October 26, 1944 by which plaintiff and cross-defendant was to pay \$40,000.00 within thirty days thereafter for an option in the hard dolls is indefinite and uncertain, and said agreement was not signed by said plaintiff and cross-defendant."

[1] Appellant in his 115-page opening brief makes a vigorous and forceful attack upon the sufficiency of the evidence to support the judgment. It is a rule too well established to require the citation of authorities that before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence it must appear from the record that, accepting the full force of the evidence adduced together with every inference favorable to the prevailing party which may reasonably be drawn therefrom, it still ap-

pears that the law precludes the prevailing party from recovering judgment. The evidence must be construed most strongly against the losing party. Every favorable inference and presumption which fairly may be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true, and evidence which is contradictory must be disregarded.

Bearing in mind this familiar rule, which, we are constrained to state, too often is overlooked by counsel in arguing conflicting evidence before an appellate court, we shall present a brief summary of the factual situation as shown by the record in this case, and the inferences which may reasonably be drawn therefrom.

Mrs. McMahan was a woman of mature years living in Burlingame. She had designed and manufactured a number of patented "hard" dolls, called "baseball dolls" because they were dressed as baseball players, and had written and had published a series of copyrighted books illustrated with pictures of such dolls. About October, 1944, she was financially handicapped in marketing these dolls and books and had an idea of manufacturing "soft" dolls—the same as the hard ones but with a soft covering—and selling them as teams of ballplayers together with the books. Plaintiff was introduced to Mrs. McMahan at that time by one William Berger, then her attorney, at her home in Burlingame as some one who had a business in which Berger thought plaintiff might be interested. Plaintiff was the owner of several bars in San Francisco and had other business interests. At that time Mrs. McMahan disclosed that she was about to sell a one-third interest in her hard dolls, to two other parties for \$150,000, and that she needed \$60,000 more "to complete her program" and that for that amount she would sell plaintiff one-third interest in her proposed soft doll. After several meetings and some investigation of Mrs. McMahan and the potentialities of the doll situation, though never having asked for or seen a soft doll, plaintiff agreed to the purchase of a one-third interest in the soft

doll venture, supposedly \$35,000 of which was for his interest in the soft doll and \$25,000 for his interest in the books, and on that date, October 26, 1944, he paid \$10,000 by check to Mrs. McMahan, which she said would be used to pay off loans made to her in the past. Plaintiff then promised to bring, and on the next day did bring, a \$7,000 check, \$2,000 of which was to be used by Mrs. McMahan to pay off additional past debts and \$5,000 as a deposit on the Atherton property involved here and which Mrs. McMahan thought "suitable" for her work. A memorandum was signed on these two dates covering the transactions taking place at that time. On December 1, \$5,000 additional was paid by plaintiff to Mrs. McMahan at her request to enable her to get an extension of time from the title company to hold the Atherton property which she contemplated purchasing.

Six drafts of a partnership agreement, which was to embody the rights of the parties, were made by Berger and the next to last one still referred to the figures of \$35,000 and \$25,000 for plaintiff's interest, respectively, in the soft dolls and books. The agreement finally signed, however, on December 2 or 15, 1944, provided that the only consideration which plaintiff was to give in exchange for the one-third interest was the property here involved. Paragraphs 1 to 4, inclusive, of that agreement are as follows:

"(1) The said Second Party shall on January 2nd, 1945, transfer and *grant*, by grant deed, to the First Party, real property free and clear of all liens or encumbrances, located in San Mateo County, Calif., and as set forth and described in a copy of a deed to be attached hereto and marked exhibit 'A', as and for his interest as hereinafter set forth, in the manufacture and sale of the said soft baseball doll teams and such other soft doll teams as may hereafter be agreed upon, and as and for their interest as hereinafter set forth, in the sale and distribution of the said travel baseball books, together with the expansion thereof.

"(2) That upon the transfer of record, of the aforesaid real property and as afore-

said, by said Second Party to said First Party, a Limited Partnership is hereby formed and in full force and effect, and shall be known and designated under the name of [*left blank*]

"(3) The aforesaid First Party shall be the General Partner and the aforesaid Second Party shall be the Limited Partner.

"(4) The said Limited Partner shall receive as his interest as hereinafter set forth, by reason of the granting of the said real property as aforesaid, one ( $\frac{1}{3}$ ) third, of all net profits, as hereinafter set forth or determined, derived from the manufacture and sale of the said soft ball doll teams, and also one ( $\frac{1}{3}$ ) third of all net profits, as hereinafter set forth or determined, from the sale and distribution of the said travel baseball books and expansion thereof."

It was explained that the purpose of the alteration in terms was merely to avoid possible income taxes payable by Mrs. McMahan, and that this way it would be an exchange of property for property rather than a capital gain. The transfer would also take place in the year 1945 rather than 1944.

Mrs. McMahan had previously entered into an agreement with a Mr. Adams for the purchase of an 11-acre residential estate in Atherton, on which there were located a large residence, a superintendent's house, a gardener's house, a garage with living quarters, and miscellaneous structures including greenhouses, storage houses and a pumping plant. The purchase price was \$65,000 and Mrs. McMahan intended to use the \$60,000 obtained from the sale of the one-third interest in the soft dolls and books to pay for the property, but, upon the advice of Mr. Berger it was decided to handle the matter so that it would be an exchange of property and thereby avoid possible income taxes by Mrs. McMahan. To that end there were placed in escrow with the title company a deed from Adams to plaintiff and his wife, and also a deed from plaintiff and his wife to Mrs. McMahan. The partnership agreement was also left with the title company to be delivered to plaintiff upon the completion of the transaction, and the deed to Mrs.



McMahan was attached to the signed agreement. About December 16, 1944, plaintiff paid to Mr. Berger for Mrs. McMahan an additional \$40,000, making plaintiff's total payment to her up to that time the sum of \$62,000; and on January 17, 1945, the final payment on the Atherton property was made to the title company by Mr. Berger, and the agreement of partnership and the deed to Mrs. McMahan were delivered from escrow. Plaintiff received the agreement and Mrs. McMahan the deed to the property. She thereupon took possession of the property, moved her furniture and personal property, including dolls and books, from her residence in Burlingame to the residence on the Atherton property. While the documents were still in escrow with the title company, Mrs. McMahan, on January 15, 1945, borrowed an additional \$15,400 from plaintiff, giving her promissory note for that sum.

There is a sharp conflict in the evidence as to whether the Atherton property was property of the partnership or the property of Mrs. McMahan alone. The deed was to her as an individual and the agreement nowhere states that it was to become the property of the partnership; in fact, the agreement provides that she was at all times to retain all property. Plaintiff on the appeal contends that it was understood that the Atherton property was to be the property of the partnership and the manufacturing site for the production of the soft dolls. Defendant contends that Mrs. McMahan purchased the Atherton property for her residence; that it was never intended to be, and could not be, used as a manufacturing site because of building and business restrictions of which plaintiff was well aware; that Mrs. McMahan intended the property to be her residence and the place where she would design and perfect the soft dolls; that plaintiff paid \$60,000 for a one-third interest in the soft dolls, books and the profits from the limited partnership, and not as a capital contribution to the partnership. The trial court found in accordance with the contentions of defendant, and the attack of plaintiff upon the judgment is based pri-

marily upon the sufficiency of the evidence to support such findings.

After Mrs. McMahan moved into the Atherton property she set up cutting tables for model-making purposes in the so-called "greenhouse" and made inquiries to get proper material for dollmaking; she employed several women to work on the sewing machines to obtain the "precise stitch" on the materials they were using; she rewired the premises to secure a higher voltage to power her portable sewing machines and machines for cutting materials. She brought out from New York an expert dollmaker and she also had her attorney ascertain the extent of the creative work she could do on the premises under the permissive provisions of the Town of Atherton ordinances. She also made some inquiry and investigation in the area for a factory site. Her expert dollmaker was unable to obtain the right materials to perfect a soft baseball doll for production and gave up "the idea of trying to substitute for the correct materials." There was testimony that the correct materials were "cotton fabrics, mostly duvetyn" and that due to war conditions such material was not available during 1944 and 1945, and did not become available until 1947. There was also testimony that plaintiff and Mrs. McMahan were "going to temporarily abandon the soft doll idea, and that he was going then directly into the manufacture of the hard dolls." Attorney Berger testified that on April 4, 1945, plaintiff was talking about a manufacturing site and that on April 11, 1945, plaintiff went to Berger's office and discussed with him the matter of "getting a site for the purpose of manufacturing hard dolls and soft dolls \* \* \* and paying more money"; also that on September 21, 1945, plaintiff again visited Berger's office, saying "he was looking around at sites with her [Mrs. McMahan]", and indicated that before he put up any more money it should be on conditions that would assure its return to him. Shortly thereafter, on October 26, 1945, plaintiff filed the original complaint in the instant action.

[2] The foregoing is a brief summary of the factual situation. Additional facts



will be set forth hereinafter. We rarely have read a record in which there was so much conflicting testimony, and we can well understand the extremely difficult task that confronted the trial judge, upon whom rested the duty and responsibility of weighing this mass of confusing and contradictory testimony. Fortunately for us, we do not have to weigh and evaluate the conflicting testimony as that duty is one exclusively for the trial judge. As an appellate tribunal we are merely concerned in determining whether there is substantial evidence to support the findings of the trial court.

[3] Before discussing the major contentions of appellant, we quote appellant's statement that "although we respectfully disagree with the learned trial judge's finding 4 that none of Mrs. McMahan's 'representations, statements or promises \* \* \* were false or fraudulent,' we make no appellate attack upon that finding." This is an admission that the record supports the finding that there was no fraud or misrepresentation on the part of Mrs. McMahan.

The first contention of appellant is that the evidence is insufficient to support Findings 6 and 12, which are in substance as follows: (6) That the Atherton property was acquired by Mrs. McMahan as her sole property with her separate funds and that neither the appellant nor the copartnership acquired or has any interest therein; (12) that said real property was conveyed to Mrs. McMahan as an individual by deed absolute and unconditional. Appellant argues that since the deed was attached to and referred to in the contract providing for the one-third interest in the partnership such deed was conditional and performance was a condition subsequent. Appellant cites the case of *Downing v. Rademacher*, 133 Cal. 220, 65 P. 385, 85 Am.St.Rep. 160. In that case, concurrently with a grant deed of mining land to Downing, he gave a written agreement to Rademacher whereunder a promise was made to pay Rademacher a royalty of one-third of the proceeds of mining gold on the land. Subsequently, Downing did not mine the land and contended that the deed to him

was not affected by his failure to perform by mining the land. The Supreme Court in ruling against Downing's contention stated, 133 Cal. at page 224, 65 P. at page 386: "The deed and the agreement constitute one instrument, and must be read as though each referred to the other and expressly incorporated its terms. And, in legal effect, what do they amount to? As between the parties, at all events, there is no such magic in a conveyance of a title in fee, which can be used to do an owner out of his property. Under this contract and deed all Downing acquired was the right to work the mine in his own way on condition that he deliver to Rademacher one-third of the valuable minerals obtained. The conveyance was, in effect, subject to this condition."

Appellant also cites *Richter v. Richter*, 111 Ind. 456, 459, 12 N.E. 698, 699, where the court said: "If from the nature of the acts to be performed by the grantee, and the time required for their performance, it is evidently the intention of the parties that the estate shall be held and enjoyed on condition that the grantee perform the acts specified, then the estate is upon condition. This is expressly so when the grantor has reserved no other effectual remedy for the enforcement of performance on the part of the grantee."

[4] There is no question as to the correctness of the rule of the cases cited by appellant, but it plainly appears in both of those cases that the consideration for the deed was the agreement to perform the service. The difficulty with appellant's position in the instant case is that the court found upon sufficient evidence that for the payment of \$60,000 appellant obtained a one-third interest in the profits of a limited partnership, that the real property was acquired by Mrs. McMahan with her own funds, and that the said property was conveyed to Mrs. McMahan as an individual by deed absolute. If we were compelled by the record to conclude that the evidence could be given no other construction than the one given it by appellant, we might agree with appellant's contention. But there is in the record evidence from which it is fairly inferable that

appellant paid Mrs. McMahan \$60,000 for a one-third interest in the profits of a limited partnership, and that the Atherton property was not intended to and did not become a part of the partnership assets, and therefore the rules enunciated in the cases cited by appellant do not apply.

[5,6] Appellant argues that the evidence of Berger and a witness, Fry, as to the negotiations between appellant and Mrs. McMahan, including the successive drafts of the contract, was an effort, by contradiction, to destroy the contract provision about the deed in the final draft, and was, therefore, an effort by parol evidence to change the written contract of the parties. But the true consideration for an agreement may always be shown. Code Civ.Proc. § 1962. The agreement in the instant case, taken as a whole, is not so free from ambiguity as to exclude parol evidence to explain it, for, as stated in the last paragraph of section 1856 of the Code of Civil Procedure," \* \* \* this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section 1860, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties." And, as stated in section 1860 of the Code of Civil Procedure: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." The following language in *Balfour v. Fresno Canal & Irrigation Co.*, 109 Cal. 221, at pages 225-226, 41 P. 876, 877, is applicable: "The true interpretation of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps a corollary, to the general rule above stated, that when any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circum-

stances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself." *Sandford v. Newark & H. R. R. Co.*, 37 N.J.L. 1, 3. For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown. Code Civ.Proc. §§ 1860, 1861; *City of Atlanta v. Schmeltzer* [83 Ga. 609], 10 S.E. 543, 545; *Keller v. Webb*, 125 Mass. 88 [28 Am.Rep. 209]; *Long v. Long*, 44 Mo.App. 141; *Swett v. Shumway*, 102 Mass. 365 [3 Am.Rep. 471]."

[7,8] We therefore are unable to agree with appellant's contention that the findings that the Atherton property was acquired by Mrs. McMahan as her sole property with her separate funds and that neither appellant nor the partnership has any interest therein lacks support in the record. There was a finding that there was no fraud or misrepresentation, which finding is not attacked by appellant, and we believe that the general rule, as stated by this court in *Borden v. Boyvin*, 55 Cal. App.2d 432, at page 436, 130 P.2d 718, 720, is applicable: "It is the rule in this state that a deed unaffected by fraud in its inception conveys title, and is not rendered void or subject to rescission on account of a failure of consideration. What is done after its conveyance has no effect upon its validity where performance is not required as a condition. *Lavely v. None-maker*, 212 Cal. 380, 298 P. 976; *Lawrence v. Gayetty*, supra [78 Cal. 126, 20 P. 382, 12 Am.St.Rep. 29]; 26 C.J.S., Deeds, § 47, p. 250; 9 Cal.Jur. 141. The rule is based upon the idea of the finality of a deed. The remedy for the breach of a personal covenant not amounting to a condition is generally an action for damages. In *Johnson v. Clark*, 7 Cal.2d 529, 61 P.2d 767, an exception is noticed where the grantee promises to support the grantor; \* \* \*"



As his second specification of error appellant contends that the court erred in making only the immaterial finding (10), "That there was ample consideration for the payments made by said plaintiff to Valerie Bernhard McMahan in that (a) for the sum of \$60,000.00 plaintiff obtained a one-third interest in the profits of a Limited Partnership and became a limited partner therein, and (b) for the sum of \$17,400.00 plaintiff became the creditor of Valerie Bernhard McMahan in the sum of \$2,000.00 for money loaned to her to liquidate some of her debts, and received the promissory note of said Valerie Bernhard McMahan in the sum of \$15,400.00 dated January 15, 1945," and in not making the material and controlling finding that she never manufactured or sold any soft dolls, that she failed to perform and therefore the consideration failed. Respondent contends that Mrs. McMahan gave exactly what was bargained for, a one-third interest in the proceeds of the manufacture and sale of the soft dolls and books, that the creation of a legal relation is a valid consideration and the courts will not remake for the parties a contract which happens to result in a bad bargain. He further argues that the obligation to manufacture and sell came *after* the agreement of limited partnership was delivered out of escrow and arises only out of that agreement to form the partnership as a method of combining the interests of the parties and not out of the original arrangement by which appellant became a one-third owner of the proceeds of the manufacture and sale. The latter was an *executed* contract, he argues, to which the rule providing for the rescission of contracts for failure of consideration does not apply where performance is not required as a condition.

It must be borne in mind that the trial court found that the Atherton property was acquired by Mrs. McMahan with her separate funds and that neither appellant nor the partnership acquired any interest therein, and we have determined that such finding is supported by the record. Finding 10 finds that there was ample consideration for the payments made by appellant to

Mrs. McMahan. It is apparent that the trial judge reached the conclusion that the appellant, for the money paid by him to Mrs. McMahan, gained the right to one-third of the profits which would be made from the manufacture and sale of the soft dolls. While it is true that no soft dolls were manufactured, it is fairly inferable from the evidence that Mrs. McMahan made an effort to secure the necessary materials and to secure a site for manufacturing, but that due to shortage of materials and lack of financing she was unable to do so before appellant commenced the action against her. The partnership agreement was between appellant and Mrs. McMahan and it hardly can be held as a matter of law that the entire obligation of proceeding with the manufacturing of the soft dolls rested upon Mrs. McMahan.

[9, 10] While it is true that no soft dolls were ever manufactured, in view of the efforts which the record shows that Mrs. McMahan put forth, considering the difficulties that were encountered by her, we do not believe that it can be held as a matter of law upon the record here that there was a total failure of consideration at the time that the action was commenced by appellant. While no such finding was made by the trial court, we believe it is necessarily included in the portion of Finding 10 which states that there was ample consideration for the payments made by appellant to Mrs. McMahan. Appellant proposed no amendments to the findings prepared by respondent and made no objection to them, and while his failure to do so will not cure a failure to find on a material issue, yet appellant may not raise for the first time on appeal the question of uncertainty or that the findings are not sufficiently explicit. *Moore v. Craig*, 5 Cal. App.2d 283, 286, 42 P.2d 647.

Appellant's third major contention is that the evidence is insufficient to support Finding 7 that appellant and Mrs. McMahan were not mutually mistaken in believing that the aforesaid real property could be used for manufacturing purposes.

[11] Appellant quotes from certain portions of the deposition of Mrs. McMahan



indicating that she did not know that the commercial activity of manufacturing dolls could not be carried on on the Atherton property until she received a letter from the city attorney. But appellant overlooks the fact that in his deposition, which was introduced in evidence, is testimony that he knew that Atherton was "a restricted district" and that Atherton was "definitely a residence property." There was also testimony of the witnesses Fry and Berger to the effect that appellant knew the Atherton property could not be used for manufacturing. The weight of the conflicting evidence was a matter for the trial judge to determine, and we cannot hold that as a matter of law the evidence was insufficient to support the said finding.

[12] Appellant contends that the trial court erred prejudicially in striking out his Exhibits 22 and 23. These were excerpts from the answer to the original complaint, verified by Mrs. McMahan, and the answer to the first amended complaint, verified by her attorney. These statements were made in Paragraph VI of the answer in reply to an allegation of scienter in support of the appellant's allegation of fraud. They were that Mrs. McMahan "\* \* \* denies that said estate located in Atherton, San Mateo County, was not a suitable site for said business, save for the ordinances prohibiting said manufacture of which both plaintiff and defendant were equally ignorant and misinformed at the time of the making of said agreement dated December 2, 1944" and that "she did not know and did not learn until April, 1945, that the manufacture of dolls was prohibited by the city ordinances of the City of Atherton, when she was first advised to that effect by a letter from the City Attorney of Atherton." The exhibits were offered by appellant as tending to prove the second count as admissions against interest, and were then admitted by the court. During the submission of the case on trial briefs, however, the court granted respondent's motion to strike them.

[13] The trial court erred in striking out said exhibits, as the statements or admissions of a party made in another plead-

ing in the same action, like any other admissions of a party, are admissible either as admissions against interest or for the purpose of impeaching the testimony of a party who has been a witness. The fact that the pleading in which the purported admission was made has been superseded by a later pleading and the further fact that the issues in the action are determined by the final pleadings do not change the rule as to the admissibility of such pleading containing the admission. The true rule is clearly stated in *Miller v. Lee*, 66 Cal.App.2d 778, at page 785, 153 P.2d 190, 194, as follows: "The court did not err in its rulings on the admission of evidence. Appellants complain particularly of the ruling permitting the introduction in evidence of the amendments to the answer to the first amended complaint, claiming that these amendments were superseded by later pleadings. Appellants testified at the trial that they had had nothing to do with the issuance of the criminal complaint and knew nothing about it. In their verified amendments to the answer to the first amended complaint appellants admitted that they had consulted a lawyer before Lee swore to the criminal complaint, giving him the facts in detail in such manner as to indicate their purpose to have plaintiff arrested. These amendments were clearly admissible not only as containing admissions by appellants but also for the purpose of impeaching their testimony."

However, as we have hereinbefore pointed out, there is ample evidence in the record to support a finding that appellant was aware of the fact that a manufacturing business could not be carried on in Atherton, and there is also evidence that Mrs. McMahan was aware of restrictions existing. In view of this evidence and of the other findings made by the court, we do not believe that the error of the court in striking out the exhibits was prejudicial error, as it is difficult to believe that appellant could have believed that a manufacturing plant of the magnitude contemplated by him could have been constructed and operated in the exclusive residential Town of Atherton.

Appellant's final contention is that the trial court erred in failing to make any finding with respect to or consequent upon dissolution of the partnership. Appellant states that this contention is "alternative" and "need not be reached if" appellant is "held entitled to restitution under any one of" his other contentions. Finding 14, which appellant contends "is not a finding at all but simply a refusal to find," is as follows: "That no issue is raised by the pleadings herein with respect to plaintiff's right to a dissolution of the Limited Partnership, or for an accounting or for the appointment of a receiver for such purpose, nor is there any claim for any such relief contained in plaintiff's supplemental and second amended complaint."

Appellant argues that the fourth count of the amended and supplemental complaint is purely a partnership dissolution count and that the fact of dissolution through the death of Mrs. McMahan stands admitted by the pleadings. Appellant asserts that dissolution having occurred, only the matter of liquidation is left, and in the liquidation appellant is clearly entitled to the Atherton land.

[14] While it is ordinarily true that the death of a partner causes the dissolution of a partnership, Corp.Code, sec. 15031, yet if the partnership agreement so provides, the business may be continued after the death of a member. 20 Cal.Jur. 794, § 93; *Thompson v. Gibb*, 1 Cal.Unrep.Cas. 173. Here the agreement provided that in the event of the death of the general partner (Mrs. McMahan) "prior to the dissolution of the said Limited Partnership, the said Limited Partnership shall continue \* \* \* and the heirs, executors, trustees or assigns of the said General Partner, shall be vested with all of the rights, benefits and privileges of the said General Partner."

[15] The complaint filed by appellant, as stated in appellant's brief, sought restitution of the Atherton property under four counts. We are unable to agree with appellant's contention that Count IV is purely a partnership dissolution count. It does not allege the dissolution of the partner-

ship nor does the prayer of the complaint seek such dissolution. After re-alleging the allegations of the first count it alleges that the sole contribution to the partnership consisted of the money contributed by appellant, that the Atherton property was purchased with said money, and that the respondent administrator took possession of the property upon Mrs. McMahan's death and has since detained same from appellant. We believe that the trial court correctly determined that no issue was raised by the pleadings with respect to appellant's right to a dissolution of the limited partnership.

In view of the foregoing, the judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER, J., dissenting.



97 Cal.App.2d 733

PEOPLE v. GARCIA.

Cr. 2605.

District Court of Appeal, First District,  
Division 2, California.

May 25, 1950.

Ray Garcia was convicted in the Superior Court for the City and County of San Francisco, Edward P. Murphy, J., of a violation of Deadly Weapons Act and he appealed. The District Court of Appeal, Nourse, P. J., held that the Act is not unconstitutional that variance between information charging ownership and possession of such a weapon and proof which failed to show ownership was not prejudicial to defendant and that federal Constitution did not preclude use by state of evidence obtained in search of automobile without a warrant.

Judgment and order denying a new trial affirmed.

#### 1. Weapons ☞3

The statute making it a felony for any person who has been previously convicted

of a felony to own or possess a deadly weapon is a proper exercise of police power of the state and does not violate state or federal constitutional provisions guaranteeing the right to keep and bear arms. Gen. Laws, Act 1970, Const. art. 1, § 1; U.S. C.A.Const.Amend. 2.

## 2. Criminal law ⚖1167(1)

Proof of possession alone was sufficient to support conviction under information charging ownership and possession of a deadly weapon in violation of statute and variance between information and proof which failed to show ownership was not prejudicial to defendant, since statute is in the disjunctive making it a felony for any person who has been previously convicted of a felony to own or possess a deadly weapon. Gen.Laws, Act 1970.

## 3. Searches and seizures ⚖7(2)

The federal constitutional provision prohibiting unreasonable searches and seizures does not affect the right of state to use evidence obtained in such a manner.

## 4. Searches and seizures ⚖7(2)

Provision of federal Constitution prohibiting unreasonable searches and seizures did not preclude the state in prosecution for violation of a state statute from using evidence obtained in search of automobile without a warrant.

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Noal R. Gray, San Francisco, for appellant.

Fred N. Howser, Attorney General, David K. Lener, Deputy Attorney General, Edmund G. Brown, District Attorney, Francis Mayer, Assistant District Attorney, San Francisco, for respondent.

NOURSE, Presiding Justice.

Defendant was tried to a jury and convicted of a violation of the Deadly Weapons Act, Stats.1923, p. 695, Deering's Penal Code Appendix p. 774, Gen.Laws, Art. 1970. The charge of a prior conviction of a felony and release on parole was admitted.

The evidence showed that defendant and a companion were driving a car about the streets of San Francisco at about 11 p. m.

and were followed by two members of the police force whose suspicions were aroused and who stopped the car for investigation. As one of the officers opened the door of the car in which defendant was riding he saw defendant slip a gun under the seat. When ordered out of the car the defendant said: "Here I go back again." "Back to Quentin." When asked the meaning of those remarks the defendant explained that he was on parole. The Deadly Weapons Act declares it a felony for any person to have in his possession or control a deadly weapon when such person had been previously convicted of a felony.

[1] Three grounds are urged for a reversal of the judgment. First, that under section 1 of article I of the state Constitution all men are guaranteed the right to bear arms for the protection of their life, liberty and property. Hence it is said the penal statute is unconstitutional. It has been held that the statute is a proper exercise of the police power of the State enacted for the safety and general welfare of society. *People v. Cordero*, 50 Cal.App.2d 146, 122 P.2d 648. It has also been held that a similar statute relating to the possession of weapons by those confined in a state prison did not violate section 1 of article I of the Constitution nor the Second Amendment to the federal Constitution which gives a citizen the right to keep and bear arms. *People v. Wells*, 68 Cal.App.2d 476, 156 P.2d 979.

[2] Second, that there is a variance between information and proof in that it was charged that defendant did "own and have in his possession" such a weapon and there was no proof of ownership. The statute is in the disjunctive reading, "own or have in his possession." Since the proof of possession was complete the defendant was not prejudiced by the wording of the information, and proof of possession alone is sufficient to support the judgment. *People v. Gonzales*, 72 Cal.App. 626, 237 P. 812.

[3, 4] Finally, it is argued that defendant was subjected to an unconstitutional search and seizure when the officers stopped him without warrant and took the gun from his possession. Reliance is made on



Byars v. United States, 273 U.S. 28, 47 S. Ct. 248, 71 L.Ed. 520. That case is typical of those following the federal rule. But the authorities are in accord that the federal Constitution does not affect the right of the State to use evidence seized in this manner. People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383; People v. Gonzales, 20 Cal.2d 165, 124 P.2d 44.

We should note that counsel for appellant did not try the case in the superior court. He appears here on assignment of this court because appellant was unable to procure counsel. We express our appreciation of his voluntary efforts on behalf of appellant.

The judgment and the order denying a new trial are each affirmed.

GOODELL and DOOLING, JJ., concur.



97 Cal.App.2d 803

**SCHUSTER v. BOWEN.**

Civ. 4018.

District Court of Appeal, Fourth District,  
California.

May 26, 1950.

H. L. Schuster sued Donald Bowen to recover money paid to defendant by check signed by plaintiff in blank, in order to protect defendant in dealings between plaintiff and defendant, and filled in and cashed by defendant. The Superior Court of Kern County, Warren Stockton, J., rendered a judgment adverse to plaintiff and plaintiff appealed. The District Court of Appeal, Shepard, J., pro tem., held that evidence justified refusal of trial court to find that defendant did not have authority to fill in amount of \$6,850, and that whether plaintiff intended check to be retained for use only while plaintiff was away on a trip, or whether check was to be retained for use during time overlapping financial transactions be-

tween plaintiff and defendant were unsettled, was for trial court as trier of facts.

Judgment affirmed.

**1. Frauds, statute of** ~~C~~158(1)

**Money received** ~~C~~18(1)

In action to recover money paid to defendant by check signed by plaintiff in blank, in order to protect defendant in dealings between plaintiff and defendant, and filled in and cashed by defendant, plaintiff had burden of proving that check had been filled in by defendant for an excessive amount and contrary to plaintiff's instruction, and that an agreement whereunder plaintiff promised defendant a specified sum of money in case plaintiff sold farm plaintiff and defendant were to operate together, was invalid under statute of frauds as contended by plaintiff. Civ.Code, §§ 1624, 3095.

**2. Appeal and error** ~~C~~931(1), 1012(1)

On appeal evidence is not weighed and court views the proof most favorable to respondent.

**3. Bills and notes** ~~C~~60

A person is not forbidden by law from giving a blank check coupled with general authority to complete check. Civ.Code, § 3095.

**4. Money received** ~~C~~18(1)

If a person gives a blank check coupled with general authority to complete check, and if after its use, maker seeks to recover, burden is on maker to show that payee was guilty of fraud vitiating gift. Civ.Code, § 3095.

**5. Money received** ~~C~~18(3)

In action to recover money paid to defendant by check signed by plaintiff in blank, in order to protect defendant in dealings between plaintiff and defendant, and filled in and cashed by defendant, evidence justified finding that defendant was not guilty of fraud in filling in amount of \$5,000 as part of total of check, which defendant testified plaintiff had promised to pay defendant if plaintiff sold farm the parties had agreed to operate together, and justified refusal of trial court to find that defendant did not have authority to fill in amount of \$6850. Civ.Code, § 3095.

**6. Appeal and error** ⇨1008(1)

In action to recover money paid to defendant by check signed by plaintiff in blank just before plaintiff went on a trip, and given in order to protect defendant in dealings with plaintiff, whether plaintiff intended check to be retained for use only while plaintiff was away on trip, or whether check was to be retained for use during time overlapping financial transactions between plaintiff and defendant were unsettled, was for trial court as trier of facts under the evidence. Civ.Code, § 3095.

**7. Bills and notes** ⇨60

A blank in a negotiable instrument must be completed within a reasonable time. Civ.Code, § 3095.

**8. Appeal and error** ⇨1010(1)

Determination of trial court as to whether blank in negotiable instrument was filled in in reasonable time will not be disturbed on appeal if sustained by substantial evidence. Civ.Code, § 3095.

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Dorsey, Campbell & Bultman, Bakersfield, for appellant.

Schmidt & Catalano, Bakersfield, for respondent.

SHEPARD, Justice pro tem.

Action to recover money paid to defendant by check signed in blank and filled in by defendant.

Defendant, in the years 1945 and 1946, acted as employee, manager, joint operator and financial supporter of certain farm properties of plaintiff. Plaintiff at various times became indebted to defendant for unpaid wages, money advanced by defendant to plaintiff for farm operations of plaintiff, money loaned, crop shares, and farm machinery belonging to defendant and sold by plaintiff for his own account. Partial payments were made from time to time but a complete and final settlement had not been made up to the time the event occurred upon which this action is based.

The first part of July, 1946, plaintiff went on a fishing trip and before leaving said to defendant: "I will sign a blank check and

give it to you for protection in our dealings."

Plaintiff did sign the check and handed it to defendant *without any other direction* as to what amount should be filled in. Defendant laid the check away and nothing further was said about it until after June 30, 1947, on which date defendant filled it in for \$6850 and cashed it at plaintiff's bank.

Plaintiff sued to recover the full amount of the check, contending at the trial that the check had been stolen and also contending that it had been filled in for an excessive amount and that it had not been cashed within a reasonable time. These issues were all decided against plaintiff by the trial court and judgment was rendered for defendant.

On appeal plaintiff urges only the two points last above mentioned, that is, plaintiff contends that the evidence conclusively shows that the check was filled in contrary to and in excess of the instructions of the maker and that an unreasonable lapse of time was allowed to expire before the check was cashed.

In order to better understand the contentions of the parties a brief résumé of the major phases of the financial transactions of the parties is desirable. Defendant started work for plaintiff 3 February, 1945, at \$200 per month. During the following 2 years he loaned \$3000 at one time and \$3600 at another time to plaintiff. He made advances for labor in the total amount of \$8000 or \$9000. His own wages were at times allowed to accumulate unpaid. He had a joint interest with plaintiff in 80 acres of potatoes which potato crop plaintiff sold for his own account creating a credit in favor of defendant thereby in the amount of \$4500. He had a joint interest with plaintiff in the corn raised on the same 80 acres. He testified the corn was in the amount of 104 tons and was of a value of \$62 a ton or \$6448, and that the deductible expenses left a net value on the corn crop of \$3700, making \$1850 defendant's share. Plaintiff sold this corn for his own account and claimed that there were in fact only 84 tons and that not all of it was sold for \$62 a ton. Plaintiff sold for his own account certain farm

machinery belonging to defendant. The value of defendant's net interest therein was \$6375. Defendant claimed that at one time he made an advance of several hundred dollars for plaintiff's personal expense on a pleasure trip. In 1946, plaintiff and defendant agreed that in 1947, they would farm, on a 50-50 basis, the 320 acres they were then operating. Some months later a discussion was had between them relative the possibility that plaintiff might sell this acreage. Defendant testified that plaintiff promised to pay defendant the sum of \$5000 if the plaintiff made the sale. This apparently was intended to compensate defendant for the termination of the agreement to farm this acreage in 1947 as a joint venture or partnership. Defendant testified this promise was repeated on other occasions both in the fall of 1946 and in the spring of 1947. There is some circumstantial corroboration of parts of defendant's description of this transaction. Plaintiff denies the promise. Plaintiff did sell the farm in October, 1946. All details of the sale of farm machinery to the buyer of the acreage were not completed until early in 1947. This was the machinery in which defendant had an interest of \$6375, and which plaintiff sold for his own account. About May or June of 1947, the plaintiff stated to defendant he had been offered \$62 a ton for the corn, was going to Bakersfield to see about the sale, and would be back later to settle with defendant. He did not return and after defendant had waited some weeks he became impatient for a settlement, added together the \$5000 promised for the termination of the 1947 joint venture farm agreement, and the \$1850 he felt was his share of the corn, making a total of \$6850, filled the check in for that sum and cashed it.

Taking first the plaintiff's contention that the evidence conclusively proves that the defendant filled the check in contrary to the maker's instructions and for an excessive amount.

Civil Code Section 3095 reads as follows: "Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein.

And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

[1,2] The burden of proof in this case is on the plaintiff. "On appeal the evidence is not weighed but the court views the proof most favorable to respondent." *Morrison v. Willhoit*, 62 Cal.App.2d 830, 836-838, 145 P.2d 707, 710; *Estate of Gillett*, 73 Cal.App.2d 588, 596-597-598, 166 P.2d 870. Since there was no agreement that any specific sum was to be filled in the authority given was general in respect to the right to fill the check in to protect defendant in the dealings of plaintiff and defendant. *Davidson v. Lanier*, 71 U.S. 447, 18 L.Ed. 377. The contention is made that the \$5000 promised in case the plaintiff sold the farm is without consideration since the agreement to farm on a 50-50 basis in 1947 was not to be performed in one year and was therefore void under the provisions of Civil Code sec. 1624. Again, it must be remembered that the burden of proof was on the plaintiff to show the invalidity of defendant's agreement. *Estate of Gillett*, supra. No attempt was made by plaintiff to question the defendant on whether or not he had foregone or been prevented from the securing of other farm arrangements, whether he had started financial arrangements for the 1947 farming, or what he had done relative the 1947 agreement. There is some indication, in any event, of upset plans, even though we disregarded the plaintiff's burden, because defendant's farm machinery was sold to the new buyer under a new arrangement.



[3,4] Fundamentally, however, the law does not forbid a man to give a blank check and couple it with general authority. If, after its use, the maker seeks to recover, it is our view that the burden should be on the giver to show that the payee was guilty of some sort of fraud vitiating the gift. In this connection it is again worth noting that our courts have consistently held that the statute of frauds is a shield and not a sword. *Wilson v. Bailey*, 8 Cal.2d 416, 422, 65 P.2d 770.

[5] We cannot say, under the evidence that the trial court was compelled to find defendant guilty of fraud in using the \$5000 item as a part of the total of the check and from an examination of the entire case we conclude that the evidence is sufficient to support the court's refusal to find that the defendant did not have authority to fill in the amount of the check as written.

On the subject of defendant having waited an unreasonable length of time, we again are confronted with the rule that evidence must be construed most strongly in favor of the judgment of the trial court. *Estate of Gillett*, supra, 73 Cal.App.2d at page 598, 166 P.2d 870.

[6-8] In the case at bar we have a check given "for your protection in our dealings". The giver may have had in mind "While I am away on my fishing trip" but the evidence does not show that, and the determination of what was intended was one for the trial court to make. The parties were in a series of overlapping financial transactions, a part of which were still uncompleted when the check was finally cashed. From the existence of these continuing financial relations the trial court may justifiably have believed that the check was to be retained for use during the time that these financial relations remained unsettled. "A blank in a negotiable instrument must be completed within a reasonable time, sec. 3095, Civ.Code. The determination of the question of what is a reasonable time depends upon the facts of each particular case \* \* \* and the trial court's determination \* \* \* will not be disturbed on appeal if there is sub-

stantial evidence to sustain such finding. \* \* \*" *Smith v. Lagerstrom*, 34 Cal. 2d 858, 861, 215 P.2d 450, 452.

We conclude that under the peculiar circumstances of this case the trial court was justified in refusing to find that the check was retained for an unreasonable length of time.

The judgment is affirmed.

GRIFFIN, Acting P. J., and MUSSELL, J., concur.



97 Cal.App.2d 875

CASEY v. CASEY (BELL, Intervener).

CASEY v. CASEY et ux. (BELL, intervener).  
Civ. 14166.

District Court of Appeal, First District,  
Division 2, California.  
June 5, 1950.

Actions by Thurman G. Casey against Minnie Casey and by Minnie Casey against Thurman G. Casey and Nell Casey, his wife. Minnie filed a cross-complaint in the action instituted by Thurman. Myrtle Bell, a sister of the parties, intervened in both actions, which were consolidated, claiming a partial remainder interest after Minnie's death. The Superior Court, Alameda County, O. D. Hamlin, J., entered a judgment deciding and ordering that Thurman owned the apartment house subject to a life estate in Minnie, that she recover the possession of the premises from him, that he be enjoined from interfering with her rights, that he was not entitled to an accounting for rentals received by her or to the rental value of the apartment occupied by her, but that she recover certain rentals received by him and he appealed. The District Court of Appeal, held that where decedent conveyed an apartment to her brother by simple grant deed delivered to him and recorded and no consideration was stated therein and none was given and brother was in confidential relation to de-

ceased, declarations of the decedent both prior and subsequent to the grant were admissible to show the intent or state of mind of the deceased and on the issue of whether the conveyance was an outright gift to the brother.

Judgment affirmed.

1. Evidence ⇨269(2)

When intent is a material element of a disputed fact, declarations of a decedent made after, as well as before, an alleged act that indicate the intent with which he performed the act are admissible as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving.

2. Trusts ⇨43(1)

If the owner of property transfers it inter vivos to another person by a written instrument in which it is not declared that transferee is to take property for his own benefit or that he is to hold it in trust, extrinsic evidence may be admitted to show that he was intended to hold property in trust either for transferor or for a third party.

3. Evidence ⇨269(3)

Where decedent conveyed apartment to brother by simple grant deed delivered to him and recorded and no consideration was stated therein and none was given and brother was in confidential relation to deceased, declarations of decedent both prior and subsequent to the grant were admissible to show intent or state of mind of deceased and on the issue of whether conveyance was an outright gift to brother, or in trust for decedent and her sister during their lives.

4. Trusts ⇨42

Where decedent conveyed apartment to brother by simple grant deed delivered to him and recorded and no consideration was stated therein and none was given and brother was in a confidential relation to deceased, testimony as to declarations of deceased prior to the grant to the effect that she intended to give brother a deed with understanding that he would take care of property and that deceased's sister live there and have an income therefrom for life, was admissible to prove that the

deed was actually given with such understanding.

5. Evidence ⇨269(1)

The doctrine that declarations of intent to do an act are admissible to prove that act thereafter was done, is fully accepted in California.

6. Trusts ⇨44(1)

In action presenting question of whether property was conveyed in trust for decedent and her sister during their lives or as an outright gift to decedent's brother, in which evidence as to declarations of deceased, considered solely with respect to her state of mind together with other circumstantial evidence, clearly supported finding of trial court that deceased's sister was to have life interest in property, admission of such evidence under the rule that the declarations of intent to do an act are admissible to prove that the act thereafter was done, even if erroneous, was not prejudicial, since the existence of an express trust may be proved by the circumstances.

7. Evidence ⇨145

Ordinarily, remoteness affects the weight of evidence rather than its admissibility and the determination of the question of whether evidence is or is not too remote is for the trial court which is clothed with wide discretion in such regard.

8. Evidence ⇨145

In action presenting question of whether property was conveyed in trust for decedent and her sister during their lives or as an outright gift to decedent's brother, where decedent conveyed apartment to brother by simple grant deed delivered to him and recorded and no consideration was stated therein and none was given and brother was in confidential relation with deceased, admission of deceased's expressions concerning her intentions, made to other persons than the brother more than one or two years prior to the execution of the deed, was not an abuse of discretion.

9. Trusts ⇨96

Where decedent conveyed apartment to brother by simple grant deed delivered to him and recorded but no consideration

was stated therein and none was given, and brother was in confidential relation to deceased, and accepted deed with the knowledge and understanding that the deceased and her sister should have a beneficial life interest in the property, brother's subsequent ouster of sister and assumption of absolute ownership in contravention of the trust upon which he held premises constituted the fraud upon which a constructive trust arose in favor of the sister.

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Frederick J. Schoeneman, John E. Willard, Oakland, for appellants.

Franklin C. Stark, Carl E. Simon, Jr., Oakland (Stark & Champlin, Oakland, of counsel), for respondent.

#### PER CURIAM.

This is an appeal by Thurman G. Casey from a judgment deciding and ordering in substance that appellant owns the disputed rooming and apartment house at 591 24th Street in the city of Oakland subject to a life estate in his sister Minnie Casey, that she recover the possession of the premises from him, that he be enjoined from interfering with her rights, that he is not entitled to an accounting for rentals received by her or to the rental value of an apartment occupied by her, but that she recover a certain amount for rentals received by him and for costs. Separate actions were instituted by Thurman and Minnie against each other and Minnie filed a cross-complaint in the action instituted by Thurman. Myrtle Bell, a sister of the parties, intervened in both actions, which were consolidated, claiming a partial remainder interest after Minnie's death, but she did not appeal from the judgment which ordered that she take nothing. She is not concerned in this appeal. The parties will hereinafter be indicated by their first names only.

On April 23, 1942, Lillian Barnard, a widowed sister of the parties, conveyed the apartment house to Thurman by simple grant deed delivered to him and recorded. No consideration is stated and it is conceded that none was given. At the time of the transfer Lillian Barnard, herein

further called Lillian, and her sister Minnie were living on the premises which Lillian had obtained from her husband Charles Barnard, at his death in August 1931. In 1929 when Charles was an invalid and Lillian in frail health, Minnie at her request gave up her millinery business in Pleasanton, California and together with the mother of the parties who had lived with her moved to the apartment house. From then on she helped to care for Charles, mother Casey and Lillian until their deaths respectively in 1931, 1937 and 1945. Minnie had a little income of her own, some small investments; Lillian's source of income was the apartment house. They shared the food bills and Minnie paid \$5.00 a month on the utilities, but otherwise paid no rent. She also assisted in the care of the rented rooms and apartments. The relation of the two sisters was very close. Whether the property was conveyed in trust for them during their lives or as an outright gift to Thurman was the main point in dispute and the sole one remaining on appeal.

Thurman was the only one of their brothers living in the bay area. They considered him as wealthy and the "business head" of the family. He visited Lillian regularly and often, and helped her out in many things. He paid the taxes for the sisters with money they gave him. Lillian leaned on him for help and business guidance, increasingly so after the death of her husband, and had implicit trust in him. The fact that Lillian gave Thurman the deed to the property did not change the factual situation. The sisters continued to live in the house, to rent rooms and apartments and to give service to the tenants; Lillian collected the rentals and returned them in her own income tax returns to the knowledge of Thurman; what she saved from the rentals she placed in a bank account in the joint names of herself and Thurman. At her death in 1945 Thurman paid the funeral expenses and other bills from it and divided the balance up between the surviving brothers and sisters. Minnie remained in possession of the property and continued its management after Lillian's death. She paid all expenses except the



property taxes and insurance. She let Thurman know that she had the tax money available but he did not accept it and paid the tax himself. Thurman did not receive any rental or profit before March 1948. Minnie did not account to him. She, not Thurman, paid income tax on the profits of the apartment house. He had no key to the premises and never asked for one; in March, 1948, he obtained one by having a duplicate made of the key of one of the tenants. At this same time he took over the management of the property; handed written notice to the tenants informing them that if they paid rent to Minnie they would have to pay again to him, started collecting rentals, asked for a rental of \$75 a month from Minnie, paid for maintenance and upkeep, put new tenants into the place, changed door knobs, in short acted as if he were entitled to possession. The preceding facts are undisputed and the evidence in that respect is without conflict.

Moreover much testimony of declarations made by Lillian both before and after the transfer, not in the presence of Thurman, was received over objection from Thurman and subject to motion to strike. The declarations were offered for limited purpose only, all of them to show Lillian's state of mind at the time of each declaration for the purpose of inferring her state of mind at the time of the act and those preceding the deed also to show what she intended to do for the purpose of inferring that the intention was carried out. The motion to strike was denied in the judgment. Many witnesses testified to various declarations to the effect that Lillian wished to take care of Minnie and wished her to have the house as a home and the income from it for life; that she had told her wishes to Thurman to whom she would give a deed and who would take care of it, and later that she had deeded it to Thurman "with the understanding" that he would take care of it during her and Minnie's life and that Minnie would have a home and the rentals; that the house was better in the hands of Thurman who was a business man and who could protect them against Lillian's stepdaughter, a

daughter of Charles by a former marriage, who thought herself entitled to have the house that had belonged to her father and who repeatedly had bothered Lillian about her pretended rights; that she thought Minnie a poor business woman and not a good enough fighter to cope with the stepdaughter. Minnie's testimony was to the same effect and moreover among other things that Lillian had always promised her the house; that Lillian had discussed the deeding to Thurman with her both before and after it took place; that they had agreed that it was the best thing to do; that they would be safe and that it would stop the stepdaughter from nagging; that prior to March, 1948, Thurman had never objected to her receiving the rentals nor asked for a portion of them, nor discussed the ownership of the house with her.

Thurman testified that Lillian during one year or more prior to the making of the deed had told him what her intentions were, every time the same; she wanted him to have the property; the day of the deeding she asked him to keep it secret from Minnie who might disagree; from the time of the deed the house was his with no strings attached to it; he could have taken possession of it and have had all the rentals. However on appeal he concedes that Lillian retained a life interest and he does not attack a finding to that effect. There were several discrepancies in his testimony and especially between his testimony at the trial and his prior deposition. With respect to Minnie he testified that after Lillian's death he proposed that she should manage the house for him and that they should agree concerning the division of the rentals; that Minnie accepted this but never accounted or made an agreement and finally in March 1948 definitely refused.

The main contention on appeal is that the trial court erred in admitting over objection the alleged declarations of the grantor because they were hearsay and not admissible under any exception to the hearsay rule. There are recognized exceptions to the hearsay rule which in this state are considered to cover the admissibility of said declarations.

In *O'Dea v. Hibernia Savings & Loan Soc.*, 119 Cal.App. 622, 7 P.2d 318 the question was before us whether parol testimony of declarations of the deceased made after the execution of the instrument were admissible to show whether an order for the transfer of money in a savings bank account to the plaintiff was intended as a gift or only to enable plaintiff to withdraw the amounts necessary for the care of the deceased. It was claimed that such testimony was incompetent as in disparagement of the written document. We held applicable the "well-recognized exception to the rule that, when the intention or state of mind of the alleged donor is involved, evidence of declarations made by him before or after the transaction is admissible though the declarations were not made in the presence of the adverse party."

[1] In the later case of *Whitlow v. Durst*, 20 Cal.2d 523, 127 P.2d 530, 531, Justice Traynor stated the general rule thus: "When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving." It is specifically mentioned in the opinion that the rule is applicable in gift cases. Since then the rule has been applied in two cases, the facts of which are sufficiently like those before us to be in point as direct authorities. In *Katz v. Enos*, 68 Cal.App.2d 266, 156 P.2d 461, decedent had during his stay in a hospital for an operation executed a gift deed of certain real property to his sister. It was found nevertheless that the property was conveyed to the sister in trust for the limited purpose to raise money thereon to pay the expenses of the operation. Division One of this court held that testimony of decedent's attorney as to declarations of decedent after he left the hospital were correctly admitted over objection based among others on the grounds that it was hearsay and offered in disparagement of a deed made by the declarant.

[2] In *Hansen v. Bear Film Co., Inc.*, 28 Cal.2d 154, 168 P.2d 946, 959, decedent had executed an instrument in writing which stated that for value received he transferred and assigned all his right, title and interest in his shares of preferred stock of the Bear Film Company to his mother, reciting that he intended to vest such title absolutely in her. Instrument and stock certificates had been delivered to her and the transfer entered in the stock books of the corporation. It was nevertheless found that the transfer was made upon her express oral promise and agreement that she would hold the stock in trust for decedent to be transferred back to him at his request. Quoting as authority *Whitlow v. Durst*; *supra*, the Supreme Court held that oral and written declarations of ownership of the stock and of the company made by decedent not within the presence or to the proved knowledge of his mother but subsequent to the transfer to her and in derogation to it were correctly admitted in evidence "on the issue of a claimed gift, and also to show the intent or state of mind of (decedent)." The court also quoted section 38, subdivision 3 of the Restatement of Trusts, reading: "If the owner of property transfers it inter vivos to another person by a written instrument in which it is not declared that the transferee is to take the property for his own benefit or that he is to hold it in trust, extrinsic evidence may be admitted to show that he was intended to hold the property in trust either for the transferor or for a third party."

[3] The deed in the present case, which contains nothing more than the mere grant, comes evidently under the above rule. Although the statute of frauds has not been invoked it may be pointed out that even when the requirements of the statute are not complied with the transferee will hold the interest in the realty upon a constructive trust for the intended beneficiary if, as is here the case, the transferee at the time of the transfer was in a confidential relation to the transferor (*Restatement, Trusts*, sec. 45(1) (b); *Cooney v. Glynn*, 157 Cal. 583, 108 P. 506; *Smith v. Lom-*



bard, 201 Cal. 518, 526, 258 P. 55 et seq.; O'Brien v. O'Brien, 50 Cal.App.2d 658, 123 P.2d 877. In this case all the declarations in dispute, both prior and subsequent to the grant, were under the cited authorities admissible to show the intent or state of mind of Lillian and on the issue of the outright gift claimed by Thurman.

[4-6] The testimony as to declarations of Lillian prior to the grant to the effect that she intended to give Thurman a deed with the understanding that he would take care of the property and Minnie live there and have the income the rest of her life seem also admissible to prove that the deed was actually given with such understanding. The doctrine that declarations of intent to do an act are admissible to prove that the act thereafter was done, for which doctrine *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 12 S.Ct. 909, 36 L. Ed. 706 is the leading case, is fully accepted in California. See *People v. Alcalde*, 24 Cal.2d 177, 185, 148 P.2d 627 et seq.; *McBaine Admissibility in California of Declarations of Physical or Mental Condition*, 19 Cal.L.R. at 367 et seq. However we need not rest our decision on that rule of which no application to a situation similar to the one before us has been cited to us; the evidence as to the declaration of Lillian considered solely with respect to her state of mind, together with the other circumstantial evidence stated, so clearly support the findings of the trial court that even if admission of prior declarations under the rule of the *Hillmon* case should have been erroneous here, such error would have been without prejudice. For the proof of a transfer in trust no proof of what was said at the transfer is required. As early as *Gunter v. Janes*, 9 Cal. 643, 655, it was held that the existence of an express trust could be proved by the circumstances. In *Hansen v. Bear Film Co., Inc.*, supra, 28 Cal.2d 154, 168-169, 168 P.2d 946 the finding of an express oral promise and agreement to hold in trust was upheld, solely on inferences from the circumstances, behavior and posterior declarations of transferor and transferee without any indication of what was actually spoken between them. In the present case

such evidence is also satisfactory. The fact that the property deeded was Lillian's only livelihood and that Thurman left her in possession and enjoyment until her death were strong indications of a trust relation, though such was expressly denied by Thurman at the trial. The incredible position taken by him in this respect together with the discrepancies in his testimony justified the trial court in believing Minnie and disbelieving Thurman where their testimony was in conflict. The circumstances and behavior so proved are in harmony with Lillian's intentions as shown by the declarations testified to. The above also disposes of appellant's contention that the decision lacked evidentiary support.

[7,8] Appellant contends that some of the declarations admitted in evidence were too remote in time to be admissible. "Ordinarily remoteness affects the weight of evidence rather than its admissibility. *Jameson v. Tully*, 178 Cal. 380, 173 P. 577. The determination of the question whether evidence is or is not too remote is for the determination of the trial court and it is clothed with wide discretion in this regard. *Estate of Warner*, 167 Cal. 686, 140 P. 583." *Moiola v. Paggi*, 5 Cal.App.2d 279, 281, 42 P.2d 331, 332. Here the court excluded declarations more than one or two years prior to the deed. Thurman testified that during such period Lillian had spoken about her intentions with him, always in the same manner. To admit her expressions to others during that period was no abuse of discretion.

[9] Appellant points out that no fraud of Thurman was found by the court and argues that therefore there can be no constructive trust. The court made findings to the effect that Thurman stood to Lillian in a confidential relation, that he accepted the deed with the knowledge and on the understanding that Lillian and after her Minnie should have the beneficial life interest in the property and that on or about March 1, 1948, he ousted Minnie and assumed absolute ownership in contravention of the trust upon which he held the premises. This is all that is required. "It is the violation of the parole promise



which constitutes the fraud upon which the trust arises." *Cooney v. Glynn*, supra, 157 Cal. at page 587, 108 P. at page 508; *Svistunoff v. Svistunoff*, 94 Cal.App.2d 651, 211 P.2d 352. Moreover it is a matter of indifference whether it be said that Minnie is seeking to enforce a voluntary trust which has been repudiated by the trustee or whether she is seeking to enforce an involuntary trust arising in law from that repudiation. *Bradley Co. v. Bradley*, 165 Cal. 237, 240, 131 P. 750.

Judgment affirmed.



97 Cal.App.2d 836

**ANDERSON v. DOOLITTLE et al.**

Civ. 17508.

District Court of Appeal, Second District,  
Division 1, California.

May 31, 1950.

Action by Orien Haywood Anderson against James A. Doolittle and another, for recovery of treble damages on ground of usurious interest payment on loan. The Superior Court of Los Angeles County, Arnold Praeger, J., denied the named defendant's motion to dissolve an attachment, and named defendant appealed. The District Court of Appeal, Drapeau, J., held that attachment was warranted since action was based upon "implied contract" within attachment statute.

Affirmed.

### 1. Attachment ⇐1

The attachment law is directed principally against debtors. Code Civ.Proc. § 537, subd. 1.

### 2. Contracts ⇐4

An "implied contract" has its foundation in the doctrine of unjust enrichment.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Implied Contract".

### 3. Attachment ⇐6

In action for recovery of treble damages on ground of usurious interest payment on loan, attachment was warranted since action was based upon "implied contract" within attachment statute. Gen. Laws, Act 3757, §§ 1-3; Code Civ.Proc. § 537, subd. 1; Const. art. 20, § 22.

Herman Lewis Bennett, Beverly Hills, for appellant.

Pacht, Warne, Ross & Bernhard, and Rudolph Pacht, Beverly Hills, for respondent.

DRAPEAU, Justice.

This is an action to recover treble damages by reason of an alleged usurious transaction. Sec. 22, Art. XX, Cal. Constitution; secs. 1, 2 and 3, Usury Law, Deering's Gen.Laws, 1944, Act 3757. Plaintiff sued out a writ of attachment. Her affidavit in support thereof averred that defendants were indebted to her upon an implied contract made or payable in this state for the direct payment of money. Defendant Doolittle denied the usury and appeals from the order denying his motion to discharge the attachment.

Briefly, the complaint alleges that defendant Doolittle lent \$5,500 to plaintiff, who executed and delivered her promissory note to him for \$8,500, made payable to one De Rosner, the agent and nominee of said Doolittle. De Rosner assigned the note to Doolittle, who in turn assigned it to defendant Lambourne. That plaintiff within the year paid to defendants the sum of \$3,404.93 as interest on said loan which was in excess of the legal rate.

It is here urged that the attachment was improperly issued because the action is based, not upon contract, "but upon a liability or penalty imposed by law."

Subdivision 1 of section 537, Code of Civil Procedure, permits the issuance of attachment "In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this State, and is not secured \* \* \*."

[1] "The attachment law is directed principally against debtors." 3 Cal.Jur. 410, sec. 8. And the supreme court of this state has held that an action for treble damages for usurious interest partakes of the nature of an action for debt: In *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 619, 254 P. 956, 959, 255 P. 805, 53 A.L.R. 725 the following appears: "While the provision for a special right of action in plaintiff for treble the amount of interest paid is in the nature of a penalty, the context of the act gives it more of the rating of an action for debt and therefore subject to offsets and counterclaims by defendants." Again in *Scott v. Hollingsworth*, 215 Cal. 314, 316, 9 P.2d 836, 837, 82 A.L.R. 995, it was said: "It is true that the causes of action counted upon partake both of the nature of penalties and of debts. They are penalties because meant to punish and deter the usurer. They are debts in that they may be treated as such with respect to set-offs and counterclaims and actions in equity between the parties respecting the transaction. *Haines v. Commercial Mortgage Co.*, supra [200 Cal. 609, 254 P. 956, 255 P. 805, 53 A.L.R. 725]; *Esposti v. Rivers Bros.*, 207 Cal. 570, 279 P. 423."

A case of more recent vintage is that of *Nutzel v. Kozdron*, 64 Cal.App.2d 908, 910, 149 P.2d 411, 412, wherein an appeal was taken from an order vacating an attachment. The affidavit on attachment averred that plaintiff's cause of action against defendants arose from the fact that defendants had forcibly robbed plaintiff of \$9,200 on a certain date. In reversing the order it was held:

"(1) An attachment lies in all cases of an implied contract for the payment of money when the defendant is a non-resident of this state. Section 537, subdivision 2 of the Code of Civil Procedure.

"(2) If a defendant steals money from a plaintiff, an implied contract to repay the money arises. (*Los Angeles Drug Co. v. Superior Court*, 8 Cal.2d 71, 74, 63 P.2d 1124; *Philpott v. Superior Court*, 1 Cal.2d 512, 521 et seq., 36 P.2d 635, 95 A.L.R. 990; *Armstrong v. Kubo Co.*, 88 Cal.App. 331, 335 et seq., 263 P. 365.)"

[2] It is elementary that "implied contract has its foundation in the doctrine of unjust enrichment." *Butler v. Peters*, 62 Mont. 381, 205 P. 247, 249, 26 A.L.R. 562.

[3] Applying the foregoing principles, it would appear that upon payment of the usurious interest by respondent, an implied contract that appellant would respond in treble damages arose in her favor. Therefore the attachment was proper.

The order appealed from is affirmed.

WHITE, P. J., and DORAN, J., concur.



97 Cal.App.2d 770

MISH et al. v. BROCKUS et al.

Civ. 17582.

District Court of Appeal, Second District,  
Division 2, California.

May 26, 1950.

Cecelia E. Mish and husband sued Ella Mae Brockus, Thomas Charles Robbins and another for personal injuries sustained by named plaintiff in an automobile collision. From a judgment of the Superior Court of Los Angeles County, Charles E. Haas, J., for plaintiffs against named defendants notwithstanding a jury's verdicts, such defendants appealed. The District Court of Appeal, Wilson, J., held that the evidence did not sustain plaintiff's allegation of defendant Brockus' willful misconduct in operating the automobile in which plaintiff was riding at the time of the collision and that the jury's verdicts were insufficient, contradictory, and incomprehensible, so that the trial court erred in granting plaintiffs' motion for judgment notwithstanding the verdicts.

Judgment reversed.

#### I. Automobiles ⚡244(20)

In action for injuries to one riding in defendant's automobile, driven by co-defendant, as result of collision with another automobile at street intersection, evidence did not sustain plaintiff's allegation

of defendant driver's willful misconduct in operation of automobile. Vehicle Code, § 403.

## 2. Automobiles ☞181(1)

"Willful misconduct" of motorist within guest statute is intentional doing of something which should not be done or intentional failure to do something which should be done, with express or implied knowledge that injury to guest will probably result. Vehicle Code, § 403.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Willful Misconduct".

## 3. Negligence ☞11

"Willful misconduct" involves deliberate, intentional or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of fact that danger is likely to result therefrom, coupled with conscious failure to act to end of averting injury, and implies at least intentional doing of something with knowledge that serious injury is probable, as distinguished from possible, result, or intentional doing of act with wanton and reckless disregard of its possible result.

## 4. Automobiles ☞181(1)

An automobile driver's negligence, as distinguished from willful misconduct, does not render automobile owner liable for resulting damages, as driver's negligence only, not his willful misconduct, is imputed to owner when automobile is being driven with his consent. Vehicle Code, § 402(a).

## 5. Trial ☞344

The trial court erred in denying motion to strike out jurors' affidavits as to what they intended by various verdicts returned by them on ground that affidavits constituted attempt to impeach verdicts, in absence of showing that verdicts were arrived at by chance. Code Civ.Proc. § 657, subd. 2.

## 6. Trial ☞344

A jury's verdict may not be impeached by jurors' affidavits as to occurrences after jury was impaneled, unless such affidavits show that verdict was arrived at by resort to determination of chance. Code Civ.Proc. § 657, subd. 2.

## 7. Judgment ☞199(1) Trial ☞339(3)

In action for injuries to guest in one defendant's automobile, driven by co-defendant, as result of collision with third defendant's automobile, jury's verdicts for third defendant and against him without assessing damages, for plaintiffs against two defendants and against all defendants without assessing damages, for all defendants against plaintiffs, and for defendants driver and owner of automobile carrying guest, were insufficient, contradictory and incomprehensible, so that court erred in rendering judgment for plaintiffs notwithstanding verdicts, instead of sending jury out and requiring them to return an understandable verdict as to all parties. Code Civ.Proc. §§ 619, 629.

## 8. Judgment ☞199(1)

In personal injury suit, plaintiffs' attempt to waive special damages and consent to judgment for general damages awarded them by one of jury's six insufficient and contradictory verdicts did not cure error in rendering judgment for plaintiffs notwithstanding verdicts, where two verdicts were against plaintiffs. Code Civ.Proc. § 629.

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Hunter & Liljestrom, Los Angeles, for appellants.

Krag & Sweet, Charles R. Hand, Alhambra, for respondents.

WILSON, Justice.

Plaintiffs brought this action for personal injuries suffered by plaintiff Cecelia E. Mish in an automobile accident. Defendant Robbins is Mrs. Mish's brother. At the time of the accident he was engaged to marry defendant Brockus. Prior to the trial they had been married.

The automobile in which Mrs. Mish was riding was owned by Robbins and was being driven by Miss Brockus with his consent. The other automobile involved in the accident was owned and driven by Lynn Walter who was also made a defendant in the action.

Two causes of action are set forth in the complaint: (1) alleging wilful misconduct



on the part of Miss Brockus, Vehicle Code, sec. 403<sup>1</sup>, and that the negligence of Walter, concurrently with the wilful misconduct of Miss Brockus, caused the collision; (2) alleging substantially the same fact contained in the first cause of action with the addition that defendant Robbins was negligent in permitting Miss Brockus to drive the automobile knowing that she was a reckless and incompetent driver.

After trial by jury six separate verdicts were rendered, to which reference will be hereafter made, whereupon plaintiffs made a motion for judgment in their favor notwithstanding the verdict, which motion was granted.

The court found that plaintiffs' special damages amounted to \$1,635.10 and rendered judgment in favor of plaintiffs for \$6,635.10 against defendants Brockus and Robbins. From this judgment defendants have appealed.

The accident happened in the early part of the afternoon. The weather was clear. Defendant Robbins had driven his automobile to the home of his sister, Mrs. Mish. He was then serving in the Navy and was about to leave on a cruise. Robbins, Miss Brockus and Mrs. Mish drove to a market, Robbins doing the driving. When they were ready to leave the market Miss Brockus asked permission to drive. With Robbins' permission she then took the driver's seat, Robbins next to her, and Mrs. Mish on the right-hand side of the front seat. After having driven about a mile they approached a highway protected by boulevard stop signs. They were driving at a speed of from 20 to 25 miles per hour. As they neared the stop sign Miss Brockus applied the brake but the speed of the car was not reduced. As the car was crossing the intersection it was struck on its right side by the automobile driven by defendant Walter. Judgment was entered in favor of the latter and he is not a party to this appeal.

Since Mrs. Mish was a guest in the car neither Robbins nor Miss Brockus would be liable for her injuries unless wilful misconduct or intoxication on the part of the driver is proved. Vehicle Code, sec. 403, *supra*. Therefore no consideration will be given to the allegation of defendants' negligence, and since there is no claim that either defendant was intoxicated our discussion will appertain only to alleged wilful misconduct.

Defendants contend the evidence is insufficient to establish wilful misconduct on the part of either Robbins or Miss Brockus. Before the latter began driving Mrs. Mish asked Robbins if she was able to drive and he answered in the affirmative saying she had been driving a long time. She did not drive in excess of 20 to 25 miles an hour, she remained on the proper side of the highway, and Mrs. Mish did not make any complaint concerning the manner in which Miss Brockus was driving.

Robbins testified that as they approached the intersection Miss Brockus was crying and seemed to be nervous because he, Robbins, was about to depart on a cruise and Miss Brockus was "upset" about it. Just before the accident Robbins observed Walter's car coming and knew they were going to collide. When he saw Miss Brockus was not going to stop he grabbed the wheel and tried to put on the brake. The brake did not hold because there was not sufficient hydraulic fluid in it. Miss Brockus did not attempt to keep him from getting control of the car.

Robbins testified there was nothing unusual about the conduct of Miss Brockus except that she was slightly nervous and was "crying a little bit"; there was insufficient fluid in his brakes and he had to "pump it." Mrs. Mish testified she remembered that Miss Brockus was crying before she began driving the car, that she cried some as they proceeded along the highway

4. Sec. 403: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of

such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver."

and stated she hated to see Robbins leave; that Miss Brockus was handling the car as any other careful driver would have handled it.

[1-3] The evidence does not sustain the allegation of wilful misconduct. That term is defined in *Turner v. Standard Oil Co.*, 134 Cal.App. 622, 626, 25 P.2d 988, 990, as "intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result." This definition has been approved in *Meek v. Fowler*, 3 Cal.2d 420, 426, 45 P.2d 194, *Stewart v. Kelly*, 68 Cal.App.2d 122, 126, 155 P.2d 850, and in many other cases. Wilful misconduct "necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom, coupled with a conscious failure to act to the end of averting injury". *Stewart v. Kelly*, supra [68 Cal.App.2d 122, 155 P.2d 852], and "implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a *possible*) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result." *Meek v. Fowler*, supra. [3 Cal.2d 420, 45 P.2d 197]

The evidence is far from bringing the instant case within the decisions above cited. There is no evidence of either a deliberate, intentional or wanton act on the part of either defendant with knowledge or appreciation that danger was likely to result from such act, and their conduct is not coupled with a conscious failure to act in order to avert injury.

[4] Even though the evidence may be deemed to show negligence on the part of

Miss Brockus in not attempting to reduce the speed of the car as it drew near the boulevard stop sign such act was not misconduct. Negligence of the driver as distinguished from wilful misconduct would not render the owner liable for damages resulting from the accident. Only negligence of the driver, not wilful misconduct, is imputed to the owner when the car is being driven with his consent. Vehicle Code, sec. 402(a)<sup>2</sup>; *Weber v. Pinyan*, 9 Cal.2d 226, 229, 233, 70 P.2d 183, 112 A.L.R. 407.

The jury returned six verdicts reading as follows:

(1)

"Verdict

"Not Guilty

"We, the jury in the above entitled action, find for the defendant Lynn Walter and against the plaintiffs Cecelia E. Mish and Henry H. Mish, husband and wife not guilty."

(2)

"Verdict

"Damages in the sum of  
5,000 and all Expenses  
Incurred.

"We, the jury in the above entitled action, find for the plaintiffs Cecelia E. Mish and Henry H. Mish, husband and wife and against the defendants Ella Mae Brockus and Thomas Charles Robbins and assess their damages in the sum of \$——."

(3)

"Verdict

"We, the jury in the above entitled action, find for the defendants Ella Mae Brockus, Thomas Charles Robbins, & Lynn Walter and against the plaintiffs Cecelia E. Mish and Henry H. Mish, husband and wife."

(4)

"Verdict

"We the jury in the above entitled action, find for the plaintiffs Cecelia E. Mish and Henry H. Mish, husband and wife and against the defendants Ella Mae Brockus, Thomas Charles Robbins, and Lynn Walter and assess their damages in the sum of \$——."

2. Sec. 402(a): "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any per-

son using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

## (5) "Verdict

## "Guilty Of Wilful Misconduct

"We, the jury in the above entitled action, find for the defendants Ella Mae Brockus and Thomas Charles Robbins and against the plaintiffs Cecelia E. Mish and Henry H. Mish, husband and wife."

## (6) "Verdict

## "No Damages

"We the jury in the above entitled action, find for the plaintiffs Cecelia E. Mish and Henry H. Mish, husband and wife and against the defendant Lynn Walter and assess their damages in the sum of \$——, No Damages."

All verdicts are dated March 18, 1949, and are signed by the foreman of the jury. The jury was polled separately on each verdict and each was declared to be the verdict of the jury.

After the polling and the declaration of the jury that each verdict was its verdict, the jury was discharged. Plaintiffs' motion for judgment notwithstanding the verdict was set down for argument on a subsequent date, at which time plaintiffs made a motion to "make return and entry of judgment in conformity to true verdict of jury, or in alternative, to enter judgment notwithstanding the verdict."

[5,6] Plaintiffs filed affidavits of 11 of the jurors which attempted to explain what the respective jurors intended by the various verdicts and to state their individual impressions. Defendants moved to strike the affidavits from the files on the ground that they constituted an attempt to impeach the verdict of the jury. The motion to strike the affidavits was denied and the court entered a judgment in favor of plaintiffs for the amounts above stated.

It was error to deny the motion to strike the jurors' affidavits from the files since there was no attempt to show that the verdicts were arrived at by chance. A verdict may not be impeached by affidavits of jurors as to occurrences after impanelment of the jury except where such affidavits

show the verdict was arrived at "by a resort to the determination of chance." Code Civ.Proc., sec. 657, subd. 2; *Phipps v. Patterson*, 27 Cal.App.2d 545, 546, 81 P.2d 437; *Rose v. Tandowsky*, 80 Cal.App.2d 927, 931, 183 P.2d 347.

[7] Verdict No. 1 is in favor of defendant Walter and No. 6 is against him but "no damages." Verdicts Nos. 2, 3, 4 and 5 are likewise inconsistent and unintelligible. No. 2, while uncertain and incomplete, is an apparent attempt to find in favor of plaintiffs without stating the amount intended to be awarded. No. 3 is clearly in favor of all three defendants and against plaintiffs. No. 4 is in favor of plaintiffs and against all defendants but the amount of damages is not assessed. No. 5, although headed "Guilty of Wilful Misconduct," is in favor of defendants Robbins and Brockus and against plaintiffs.

The verdicts are insufficient, contradictory and incomprehensible. It was therefore the duty of the court to proceed as required by section 619 of the Code of Civil Procedure,<sup>3</sup> send the jury out and require them to return an understandable verdict as to all parties. Plaintiffs' counsel requested that the verdicts be corrected and that the jury be sent out for a proper verdict. Instead the court discharged the jury immediately after being polled and did not afford them an opportunity to return an intelligible verdict. In order that the court may have jurisdiction to enter a judgment notwithstanding the verdict (Code Civ. Proc., sec. 629) there must be a verdict. Since the several verdicts are inconsistent and, when considered together, the intent of the jury is not ascertainable, there is no verdict upon which the court could have entertained plaintiffs' motion for judgment notwithstanding the verdict.

[8] Plaintiffs' attempt to waive special damages and their consent to a judgment for general damages in the sum of \$5,000 did not cure the error, since the two verdicts (Nos. 3 and 5) against them are of

3. Code Civ.Proc., sec. 619: "When the verdict is announced, if it is informal or insufficient, in not covering the issues sub-

mitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out."



no less strength and importance than the one purporting to be in their favor for \$5,000.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concur.



97 Cal.App.2d 787

**CHIYOKO IKUTA v. SHUNJI K. IKUTA**  
et al.

Civ. 17318.

District Court of Appeal, Second District,  
Division 3, California.  
May 26, 1950.

Chiyoko Ikuta sued Dr. Shunji K. Ikuta and another for divorce and alienation of affections. The Superior Court of Los Angeles County, Stanley N. Barnes, J., dismissed the complaint as to defendant Mary Takata, and plaintiff appealed. The District Court of Appeals, Shinn, P. J., held that the statute abolishing the right of action for alienation of affections, was constitutional and precluded recovery from respondent Takata.

Judgment affirmed.

**1. Constitutional law** ⇨83(1), 87

**Husband and wife** ⇨323

The statute abolishing right of action for alienation of affections does not violate constitutional guaranty of rights to enjoy liberty and to acquire, possess and protect property. Civ.Code, § 43.5; Const. art. 1, § 1.

**2. Constitutional law** ⇨83(1), 87

The constitutional guaranty of rights to enjoy liberty and to acquire, possess and protect property cannot curtail basic power of legislature to enact reasonable police regulations. Const. art. 1, § 1.

**3. Husband and wife** ⇨323

The statute abolishing rights of action for alienation of affection will con-

trol over previous inconsistent provisions of Civil Code. Civ.Code, § 43.5.

**4. Constitutional law** ⇨168

**Husband and wife** ⇨323

The statute abolishing right of action for alienation of affections does not impair obligation of contracts. Civ.Code § 43.5; Const. art. 1, § 16.

**5. Husband and wife** ⇨1

The marriage relation may be regarded as a civil contract for some purposes, but is subject to plenary control by legislature.

**6. Constitutional law** ⇨153

Marriage is not a "contract" within constitutional prohibition against impairing obligations of contracts. Const. art. 1, § 16.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Contract".

**7. Constitutional law** ⇨205(1)

**Husband and wife** ⇨323

**Statutes** ⇨74(2)

The statute abolishing right of action for alienation of affections is not unconstitutional as special legislation, though it grants immunity to marital interloper and not to one interfering with other types of contracts. Civ.Code, §§ 43.5, 55, 155; Const. art. 1, §§ 11, 21; art. 4, § 25, subd. 19.

**8. Statutes** ⇨141(2)

Though title of an amending statute is sufficient if it merely states the code and section amended, an act adding a wholly new provision must indicate the subject matter thereof. Const. art. 4, § 24.

**9. Statutes** ⇨109.3

The Constitution does not demand that title of act be a catalogue or abstract of its provisions, but merely that it contain a reasonably intelligent reference to subject of legislation. Const. art. 4, § 24.

**10. Statutes** ⇨109.2, 109.4

Title of act will not be held objectionable merely because general in terms, or broader in scope than in provisions of act, as long as those provisions are ger-

mane to the subject thus expressed. Const. art. 4, § 24.

#### 11. Statutes ⇐117(8)

Abolition of actions for alienation of affections, criminal conversation, seduction, and breach of promise of marriage is germane to subject of "personal relations," so that act effecting such abolition was valid as dealing with a single subject adequately expressed in title as an act to amend particular statute, add sections and to repeal section of Civil Code, relating to personal relations. Civ.Code, § 43.5; Const. art. 4, § 24.

#### 12. Statutes ⇐109.2

The constitutional requirement that every act embrace but one subject does not compel piecemeal legislation, and if all its provisions are related or connected thereto, subject of act may be as extensive as an entire code or as narrow as a single section. Const. art. 4, § 24.

Hanifin & Sease, Los Angeles, for appellant.

Stuart P. Fischer, Los Angeles, for respondent.

SHINN, Presiding Justice.

The sole question presented by this appeal is the constitutionality of section 43.5 of the Civil Code which provides: "No cause of action arises for: (a) Alienation of affection. (b) Criminal conversation. (c) Seduction of a person over the age of legal consent. (d) Breach of promise of marriage."

Appellant's complaint alleged six causes of action. The first, fourth, fifth and sixth counts were for divorce and other relief on the ground of extreme cruelty. Respondent Takata was named as a defendant only in respect of the second and third counts. The second alleged acts of adultery by plaintiff's husband with respondent as a ground of divorce. The third attempted to state a cause of action against respondent for alienation of the affections of plaintiff's husband. Respondent's general demurrer was sustained as to

count two with leave to amend, and was sustained as to count three without leave to amend. Plaintiff having failed to amend as to count two within the time granted, judgment was rendered dismissing the complaint as to respondent Takata. The appeal is from that judgment. But a reversal is sought only as to the third cause of action.

The parties are apparently agreed that the demurrer to the third count was sustained solely on the ground that causes of action for alienation of affection have been abolished by section 43.5. Respondent does not contend that the judgment can be sustained on any other ground. It follows that unless section 43.5 is ineffective to accomplish its intended purpose, the judgment must be affirmed.

[1] The constitutionality of section 43.5 is assailed on five separate grounds. Four of appellant's contentions are substantially identical with points urged and rejected in *Langdon v. Sayre*, 74 Cal.App. 2d 41, 168 P.2d 57, where we affirmed the constitutional validity of section 43.5 insofar as it abolished actions for breach of promise to marry. The fifth is urged for the first time in the present case. Although, technically speaking, the *Langdon* case may not be a controlling precedent, since it dealt with another portion of the statute and the personal relations of unmarried persons, we see no occasion to depart from the views there expressed, and have concluded that appellant's final point is likewise untenable.

[2] Appellant claims that section 43.5 is obnoxious to the provisions of section 1 of article I of the California Constitution in that it "subjects the happiness of every married person, to the caprice and irreverence of whomever arbitrarily seeks to interfere with the most solemn and sacred of obligations." The rights to enjoy liberty, to acquire, possess and protect property, which are secured to the individual by section 1, are not absolute but are "circumscribed by the requirements of the public good." In *re Moffett*, 19 Cal.App.2d 7, 14, 64 P.2d 1190, 1194. Like the protection accorded to personal

rights and privileges by the requirement of due process of law, the guarantees of section 1 cannot operate as a curtailment upon the basic power of the legislature to enact reasonable police regulations. *Matter of Yun Quong*, 159 Cal. 508, 511-512, 114 P. 835, Ann.Cas.1912c, 969; *Manford v. Menil Singh*, 40 Cal.App. 700, 701, 181 P. 844. That section 43.5 is a justifiable exercise of the police power cannot be questioned. Actions for alienation of affections, criminal conversation, breach of promise of marriage, and seduction have been widely criticised as fruitful sources of fraud and extortion because of the ease with which they may be employed to embarrass, harass, and besmirch the reputation of one wholly innocent of wrongdoing. See 13 So.Calif.L.Rev. 37, and authorities cited. The power of the legislature to ameliorate such evils by abolishing or restricting causes of action giving rise to them has recently been reaffirmed in *Werner v. Southern Cal. etc. Newspapers*, 35 Cal.2d 121, 216 P.2d 825. Statutes similar to section 43.5 have been upheld in other jurisdictions. *Pennington v. Stewart*, 212 Ind. 553, 10 N.E.2d 619; *Rotwein v. Gersten*, 160 Fla. 736, 36 So.2d 419; *Bean v. McFarland*, 280 Mich. 19, 273 N.W. 332; *Bunten v. Bunten*, 192 A. 727, 15 N.J.Misc. 532; *Hanfgarn v. Mark*, 274 N.Y. 22, 8 N.E.2d 47, appeal dismissed for want of substantial federal question, 302 U.S. 641, 58 S.Ct. 57, 82 L.Ed. 498. See *Young v. Young*, 236 Ala. 627, 184 So. 187. The legislature could reasonably have concluded that eradication of the abuses associated with the actions could be successfully accomplished only by eliminating the actions entirely. This being so, it was within the constitutional power of the legislature to require the honest and well-intentioned complainant, as a member of society, to conform to a law designed for the protection of society. *Bunten v. Bunten*, supra.

[3] Appellant's further contention that the statute is against public policy because it is demoralizing, and permits wilful disruption of the marriage, home and family without restraint, is sufficiently answered by what has been said. In any event, the

argument should properly be addressed to the legislature. Section 43.5 constitutes a legislative declaration that the public policy of California is opposed to appellant's view. See *Langdon v. Sayre*, supra, 74 Cal.App.2d 41, 45-46, 168 P.2d 57, quoting from *Thome v. Macken*, 58 Cal.App.2d 76, 136 P.2d 116. If, as appellant urges, section 43.5 is inconsistent with other provisions of the Civil Code previously enacted, the more recent expression of the legislative will must, of course, control.

[4-6] Nor is section 43.5 violative of section 16 of article I of the Constitution in that it impairs the obligation of contracts. Although the marriage relation may properly be regarded as a civil contract for some purposes, see *Mott v. Mott*, 82 Cal. 413, 22 P. 1140; Civ.Code, secs. 55, 155, it is a matter which has always been regarded as subject to plenary control by the legislature. In *re Estate of Gregorson*, 160 Cal. 21, 24, 116 P. 60, L.R.A.1916C, 697, Ann.Cas.1912D, 1124. "When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties, and obligations. \* \* \* \* \* 'It is not then a contract within the meaning of the clause of the constitution which prohibits the impairing the obligations of contracts.'" *Maynard v. Hill*, 125 U.S. 190, 211, 8 S.Ct. 723, 729, 31 L.Ed. 654, quoting from *Adams v. Palmer*, 51 Me. 480, 481; see also *Fearon v. Treanor*, 272 N.Y. 268, 5 N.E.2d 815, 109 A.L.R. 1229.

[7] Appellant's reliance upon sections 11 and 21 of article I, and section 25 (19) of article IV is misplaced. These provisions prohibit special legislation in behalf of preferred classes or individuals. The fact that section 43.5 grants an exclusive immunity to a marital interloper at the expense of the injured spouse, although no such immunity attaches to one who interferes with certain other types of contracts, does not render it discrimina-



tory in the constitutional sense. The statutory classification is neither arbitrary nor irrational, bears a definite relationship to the legislative objective, and embraces equally all persons similarly situated.

[8-12] Appellant appears to rely chiefly upon his final contention, which was neither presented nor passed on in *Langdon v. Sayre*, supra, that section 43.5 is void for non-compliance with section 24 of article IV of the Constitution. That section provides: "Every Act shall embrace but one subject, which subject shall be expressed in its title." The argument in appellant's brief is wholly misdirected to the unofficial section heading added by the publisher of the Civil Code rather than to the official statutory title; but we have given careful consideration to the proposition urged. Section 43.5 was enacted by chapter 128 of the Statutes of 1939, the title of which read: "An act to amend section 49 of, to add sections 43.5 and 1590 to and to repeal section 3319 of the Civil Code, relating to personal relations." Stats.1939, p. 1245. Although the title of an amending statute is apparently sufficient if it merely states the code and section being amended, see *Milgate v. Wraith*, 19 Cal.2d 297, 304, 121 P.2d 10, it is necessary for an act which adds a wholly new provision to indicate the subject matter thereof. 23 Cal.Jur., sec. 54, p. 661, and cases cited. The general phrase, "relating to personal relations," was evidently incorporated for this purpose. The constitution does not demand that the title of an act be a catalogue or abstract of its provisions, but merely that it contain a reasonably intelligent reference to the subject of the legislation. *Powers Farms, Inc. v. Consolidated Irr. Dist.*, 19 Cal.2d 123, 130, 119 P.2d 717; *Heron v. Riley*, 209 Cal. 507, 510-512, 289 P. 160; 23 Cal.Jur., sec. 46, p. 651. A title will not be held objectionable merely because it is general in terms, or is broader in scope than the provisions of the act, as long as those provisions are germane to the subject thus expressed. *County of Los Angeles v.*

*Hurlbut*, 44 Cal.App.2d 88, 100-103, 111 P.2d 963, and cases cited; *County of Ventura v. Southern California Edison Co.*, 85 Cal.App.2d 529, 538, 193 P.2d 512. The title of chapter 128 manifestly suggests that rights arising out of relations between persons will be affected by its provisions. It thus gives sufficient notice, we think, to satisfy the constitutional purpose of preventing the enactment of surreptitious legislation under the guise of a misleading or deceptive title. Cf. *Matter of Coburn*, 165 Cal. 202, 131 P. 352; *Deyoe v. Superior Court*, 140 Cal. 476, 74 P. 28, 98 Am.St.Rep. 73. Furthermore, the abolition of actions for alienation of affections, criminal conversation, seduction, and breach of promise of marriage is clearly germane to and within the scope of the subject of "personal relations." Admittedly, as appellant points out, there are significant differences between the several causes of action; but there are also elements of similarity which reasonably justify collective legislative treatment. Each of them is predicated upon a violation, in one manner or another, of the right which "every person has, subject to the qualification and restrictions provided by law \* \* \* of protection \* \* \* from injury to his personal relations" Civ.Code, sec. 43; and each, for reasons already indicated, is fraught with the same possibility of fraud and abuse. The constitution does not compel piece-meal legislation. 23 Cal.Jur., sec. 42, p. 646. Provided all its provisions are related or connected thereto, the subject of an act may be as extensive as an entire code, see *Evans v. Superior Court*, 215 Cal. 58, 8 P.2d 467, sustaining the enactment of the Probate Code, or as narrow as a single section, see *People v. Rambaud*, 78 Cal.App. 685, 248 P. 954, upholding an amendment to section 264 of the Penal Code. It thus appears that the provisions of section 43.5 deal with but a single subject, which is adequately expressed in the title of chapter 128.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

97 Cal.App.2d 793

**CHIYOKO IKUTA v. SHUNJI K. IKUTA.**

Civ. 17248.

District Court of Appeal, Second District,  
Division 3, California.

May 26, 1950.

Chiyoko Ikuta sued Dr. Shunji K. Ikuta for a divorce. The Superior Court of Los Angeles County, Le Roy Dawson, J., entered an order making an award of temporary support and maintenance, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that the award of \$350 per month was not an abuse of discretion as inadequate, in view of plaintiff's substantial income resources.

Order affirmed without prejudice to further proceedings.

**1. Divorce ⇨226**

Since award of attorney's fees or suit money in divorce suit was independent of other issues before trial court, trial court must rule upon questions thus tendered and either grant or deny relief in whole or in part, deny relief without prejudice to subsequent application, or make order retaining jurisdiction.

**2. Divorce ⇨228, 280**

In absence of record evidence of a decision, court's remarks that "at the present time there will be no additional funds awarded for attorney's fees" did not amount to an adjudication and could not supply deficiencies of minute order in divorce suit which was silent on issue of attorney's fees and suit money, and left nothing for reviewing court for review.

**3. Divorce ⇨286**

Order for support and maintenance cannot be disturbed as insufficient unless court can find in record a conclusive showing as matter of law that plaintiff's necessary expenses would not be met by the amount awarded, as supplemented by her personal income, and that defendant is financially able to contribute a substantially greater sum.

**4. Divorce ⇨215**

Award of \$350 per month pendente lite in divorce suit, to wife of physician

earning substantial sums, was not an abuse of discretion as inadequate, in view of wife's substantial income resources.

**5. Divorce ⇨209**

Since allowance for support pendente lite rests upon necessity, husband's financial status is material only in determining maximum amount which he can contribute toward wife's necessary expenses.

**6. Divorce ⇨214(3)**

In divorce suit tried in 1949, evidence of husband's earnings in 1947 would be merely cumulative and exclusion thereof was not error.

Hanifin & Sease, Los Angeles, for appellant.

Edward J. Cotter, Los Angeles, for respondent.

SHINN, Presiding Justice.

This appeal is another phase of the same divorce action involved in *Ikuta v. Ikuta*, Cal.App., 218 P.2d 854. Upon the hearing of an order to show cause the court on December 16, 1948, ordered defendant to pay all mortgage installments, utility and community bills; \$200 for support of plaintiff and the minor children whose custody was awarded to her; and \$500 direct to plaintiff's attorney, payable at once. The order specified that it was "without prejudice to any order that may be subsequently made." It directed that "the order to show cause is continued to January 27, 1949 \* \* \* at which time a further award of attorney's fees may be made." On January 20, 1949, plaintiff obtained another order to show cause regarding attorney's fees, suit money and temporary support. Plaintiff's affidavit upon which this latter order was based set forth facts purporting to justify payment by defendant of more than \$9,000 as the estimated cost of investigating, obtaining evidence for, and conducting plaintiff's case. On January 27, 1949, both orders to show cause came on for hearing. Considerable testimony was taken at the hearing, which lasted two days, and a written stipulation of the parties was filed providing that cus-

tody of the children should remain with plaintiff: that defendant would continue to pay all premiums on insurance policies then existing on the life of defendant and any of the children and all mortgage payments on the family home. The court's minute order dated January 28, 1949 provided: "It is ordered that the *existing order regarding temporary custody of the minor children of the parties shall remain in effect*; that defendant pay all premiums on all insurance now existing; that defendant pay plaintiff \$350.00 per month for support of herself and children of the parties, payable one-half on the 10th and 15th days of each month, commencing February 10, 1949, and continuing until further order of court; *that defendant pay all current bills for month of January, 1949*; and that defendant have possession and use of the family automobile; that defendant leave the home of the parties and live separate and apart. It is further ordered that both parties are restrained from disposing of, hypothecating, or encumbering the community property, and from molesting and annoying one another."

Plaintiff's appeal is from all of the quoted order except those portions which we have set forth in italics.

[1,2] Plaintiff contends first that the court abused its discretion when it failed to award her any suit money or additional attorney's fees and did not reserve determination of those matters to the time of the trial. It appears from the reporter's transcript that the court believed plaintiff to be financially able to bear the expense of preparing her case for trial and with respect to counsel fees the court stated: "At the present time there will be no additional funds awarded for attorney's fees." The minute order, to which alone we must look to learn what was decided, is completely silent on these issues. Since an award of attorney's fees or suit money was a matter independent of the other issues before the court, it was necessary for the court to rule upon the questions thus tendered and either grant or deny relief in whole or in part, deny them without prejudice to a subsequent application or make

an order retaining jurisdiction with respect to counsel fees, see *Wilson v. Wilson*, 33 Cal.2d 107, 199 P.2d 671. In the absence of record evidence of a decision the remarks of the court do not amount to the adjudication which the parties are entitled to expect and which the law requires, and cannot supply the deficiencies of the order. The record furnishes no reason for doubt that the omission from the order of a decision of these issues was intentional. The remarks we have quoted seem to indicate, at least with respect to counsel fees, that if a ruling had been made the applications would have been denied without prejudice, or the court would have retained jurisdiction to award counsel fees at a later stage of the proceedings. Since no adjudication was made as to these matters there is nothing before us for review.

[3,4] Plaintiff's next point is that the court failed to grant a sufficient allowance for support and maintenance. The order may not be disturbed unless we are able to find in the record a conclusive showing, as a matter of law, that plaintiff's necessary expenses will not be met by the amount awarded, as supplemented by her personal income, if any; and that defendant is financially able to contribute a substantially greater sum for support and maintenance. See *Sweeley v. Sweeley*, 28 Cal.2d 389, 170 P.2d 469. Cf. *Loeb v. Loeb*, 84 Cal.App.2d 141, 190 P.2d 246; *Falk v. Falk*, 48 Cal.App.2d 780, 120 P.2d 724. From a review of the evidence, we are satisfied that no abuse of discretion was committed.

Plaintiff's affidavit in connection with the first order to show cause itemized claimed necessary expenses, apart from mortgage and insurance payments which defendant is required to make, of \$2,065.00 per month. Her testimony offered in support of these claims, however, was inadequate and unsatisfactory in many particulars. In contradiction of plaintiff's claims there was evidence that, aside from mortgage payments, taxes, and insurance, defendant had expended less than \$5,000 in 1948 for maintenance of the household and support of his family.



Plaintiff's affidavit, supplemented by her testimony on cross-examination, warranted the conclusion that at the time of the hearing she owned, as her separate property, real estate located in the United States and Hawaii valued at more than \$200,000, which produced a monthly income of more than \$700. It appears that this property was agreed to be transferred to her by her husband in a property agreement executed in October, 1948, in the course of an unsuccessful reconciliation. The agreement itself was not in evidence, and the record does not disclose what its terms were nor the extent to which they have been executed, although from statements of counsel, it appears that some of the details remained to be consummated. Plaintiff's own evidence was conflicting as to whether the income was net or gross. National Mortgage Company, a Hawaiian concern which, as defendant's agent, had been in charge of the real property at the time of the property agreement, continued to manage her properties, and collected and distributed all of the income therefrom. Although plaintiff testified that none of the income was available for her use, her attempt to explain why was vague and inconclusive. She admitted that for an unspecified period of time prior to August, 1948, she had received \$200 per month from National Mortgage Company, but only "through the generosity of the management." Her statement that there was no income left after expenses and taxes evidently was based on her experience during the time prior to the execution of the terms of the property agreement, when it appears that the net income from all of the real estate was accumulated by Na-

tional Mortgage Company and used to pay defendant's income taxes, including certain delinquent taxes, as well as insurance premiums and \$200 per month for support of defendant's indigent sister. We think it would be permissible to infer that plaintiff had substantial income resources which could be made available to her to supplement the allowance awarded by the court.

[5] In view of the conclusions already reached, we need not review the evidence bearing upon defendant's ability to provide, other than to say that his earnings as a physician and surgeon appear to be substantial. Since an allowance for pendente lite support rests upon necessity, defendant's financial status would be material only in determining the maximum amount which he is able to contribute toward plaintiff's necessary expenses, and has no other bearing upon the need for an allowance nor its amount. *Loeb v. Loeb*, supra. We are satisfied that the pendente lite allowance for support was not unreasonably small.

[6] Plaintiff's final contention is that the court erroneously excluded evidence as to defendant's earnings in 1947. At best the evidence would have been merely cumulative. The ruling was not in error. No other grounds of reversal are urged.

The order is affirmed without prejudice to further proceedings in the trial court for the determination, as of February 28, 1949, of plaintiff's pending application for suit money and additional attorney's fees, or to a new application for such allowances.

WOOD and VALLÉE, JJ., concur.

35 Cal.2d 514

PEOPLE v. GULDBRANDSEN.

Cr. 5065.

Supreme Court of California, in Bank.

June 2, 1950.

Henry B. Guldbrandsen was convicted in the Superior Court, Sonoma County, Hilliard Comstock, J., of murder in the first degree, rape, and assault with intent to murder, and he appealed. The Supreme Court, Gibson, C. J., held that evidence supported conviction on all charges contained in information.

Affirmed.

1. Homicide ⇨253(1)

Evidence supported conviction of murder in the first degree. Pen.Code, § 188.

2. Homicide ⇨253(3), 282

In prosecution for first-degree murder, direct evidence of a deliberate purpose to kill is not required, and necessary elements of deliberation and premeditation may be inferred from proof of such facts as will furnish a reasonable foundation for such an inference, and where evidence is not in law insufficient, matter is exclusively within province of jury for determination. Pen.Code, § 188.

3. Homicide ⇨232

Fact that defendant went outside the cabin to pick up an Indian pestle made of stone and brought it back inside the cabin to attack victims, absence of any immediate provocation for the attack, fact that victims were unarmed and apparently asleep, the numerous vicious blows, and the identical pattern of each of the killings, furnished evidence to support jury's inference that defendant was possessed of a willful and deliberate and premeditated purpose to kill both victims. Pen.Code, § 188.

4. Rape ⇨51(1)

Evidence supported conviction of rape.

5. Rape ⇨11

Even if established that prosecutrix submitted to sexual intercourse in attempt to save her life or to escape further beating from defendant, submission induced by such fear did not constitute consent.

6. Criminal law ⇨1169(1)

In rape prosecution, admitting evidence of fact that prosecutrix complained of an assault on her person to two women, even if improper because prosecutrix did not testify, did not require a reversal, where it did not appear that admission of such evidence resulted in a miscarriage of justice.

7. Criminal law ⇨1172(2)

In rape prosecution, giving of instruction to effect that evidence of prompt complaint by prosecutrix might be considered by jury in corroboration of other evidence given in the case did not require a reversal, even if error, where it did not appear that giving of the instruction complained of resulted in a miscarriage of justice.

8. Criminal law ⇨808½, 1172(2)

In murder prosecution, giving of instruction in language of statute concerning proof of mitigating circumstances, without explaining meaning of statute, was error, but was not prejudicial error, where there was no evidence of excuse or justification, and other clear instructions were given to effect that burden of proof was on prosecution, and evidence of guilt was clear and convincing. Pen.Code, § 1105.

9. Criminal law ⇨814(18), 1172(6)

In prosecution on charges of murder, rape and assault with intent to murder, where defendant did not take witness stand, instruction to effect that witness could be impeached by proof that he had been convicted of a felony was not authorized by testimony of a witness that defendant had told witness that he had served a two year term for assault with a deadly weapon, but giving of the instruction was not prejudicial error in view of the record.

10. Criminal law ⇨438

In prosecution on charges of murder, rape and assault with intent to murder, photographs of scene of the crimes and of bodies of the two victims who were murdered, though gruesome in character, had evidentiary value, and their admission into evidence was within trial court's discretion.

Toland C. McGettigan, Santa Rosa, for appellant.

Fred N. Howser, Attorney General, Doris H. Maier, Deputy Attorney General, and Charles J. McGoldrick, District Attorney (Sonoma), Santa Rosa, for respondent.

GIBSON, Chief Justice.

Defendant was charged by information with the murder of Peter Flint and Peter Jensen, with the rape of Eva Paget, and with assault with intent to murder her. He pleaded not guilty and not guilty by reason of insanity to each of the counts but later withdrew the insanity pleas. A jury found defendant guilty of murder in the first degree on both counts without recommendation as to punishment and also found him guilty of assault and rape as charged. Motions for a new trial, for arrest of judgment, and for reduction of the verdicts on the murder counts to second degree murder, were denied. Defendant was sentenced to death on the murder counts and to imprisonment for the period prescribed by law for rape and for felonious assault. The sentence of death having been imposed, this appeal comes before us automatically. Penal Code, § 1239, subd. (b).

The record shows without contradiction that defendant killed Flint and Jensen, but it is argued that the evidence does not support the verdict of murder of the first degree. Defendant also claims that the evidence is not sufficient to show the commission of rape. No contention is made as to the sufficiency of the evidence to support the assault conviction.

There were no eyewitnesses to the killings nor to the alleged assault and rape of Eva Paget. Defendant did not testify in his own behalf, and Mrs. Paget, because of her physical condition, was unable to be present at the trial or to give testimony. The People's case consists in part of admissions made by the defendant. On the day after the crimes were committed he told a newspaperman in Eureka that he was "the man they were looking for" in Sonoma County in connection with the kill-

ings of Flint and Jensen and the rape of Eva Paget. He related what had occurred and later signed a statement prepared by the news reporter. Shortly thereafter he was questioned by the District Attorney of Humboldt County in the presence of a stenographer. The statement signed by defendant and the transcription of the interrogation by the district attorney were received in evidence without objection.

According to defendant's statements he left Alameda on Friday, July 1, 1949, and drove to Sonoma County with Peter Flint to spend the week-end at the cabin of Peter Jensen, a friend of Flint. On the way they stopped at Londonside and visited with Eva Paget who was living in a summer cottage with her two children and a young girl who acted as a "baby sitter." Flint introduced defendant to Mrs. Paget, and the three of them visited a nearby tavern where they had some beer, played a little shuffleboard, and were generally friendly. Defendant and Flint spent the night at Jensen's cabin.

Jensen, who worked at the Sonoma State Home, arrived at his cabin sometime Saturday, July 2. Flint had an engagement with Mrs. Paget that evening, and Jensen and defendant went together to a bar and later to Jensen's apartment at the Sonoma Home. Flint picked up defendant at the apartment, and they went to the cabin to sleep. The following day Flint and defendant went swimming and visited Flint's sister-in-law, whose home was near Sonoma. That evening Flint again had an engagement with Mrs. Paget, and he left defendant at a bar not far from her house. Flint and Mrs. Paget joined defendant later that evening, and the three of them went to another bar where they drank a few bottles of beer, talked and played shuffleboard. Mrs. Paget left the bar about 1:00 o'clock in the morning with other friends. Flint and defendant stayed on until closing time, drinking beer and talking quietly, and returned to the cabin about 2:30 a. m. Jensen was there and had already retired. Flint and defendant slept together in another bed in the same room.



Defendant said he awoke the following morning, Monday, July 4, trembling and with his heart beating fast. He got out of the bed, went outside, picked up an Indian pestle made of stone which he remembered having seen, went back into the cabin and struck Flint several times about the head with the pestle. Defendant then went to the other bed where Jensen was asleep and struck him on the head with the pestle several times. He pulled the bedclothes over the head of each of the men and then washed himself and dressed. Taking Flint's car, he drove down to Mrs. Paget's place and told her that Flint had broken an arm and wanted to see her. Defendant waited at her house while she dressed and then drove her to Jensen's cabin. As they were going up the steps leading to the cabin door he struck her about the head with "the bludgeon," and she fell to the ground, bleeding. She said something about her children and asked for some water. Defendant went to get water for her, and while he was gone she tried to escape by running back to the car and attempting to drive away. Defendant overtook her, however, and made her get out of the car and start back for the house. He held her arm and led her to the kitchen, where he gave her some towels. He told her that Flint and Jensen were visiting at a nearby cottage, and she did not go into the main room where their bodies were. She washed herself and asked to be taken back to her house, promising that she would not tell what had happened. Defendant refused, saying that she would have to stay there until after he left.

According to defendant, Mrs. Paget then offered herself to him voluntarily as an inducement to him to take her home, and they removed their clothes and had sexual intercourse on a barbecue table in the yard behind the cabin. Afterward defendant gave her his shirt to wear and tied her to a tree in the back yard with a belt and rags. He then went inside the cabin, washed, changed to clean clothes belonging to Flint, took Flint's wallet and keys, and drove away in Flint's car at about 11:00 a. m. Defendant drove as far as Eureka where

he registered at a hotel under an assumed name, went to a movie and stayed in some bars until 2:00 a. m. The following day, as we have already seen, he contacted the newspaper reporter, told his story, and was turned over to the district attorney's office.

A bloodstained pestle corresponding to that described by defendant was found by officers near the cabin. An autopsy was performed on the bodies of Flint and Jensen, and the doctor testified that both men had been struck about the head and shoulders numerous times with a heavy, blunt instrument like the pestle, that their skulls were splintered, and that both men died from shock and hemorrhage following laceration of the scalp and fracture of the skull and contusions of the brain. Chips and slivers of bone had been driven into the brain of each man by the force of the blows.

A witness testified that at about 2 o'clock the afternoon of July 4 she and another woman stopped their car near Jensen's mailbox to eat a picnic lunch and that while they were there Mrs. Paget approached them. She was bloody, bruised and scantily dressed in a man's shirt, and complained of a recent assault on her person. The two women put her in their car and drove until they found a highway patrol officer who took her to a hospital. At the time of the trial she was still in no condition to testify, although under subpoena. Strands of her hair were found adhered to blood on the stone pestle and her clothes were found covered with blood near the barbecue table where defendant said the act of intercourse had taken place. There was other evidence of the occurrence of intercourse, the details of which need not be repeated here.

[1] In our opinion, the evidence is sufficient to support the convictions of murder of the first degree. Malice will be implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart. Penal Code, § 188. According to his own statement defendant killed Flint and Jensen for no reason, and there is nothing

in the evidence to suggest any provocation for the murders. The manner of killing in the present case is sufficient evidence from which malice can be implied.

[2,3] Direct evidence of a deliberate and premeditated purpose to kill is not required. Deliberation and premeditation may be inferred from proof of such facts and circumstances as will furnish a reasonable foundation for such an inference, and, where the evidence is not in law insufficient, the matter is exclusively within the province of the jury for determination. See *People v. Isby*, 30 Cal.2d 879, 888, 186 P.2d 405. In the present case, defendant's actions in going outside the cabin to pick up the pestle which he remembered having seen and in bringing it back inside the cabin, the absence of any immediate provocation for the attack, the fact that the victims were unarmed and apparently asleep, the numerous vicious blows, and the identical pattern of the killings, all furnish evidence to support the jury's inference that defendant was possessed of a willful deliberate and premeditated purpose to kill both Flint and Jensen. See *People v. Isby*, 30 Cal.2d 879, 888, 186 P.2d 405; *People v. Cook*, 15 Cal.2d 507, 514-517, 102 P.2d 752. Moreover, the jury could have believed that defendant's motive for the killings was to get Jensen and Flint out of the way so he could force himself upon Mrs. Paget.

[4,5] There is ample evidence to support the conviction of rape. The jury was, of course, entitled to disbelieve defendant's statement that Mrs. Paget had offered herself to him voluntarily. He admitted that he struck her shortly before having intercourse with her, and that fact is corroborated by evidence that strands of her hair were found adhered to blood on the pestle. Her efforts to escape from defendant immediately prior to the act of intercourse, the fact that she was subsequently tied to a tree, her appearance when seen by the two women, and her physical condition when examined at the hospital, constituted further evidence from which the jury could have inferred, as it apparently did, that she had not voluntarily consented to inter-

course. Even had she submitted in an attempt to save her life or to escape further beating, submission induced by such fear does not constitute consent. See *People v. Lay*, 66 Cal.App.2d 889, 893, 153 P.2d 379.

[6,7] Defendant contends that the trial court erred in admitting evidence of the fact that Mrs. Paget complained of an assault on her person to the two women. He argues that such evidence is admissible only as corroboration of testimony by the prosecutrix and is inadmissible where, as here, the prosecutrix is an adult and competent to testify but has not taken the stand. He also complains of an instruction to the effect that evidence of the prompt complaint might be considered by the jury in corroboration of other evidence given in the case. There is some suggestion in the cases that evidence that a complaint was made is inadmissible where the prosecutrix does not take the stand, unless she is a child too young to testify. See *People v. Figueroa*, 134 Cal. 159, 162, 66 P. 202; *People v. O'Bryan*, 132 Cal.App. 496, 503, 23 P.2d 94; note, 157 A.L.R. 1359; cf. *People v. Adams*, 14 Cal.2d 154, 158-159, 93 P.2d 146. It is unnecessary for us to determine whether this is a sound rule or whether an exception should be made in cases such as this where an adult witness is unable to testify, since it is clear that neither the admission of the evidence nor the giving of the instruction complained of resulted in a miscarriage of justice.

[8] Defendant contends that the trial court erred in giving the following instruction: "Section 1105 of the Penal Code \* \* \* provides as follows: 'Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.'" This instruction has been disapproved in recent cases where it

has been given without an explanation of the meaning of the statute, but the error is not prejudicial in the present case where there is no evidence of excuse or justification, where other clear instructions were given to the effect that the burden of proof was on the prosecution and where the evidence of guilt is clear and convincing. See *People v. Tuthill*, 31 Cal.2d 92, 102, 187 P.2d 16.

[9] Defendant also complains of an instruction to the effect that, among other specified methods of impeachment, a witness may be impeached by proof that he has been convicted of a felony. The newspaper reporter to whom defendant volunteered the story of the crimes testified that defendant told him he had served a two year term for assault with a deadly weapon. Defendant does not complain of the admission of the evidence, which was received without objection, but argues that the instruction was erroneous because defendant was not a witness and, therefore, was not subject to impeachment. It is true that the instruction had no application in the present case, but, in view of the record, it would seem clear that no prejudice resulted therefrom.

[10] Photographs of the scene of the crimes and of the bodies of Flint and Jensen were admitted in evidence over defendant's objections. It is argued that the photographs were so gruesome in character that the jury, after seeing them, could not dispassionately consider the case. There can be no question, however, that they had evidentiary value, and their admission into evidence was within the court's discretion. See *People v. Isby*, 30 Cal.2d 879, 892, 186 P.2d 405; *People v. Smith*, 15 Cal.2d 640, 649, 104 P.2d 510.

The judgments of conviction and the orders denying the motions for a new trial, for arrest of judgment and for reduction of the verdicts on the two murder counts are, and each of them is, affirmed.

**SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.**

## PEOPLE v. WOODS.

Cr. 5063.

Supreme Court of California, in Bank.

May 31, 1950.

Rehearing Denied June 29, 1950.

Charles H. Woods was convicted in the Superior Court of Los Angeles County, Frederick F. Houser, J., of receiving a bet on a horse race and of maintaining a bookmaking establishment, and he appealed from the judgments of conviction and from orders denying his motions for new trial. The Supreme Court, Gibson, C. J., held that evidence was sufficient to sustain conviction of taking a bet on the outcome of a horse race but was insufficient to sustain conviction of maintaining a bookmaking establishment, that certain evidence was properly admitted, that erroneous instruction was not reversibly erroneous, that conduct of certain juror was improper but not reversible error, and that conversation of judge with juror in absence of defendant was improper but not reversible error.

Judgment of conviction for maintaining a bookmaking establishment and order denying motion for new trial reversed, and judgment of conviction of receiving a wager on the outcome of a horse race and order denying motion for new trial affirmed.

Carter and Schauer, JJ., dissented.

Prior opinion, 210 P.2d 524.

**1. Gaming**  $\hookrightarrow$  98(3)

Evidence that within a few minutes after defendant entered his automobile he received a bet on a horse race from a newsboy who had been standing on the corner, that paper on which defendant noted the bet was found on seat of automobile, and that when defendant was arrested he had a scratch sheet and an address book on his person, was insufficient to sustain conviction for maintenance of a bookmaking establishment. Pen. Code, § 337a, subd. 2.

**2. Gaming**  $\hookrightarrow$  98(1)

Evidence that actions of defendant in bar indicated that he was engaged in taking bets on horse races, and that when he left bar and got into his automobile a newsboy went over to the automobile and placed a bet with the defendant, and that defendant admitted to police officer that he had been



taking bets in the vicinity for about two months was sufficient to sustain a conviction for receiving money as a wager on a horse race. Pen. Code, § 337a, subd. 3.

### 3. Criminal law ☞369(2)

Except where it shows merely criminal disposition, evidence which tends logically and by reasonable inference to establish any facts material for the prosecution, or to overcome any material facts sought to be proved by the defense, is admissible, though it may connect the accused with an offense not included in the charge.

### 4. Criminal law ☞369(2)

In prosecution for maintaining a book making establishment and for receiving money as a wager on a horse race, wherein the prosecution relied on act of defendant in taking a bet from a newsboy while defendant was sitting in his automobile, testimony of police officer that before defendant went to his automobile and took bet from boy his actions in bar with two unidentified men, indicated that defendant was taking bets, was properly admitted. Pen. Code, § 337a, subds. 2, 3.

### 5. Criminal law ☞1137(3)

Defendant who requested that court give instructions relating to confessions, was in no position to base a claim of error on ground that those instructions were not applicable.

### 6. Criminal law ☞781(6), 1172(2)

Instruction that if jury should find that a confession was false, either entirely or in part, it remained nevertheless evidence for jury's consideration, to be given such significance as jury's judgment might determine under the circumstances, was erroneous without direct qualification by appropriate limiting instructions, but it was not prejudicially erroneous, where there was clear and convincing testimony by an eye witness that defendant accepted a bet on a horse race.

### 7. Criminal law ☞855(7)

In prosecution for maintaining a book making establishment and for receiving money as a wager on a horse race, conduct of juror in approaching counsel for defend-

ant and deputy district attorney and inquiring whether police officer who had testified was still there, in order to inquire of officer as to the meaning of the phrase "place and show", was improper, but was not ground for a mistrial, where judge admonished juror, and police officer testified that he had never spoken to juror. Pen. Code, § 337a, subds. 2, 3.

### 8. Criminal law ☞636(7), 1166½(4)

Act of judge in answering in his chambers in absence of defendant the question of a juror as to what a hung jury was, was improper, but was not reversible error.

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Chotiner & Chotiner and Murray M. Chotiner, Beverly Hills, for appellants.

Fred N. Howser, Attorney General, and Kent C. Rogers, Deputy Attorney General, for respondents.

GIBSON, Chief Justice.

In count one of an information, defendant Woods was charged with receiving a bet on the outcome of a horse race, in violation of Penal Code section 337a, subdivision 3. Count two charged that defendant kept and occupied an automobile with a book and papers for the purpose of recording a wager, in violation of subdivision 2 of the same section. A jury found the defendant guilty on both counts and he was sentenced to be imprisoned in the county jail for six months on each count, the sentences to run concurrently. This appeal is taken from the judgments of conviction and the order denying defendant's motion for new trial.

Early in the afternoon of November 23, 1948, police officers Potter and O'Keefe went to a bar near Florence and Vermont avenues in the city of Los Angeles. Potter entered the bar and O'Keefe waited across the street. According to Potter's testimony, when he went inside defendant was seated at the counter in the bar with a scratch sheet in front of him. Two men, one of whom carried the sports section of a newspaper, approached defendant at different times and spoke to him. Each man handed some currency to defendant, who looked at

the scratch sheet, went to a telephone booth in the bar and had a conversation over the telephone. Potter had defendant under observation in the bar for about twenty minutes, and during that time defendant did not eat or drink anything. Defendant left the bar and got into his automobile which was parked at the curb near by.

Police officer O'Keefe testified that a newsboy, who had been standing on the corner studying a racing form, took money from his pocket, looked in the direction of defendant and pointed to the bar. Defendant shook his head from side to side. The newsboy entered the bar, remained for about 30 seconds, came out, and walked directly to defendant's car. The newsboy said to defendant, "Give me \$2.00 to win on Secret Flight in the 8th at Tanforan," and handed him some currency. Defendant replied, "Okay," and wrote something on a piece of paper. After the newsboy departed, O'Keefe engaged defendant in a conversation. Defendant said that he had been taking bets in that vicinity for about two months, that he phoned the bets out, and received ten per cent for handling them. O'Keefe thereupon placed defendant under arrest. At that time defendant had in his pockets a "Metropolitan Scratch Sheet," an address book, and over \$200 in cash. The piece of paper on which O'Keefe had seen the defendant write was found on the seat of the car and contained the notation "8-Sec. Fligh-2-" and some other "scribbling." O'Keefe, who qualified as an expert on bookmaking practice, testified that the piece of paper was what is commonly called a "betting marker"; that the numeral "8" signified the 8th race; that "Sec. Fligh" indicated "Secret Flight," the name of a horse, which according to defendant's scratch sheet, was running in the 8th race at Tanforan Race Track; and that the number "2," with a dash after it, signified \$2.00 to win, nothing to place or show. The address book was of a type frequently carried by bookmakers for listing the names or initials of debtors and creditors and was known in the trade as an "owe sheet." The scratch sheet, the paper on which defendant noted the bet, and the address book were received in evidence.

Defendant denied having received any money in the bar, except as change for his purchase of a sandwich and coffee. He stated that his exchange of money with the newsboy was for the purchase of a newspaper, and explained the notation he had made on the piece of paper as being merely the recordation of a personal bet that he intended to make. Defendant also denied having made the statements attributed to him by officer O'Keefe.

[1,2] The first ground for reversal urged by defendant is that the evidence is insufficient to support a conviction on either count. We are of the view that defendant's contention must be sustained as to the second count but that the evidence is sufficient to support the judgment on the first count.

Section 337a, subdivision 2 of the Penal Code defines the offense charged in count two as the keeping or occupancy "for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or inclosure, of any kind, or any part thereof with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, \* \* \* upon the result or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast \* \* \*." It is clear that the offense thus defined is the maintenance of some type of bookmaking establishment. Assuming that an automobile under some circumstances might be kept or occupied as a bookmaking "place" and thus come within the terms of the statute, see *People v. Roche*, 68 Cal.App.2d 665, 669, 157 P.2d 440, the evidence does not show that the automobile in the present case was so maintained. The only evidence relied upon to substantiate the charge is that within a few minutes after defendant had entered his automobile, he received a bet from a newsboy who had been standing on the corner, that the paper on which defendant noted the bet was found on the car seat, and that when arrested defendant had a scratch sheet and an address book on his person. Something more than this is necessary to

constitute a violation of subdivision 2.<sup>1</sup> Although it can be inferred that defendant used the automobile to travel to and from the community where he engaged in the bookmaking business, it cannot be reasonably inferred from the evidence that the automobile was kept or occupied as a bookmaking establishment. The judgment must be reversed as to count two.

The offense charged in count one, the violation of subdivision 3 of section 337a, is committed when money is received as a wager on a race. *People v. Hoffman*, 94 Cal.App.2d 379, 210 P.2d 885. The testimony of officer O'Keefe concerning the transaction between defendant and the newsboy, the piece of paper on which defendant recorded the bet, and defendant's admissions with respect to the business in which he was engaged, are clearly sufficient to support the verdict of the jury that defendant was guilty of taking a wager on the outcome of a horse race. Defendant relies on *People v. Banks*, 39 Cal.App.2d 164, 102 P.2d 818, in which it was held that evidence somewhat similar to that in the present case was insufficient to support a conviction under subdivision 3. However, it appears, as stated in the case of *People v. Hoffman*, supra, 94 Cal.App.2d 382, 210 P.2d at page 887, that in the *Banks* case "the appellate court weighed the evidence and decided in accordance with the testimony of witnesses who were not believed by the trial court and contrary to the evidence that the court had accepted as true." *People v. Banks*, supra, is disapproved insofar as it is in conflict with our holding that the evidence is sufficient to support the judgment as to count one.

[3, 4] Defendant contends that the trial court erred in denying his motion to strike Potter's testimony. At the close of the direct examination of this witness, defendant inquired whether the People were relying upon the events in the bar or the transaction with the newsboy as constituting the offense charged in count one. The People answered that the purpose of Potter's tes-

timony was not to show that an offense was committed in the bar, but to illuminate the character of the transaction which occurred later outside the bar. Defendant then moved to strike the testimony of Potter as being evidence of crimes with which defendant was not charged. It is settled in this state that except when it shows merely criminal disposition, evidence which tends logically and by reasonable inference to establish any fact material for the prosecution, or to overcome any material fact sought to be proved by the defense, is admissible although it may connect the accused with an offense not included in the charge. *People v. Dabb*, 32 Cal.2d 491, 499, 500, 197 P.2d 1; *People v. Peete*, 28 Cal.2d 306, 314, 315, 169 P.2d 924. The actions of defendant and the two unidentified men in the bar, which indicated that defendant engaged in the taking of bets, shed some light on the nature of the transaction between defendant and the newsboy which followed shortly thereafter, and also tended to confirm the admissions made to O'Keefe with respect to defendant's occupation. See *People v. Schwartz*, 14 Cal.App. 9, 12, 110 P. 969. The evidence was therefore relevant and the motion to strike was properly denied.

[5] The trial court at the request of defendant instructed the jury on the general subject of admissions and confessions. Instructions relative to a confession were not applicable to the facts of this case because the only statements made by defendant outside the court room were those made to Officer O'Keefe which were merely admissions and did not amount to a confession of either of the offenses charged. Of course, defendant, having requested that the court give instructions relating to confessions, is in no position to base a claim of error on the ground that instructions on that subject were inapplicable, and he does not do so. He does, however, complain that the following instruction, which he did not request, is erroneous: "If under my instructions you find that a voluntary confession was made,

1. The statute requires that the place must be kept or occupied with books, papers or other paraphernalia and that it must

be so kept or occupied for the purpose of recording bets.



you are the exclusive judges as to whether or not the confession was true; and in deciding that question you should consider all the circumstances connected with the making of the statement, as shown by the evidence. *But even if you should find that a confession was false, either entirely or in part, it remains, nevertheless evidence for your consideration, to be given such significance as your judgment may determine under instructions that I shortly shall give concerning false statements made by a person accused of crime.*" (Italics added.) No such further or other instructions were given in this regard.

[6] This instruction in effect permits the jury to infer the guilt of an accused from the falsity of his confession, and the italicized portion would appear to be clearly erroneous when given without direct qualification by appropriate limiting instructions. It was recently condemned in *People v. Ford*, 89 Cal.App.2d 467, 473, 200 P.2d 867, 871, where it was given without explanation. In that case the court stated that it could not see how the jury could have evolved any reasonable theory under which a false confession of guilt could be considered as an indication of guilt and that "if this could not have been done the instruction was confusing and impossible of rational application to the evidence." Assuming that under some circumstances a jury might be told that a voluntary but false confession has some probative value, the instruction should, nevertheless, be carefully qualified to point out the evidentiary effect of such a confession.

We are of the opinion, however, that the instruction complained of was not prejudicial in the present case. There was clear and convincing testimony by an eye witness to the transaction that defendant had accepted a bet from the newsboy, and the testimony was supported by the introduction in evidence of the paper on which defendant recorded the bet. It is true that in *People v. Ford*, supra, where the same instruction was given, the judgment was reversed, but in that case there was only slight evidence of guilt aside from

the confession, and there was other error which the court held reversible.

Defendant also complains of the conduct of one member of the jury and asserts that because of it he did not receive a fair trial. It appears that during a recess, a juror approached counsel for defendant and the deputy district attorney and inquired, "Is O'Keefe still here?" but he received no reply. The following morning, the trial judge in chambers, with the reporter present but in the absence of defendant and both counsel, asked the juror for an explanation of his conduct. The juror replied that he merely wanted to ascertain the meaning of officer O'Keefe's use of the phrase "place and show." The judge admonished the juror he must not discuss the case with any one and told him that if he had spoken to O'Keefe, it would have constituted a violation of his oath as a juror. Thereafter, in open court, defendant moved for a mistrial on the ground that the juror's conduct in seeking out one of the People's witnesses evidenced an unusual attitude that might well preclude impartial deliberation. The judge then informed counsel as to the substance of his conversation with the juror in chambers. O'Keefe was recalled and testified that he had never spoken to the juror. The People offered to stipulate that the juror could be withdrawn and defendant tried by the eleven remaining jurors, which offer was refused. The motion for mistrial was denied, the court concluding that the question as to the meaning of "place and show" would have been proper if asked in open court, and that there was no indication that the juror was in any way biased.

[7] Although the conduct of the juror was unfortunate, it was not such as to require that a mistrial be declared. In cases in which a conversation has taken place between a juror and a witness, this fact in and of itself has been held to be insufficient to raise a presumption that defendant was prejudiced. *People v. Dunne*, 80 Cal. 34, 36, 21 P. 1130; *People v. Henry*, 132 Cal. App. 557, 562, 563, 23 P.2d 77; see *People v. Golsh*, 63 Cal.App. 609, 617, 618, 219 P. 456. Where, as here, the juror's

attempt to communicate with a witness has been unsuccessful, there is even less reason to hold such conduct prejudicial. Cf. *People v. Dennis*, 39 Cal. 625, 637, 638.

[8] On this appeal defendant for the first time claims it was error for the judge to converse with the juror in defendant's absence. This was not assigned as a ground for the motion for mistrial although at the hearing defendant was informed by the judge concerning the conversation. It appears, however, that defendant was unaware of the fact that during the course of the conversation in chambers the juror asked "What is a hung jury?" and the trial judge explained that "in a criminal case you have to have twelve jurors reach a verdict of either guilty or not guilty. If all twelve jurors do not agree, it is a hung jury." Private communications between a judge and a juror with respect to matters related to the case are of course improper, but nothing took place in the conversation complained of which could possibly have prejudiced defendant and therefore it did not constitute reversible error. *People v. Alcalde*, 24 Cal.2d 177, 183, 189, 148 P.2d 627.

Insofar as count one is concerned, the judgment and order denying motion for new trial are affirmed. As to count two, the judgment and order denying motion for new trial are reversed.

SHENK, EDMONDS, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The majority opinion concedes that the instruction which related to a confession was inapplicable to the case, and that a portion of the instruction given was clearly erroneous, but holds that it was not prejudicial to the defendant. I cannot agree. In my opinion, it was prejudicial, and when considered with other occurrences at the trial, constituted reversible error.

The word "confession" has a connotation to the average person which the word "admission" does not have. Wigmore (*Evidence*, 3rd Ed., sec. 816) points out that

where a confession is concerned, the *testimonial* aspect is the predominant one. The jury may very well have based its verdict on the supposed confession of guilt because it was of the impression that defendant had freely and voluntarily said that he had committed the crime and was thereby impliedly willing to receive his punishment. In addition to the prejudicial effect of the instruction which should not have been given under the facts of the case, the instruction went even farther and permitted the jury to consider it even if it were *found to be false*. It is significant that no instruction was given which would tend to clarify this statement, if such clarification could have been achieved. I cannot see how a false confession of guilt can be considered as having any bearing on a person's guilt or innocence. In *People v. Ford*, 89 Cal.App.2d 467, 200 P.2d 867, the court was concerned primarily with the *falsity* of a confession obtained *after* the accused had been informed of the crime with which he was charged. It was there held that the giving of the same instruction as the one present in this case constituted reversible error. The statements made by the defendant in this case were made prior to any accusation or charge against him and could not have been considered as a confession. Wigmore (sec. 821) defines a confession as "*an acknowledgment in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it.*" [Emphasis that of the author.]

There was no evidence in the case which warranted the giving of an instruction on the effect of a confession. In *Davenport v. Stratton*, 24 Cal.2d 232, 149 P.2d 4, this Court held that the giving of an instruction without support in the evidence constitutes prejudicial error where it is calculated to mislead the jury.

With respect to another occurrence at the trial, the majority concedes that the conduct of the juror was "unfortunate", but that the fact of the conversation, or attempted conversation, between the juror and the witness "in and of itself" did not constitute prejudicial error. It is also stated that the conversation (of which the defendant was not informed during the course of the trial)

between the judge and the juror, with reference to the meaning of a hung jury, was improper but could not have prejudiced the defendant.

I am of the opinion that the testimony of Potter was also prejudicial in that it tended primarily to show criminal disposition on the part of the defendant. This is apparent from the majority opinion which states that defendant's actions in the bar "indicated that defendant engaged in the taking of bets, shed some light on the nature of the transaction between defendant and the newsboy which followed shortly thereafter, and also tended to confirm the admissions made to O'Keefe with respect to defendant's occupation."

It would seem to me that it cannot fairly be said that had these errors not occurred the verdict would have been the same. *People v. Orcalles*, 32 Cal.2d 562, 573, 197 P.2d 26.

I would therefore reverse the judgment as to Count One as well as to Count Two.

SCHAUER, J., concurs.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.



97 Cal.App.2d 867

PEOPLE v. INGLES.

Cr. 2641.

District Court of Appeal, First District,  
Division 1, California.

June 5, 1950.

G. Grant Ingles pleaded guilty in the Superior Court, in and for the City and County of San Francisco, Edward P. Murphy, J., to an information charging him with uttering a check on a bank without sufficient funds and after judgment of conviction became final, petitioned the Superior Court for a writ of error coram nobis. From a denial of that petition, the defendant appealed. The District Court of Appeal, Bray, J., held that although crime for which defendant was held to answer and which was charged in

information was entirely different from that charged in complaint, mistake could by the exercise of reasonable diligence have been discovered by defendant in time to have presented mistake to the court and as defendant had right to make a motion to set aside the information on ground that he had been committed without reasonable or probable cause but did not do so, defendant was thereafter barred from raising in coram nobis, matters that he should have raised on motion.

Order affirmed.

#### 1. Criminal law ☞997

One who applies for a writ of coram nobis must show that facts on which he relies were not known to him and could not in exercise of due diligence have been discovered by him at any time substantially earlier than time of his motion for writ, otherwise he has stated no ground for relief.

#### 2. Criminal law ☞997

Coram nobis is a remedy of narrow scope and its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if trial court had known it and which, through no negligence or fault of defendant was not then known to court.

#### 3. Criminal law ☞997

Where difference between charge in complaint for which defendant was held to answer and that set forth in information was readily apparent, and defendant's attorney waived reading of information by clerk, if attorney and defendant did not read it or compare it with charge in complaint it was such a lack of diligence as would bar right to coram nobis and as defendant's lack of diligence in discovering mistake as to particular crime was entirely his own fault, he was not entitled to coram nobis.

#### 4. Criminal law ☞997

Where charge for which defendant was held to answer and charge set forth in information were different, defendant had right to move that information be set aside by court on ground that he had been committed without reasonable or



probable cause and as defendant failed to do so he was thereafter barred from raising on coram nobis matters that he should have raised on motion. Pen.Code, §§ 995, subd. 2, 996.

##### 5. Criminal law ⇨997

Where remedies exist by statute which did not exist at common law, office and function of coram nobis are abridged thereby and writ is unavailable.

##### 6. Criminal law ⇨997

Where charge for which defendant was held to answer and to which he pleaded guilty, as set forth in information was different from that set forth in complaint, but defendant intended to plead guilty to a felony arising out of the passing of an alleged fictitious check and pleaded guilty instead to charge of uttering a check without sufficient funds, and failed to exercise any of the statutory remedies after judgment, he had no further legal recourse. Pen.Code, §§ 476, 476a, 995, subd. 2, 996.

##### 7. Criminal law ⇨195(1)

Where charge to which defendant pleaded guilty as set forth in information was different from that set forth in complaint, and defendant contended his conviction would not be a bar to a subsequent prosecution of original charge, set forth in complaint, question would become material only if an attempt was made to so prosecute defendant and would not be determined until such time.

Wm. F. Cleary, San Francisco, for petitioner.

Fred N. Howser, Atty. Gen., Clarence A. Linn, Deputy, Alfred Del Carlo, Asst. Dist. Atty., San Francisco, for respondent.

BRAY, Justice.

Appellant pleaded guilty to an information charging him with violation of section 476a of the Penal Code, a felony. After sentence to San Quentin thereon, and after the judgment of conviction became final, he petitioned the superior court for a writ of error coram nobis. From a denial of his petition he appealed.

##### Question Presented.

The main question presented is whether coram nobis will lie where a defendant pleads guilty to a crime charged in an information, which crime is a different one than that set forth in the complaint which initiated the proceeding in the committing magistrate's court.

##### Facts.

The facts are undisputed. On March 12, 1949, the prosecution of appellant was commenced with the filing in the municipal court of a complaint charging him with a violation of section 476 of the Penal Code, setting forth in substance that, with intent to defraud "De Ferrari & Peters," he feloniously made, passed, uttered and published a certain fictitious check, which was in words and figures as follows:

"Factory Payroll Check  
The National Company

Check

Number 3958

PAY Twenty Seven \$\$\$\$ Cents 38 €€€€

To the Order of G. Grant Ingles

302-1503186 OD

46-02 N. W. Baker

Any Bank or Trust Co.

Anywhere (signed) L. R. Prentez" and said check was indorsed by said G. Grant Ingles in words and figures as follows:

"G. Grant Ingles

"2001 California St., San Francisco"; that there was no such firm as The National Company, which appellant well knew, and that appellant well knew that the check was fictitious.

Appellant waived a preliminary examination and the judge of the municipal court, on March 16, 1949, held the petitioner to answer "for the offense of 'Felony to-wit, 476-A Penal Code'." (Emphasis added.) Thereafter and on March 25, the district attorney filed an information in the superior court charging appellant with violation of 476a, Penal Code. The information did not set forth a copy of the check, but in substance charged that appellant, with intent to cheat "De Ferrari & Peters and Bank of America, N. T. & S. A., a corpo-

ration," feloniously made, drew, uttered, and delivered to De Ferrari & Peters a check and draft for the payment of \$27.38, drawn upon a bank, "to wit, Bank of America," knowing at the time that he had not sufficient funds in, or credit with said bank to meet the check and draft upon its presentation for payment.

It will be noted that the charge of violating section 476a of the Penal Code, that is, uttering a check on a bank without sufficient funds, is an entirely different crime than that charged in the complaint, namely, violating section 476, that is, uttering a fictitious check. The information also charged appellant with a prior conviction and incarceration.

On March 29 appellant was arraigned. The record shows that he was present with an assistant public defender who was appearing for appellant's attorney, Eyman. The reading of the information was waived. At the request of the attorney the time to plead was continued to April 5. On that day appellant was present without his attorney, who was engaged elsewhere. The district attorney stated that Mr. Eyman had requested that the matter be continued to April 8. This was done. On that day appellant was present with his counsel and pleaded "guilty of the offense charged," but denied the prior. Appellant waived time for pronouncement of sentence and then made a motion for probation. On May 9, appellant being present without counsel, the hearing of the probation report was continued to May 10.

On that day Attorney Eyman informed the court that appellant and his mother desired to substitute Attorney Sullivan, and that the latter desired the matter continued to the 12th. The court thereupon stated that it saw no necessity for a continuance, that the record showed that appellant had been "in trouble since 1943, at which time he was picked up in San Francisco at the request of his mother. He cashed a series of twenty checks and was in trouble not only in San Francisco, but in Denver and Oakland. His difficulties seem to stem from a bad family situation involving his mother and aunt. He has an extremely bad record. He has been given probation

before, once for a period of five years, and every opportunity he has been given he has failed miserably. It is to be hoped that through proper psychiatric treatment which may be rendered to him while in the custody of the Youth Authority he might return as a normal member of society, and for that reason I am recommending he be referred to the Youth Authority for their consideration and possible acceptance."

The court made an order denying probation and then ordered the cause referred to the Youth Authority and continued the cause to May 24 "for report." On that day, appellant appearing without counsel, the cause was continued to May 27. On that day, the court stated: "I understand Mr. Sullivan, the defendant's lawyer, will not be here. However, there is nothing he could do for this man if he were here, and I do not think the law requires that his attorney be present at this proceeding. This young man has applied for probation. He was referred to the Youth Authority and the Youth Authority has refused to accept him. The report of the Probation Department, with which the Court is familiar, indicates he has passed about twenty checks, totaling about \$400 in San Francisco alone. He has been in trouble since 1943, exclusive of the trouble he had in the Army. He has been charged with armed robbery and burglary, and he offers no excuse other than to say he can't stop his depredations. It is the thought of the Court that through the medium of psychiatric and psychological studies, for whatever benefit they may be, which is dubious, some help might be accorded to him. However, the Youth Authority has advised the Court they do not believe he would be benefitted by their training and treatment. So, therefore, this Court has no other alternative than to deny the motion for probation." The court thereupon sentenced appellant to San Quentin. On June 9, in the absence of appellant, the district attorney moved for a dismissal of the prior conviction charged in the information. The motion was granted. As amended judgment of conviction under section 476a of the Penal Code and an amended sen-

tence to San Quentin was then made by the court.

On August 22, appellant filed a petition for writ of error coram nobis on the grounds of the existence of facts which, had they been before the court, would have precluded the rendition of the judgment.

#### The Difference In Offenses.

Unquestionably the crime for which appellant was held to answer and which was charged in the information, is entirely different from that charged in the complaint. To determine whether such fact justifies the relief of coram nobis it is necessary to consider the scope of the latter writ.

[1,2] Appellant quotes the following language from 31 Am.Jur. 323: "A writ of coram nobis or coram vobis, where available, is used to obtain a review of a judgment where it appears that certain mistakes of fact have occurred which were not put in issue, were unknown to the court, and were not passed upon by it"; and relies principally upon that quotation and similar language taken from *People v. Reid*, 195 Cal. 249, 259, 232 P. 457, 36 A.L.R. 1435. However, such language gives only a part of the test. The other part is set forth in 31 Am.Jur. 325 as follows: "It is essential to the availability of the remedy of coram nobis or coram vobis that the mistake of fact relied upon for relief was unknown to the applicant at the time of the trial, and could not by the exercise of reasonable diligence have been discovered by him in time to have been presented to the court, unless he was prevented from so doing by duress, fear, or other sufficient cause, so that it was by no negligence or other fault of his that the matter was not made to appear at the former trial." It is not merely that a judgment is made upon the assumed existence of a fact or condition which did not in truth exist, and the nonexistence of which, if it had been known, would have precluded the rendition of the judgment, which justifies the issuance of the writ of coram nobis, but there is one additional requisite, namely, the existence of that fact must not have been known, and could not have been known to the appellant by the exer-

cise of reasonable diligence. *People v. Shorts*, 32 Cal.2d 502 at page 506, 197 P.2d 330, contains an exhaustive discussion of the principles of the "extraordinary remedy" of coram nobis as applied in this state. It is there said in 32 Cal.2d at page 513, 197 P.2d at page 336: "One who applies for a writ of *coram nobis* upon a ground such as the one here presented must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief." As said in *People v. Adamson*, 34 Cal.2d 320, 326, 210 P.2d 13, 15, coram nobis is a remedy of "narrow scope. \* \* \* Its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court. (Citations.)" See also *People v. Thompson*, 94 Cal.App.2d 578, 211 P. 2d 1.

[3] Applying these tests, appellant is not entitled to the extraordinary relief sought. The fact that the charge for which he was held to answer and which was set forth in the information was different from that set forth in the complaint was readily apparent. While his attorney waived the reading of the information by the clerk (a matter of common practice), if the attorney and appellant did not read it or compare it with the charge in the complaint, it was such a lack of diligence as would bar the right to coram nobis. Appellant and his attorney intended that he plead guilty to a felony arising out of the passing of the check in question. The one he pleaded to and the one he intended to plead to are of equal severity so far as punishment is concerned. His lack of diligence in discovering the mistake as to the particular crime was entirely his own fault. Appellant contends that his youth and the fact that his attorney was not present when he was sentenced constituted a reason for his not discovering the error. So far as



his youth is concerned, his court experience as disclosed by the statements of the court as to his previous record proves that when he pleaded guilty he knew he was taking his chances as to whether he might be given probation or referred to the Youth Authority.

Appellant contends that at the time he pleaded he was a minor under great emotional stress and strain and was only vaguely aware of what was going on and imperfectly comprehended the meaning and effect of what was said and done. As to this contention the judge who presided when the plea was made as well as at the coram nobis proceeding, stated (referring to an offered stipulation that appellant, if present, would testify to being under stress, etc.): "I think he was perfectly aware of the nature of the proceedings which were taken and I certainly would not accept such a stipulation, based upon my own personal observation of the situation as it occurred. \* \* \* I will accept it as a stipulation that he was under emotional stress and strain, that is, if he were here he would say he was under emotional stress and strain, I will accept that but I will not accept it as a fact." While, naturally, a defendant, whether young or old, who is required to plead to a charge of felony, is under considerable emotional stress and strain, that fact does not permit him to disavow his plea when he finds that the court is not as lenient with him as he thought it would or should be.

As to the absence of his counsel from court at the time of sentence, the record shows that with the exception of the time of plea, which is the most crucial time in court appearances of a defendant intending to plead guilty (crucial in the sense that he needs his attorney more than thereafter) his attorney (and he had two in succession) did not appear. Appellant contends that at least on one occasion his attorney was ill. Had there been good reason for his nonappearance a showing could have been made, and a continuance most likely granted. If refused, then a different complexion might appear on the

face of the proceedings. Moreover, even if his counsel were present at the time the report recommending against probation and the later refusal of the Youth Authority to accept appellant were heard, it is doubtful if the attorney would have discovered the difference in the charge. The time to consider the information in its relation to the original charge was at the time of plea. Thereafter it is the action that the court will take on the plea upon which the attorney concentrates. If the attorney had not already discovered the error, ordinarily there would be nothing in the subsequent proceedings which would be likely to draw his attention to it.

[4,5] There is another reason why coram nobis will not lie here. Section 995 of the Penal Code provides that the information must be set aside by the court, upon the defendant's motion, where "2. \* \* \* the defendant had been committed without reasonable or probable cause." Committing a defendant for a different crime than that with which he is charged in the complaint unquestionably is commitment without probable cause. Section 996 provides: "If the motion to set aside the indictment or information is not made, the defendant is precluded from afterwards taking the objections mentioned in the last section." The appellant had the right to make such motion and did not do so. He is therefore barred from raising on coram nobis the matters that he should have raised on motion. *People v. Coates*, 95 Cal. App.2d 78, 212 P.2d 263. As said in *People v. Mooney*, 178 Cal. 525, 529, 174 P. 325, 327: "'\* \* \* where remedies exist by statute which did not exist at common law, the office and function of the writ [coram nobis] are abridged thereby, and in such cases the writ is unavailable.'" While the *Mooney* case refers specifically to the statutory remedies of appeal and motion for new trial, the same theory applies to any other statutory remedies which a defendant has.

In this case, appellant had a number of statutory remedies which, had he used reasonable diligence, would have been open to him: Among others, the motion under

section 995, a not guilty plea coupled with an objection to the introduction in evidence of the check as not being material to the crime charged in the information, or a motion in arrest of judgment at the time of sentence.

#### Mistake In Plea.

[6] While it is true that appellant pleaded guilty to a crime of which there is no evidence of his guilt, he is in no different situation than was the defendant in *People v. Moore*, 9 Cal.App.2d 251, 49 P.2d 615, where the defendant admitted four prior felony convictions and a judgment was entered of conviction on the primary charge and he was sentenced as an habitual criminal. Later, he found out that three of the prior convictions were not felonies in this state. He thereupon sought relief by *coram nobis*. The order of the superior court denying him such a writ was affirmed on appeal. It was held that this type of mistake cannot be cured by *coram nobis*, as defendant had open to him certain statutory remedies. The defendant contended that as he did not discover his mistake until too late to take advantage of the statutory remedies, the writ should lie. As to this contention the court stated, quoting from *People v. Reid*, *supra*, 195 Cal. 249 at pages 257, 258, 232 P. at page 460: "Appellant concedes that the provision of a statutory remedy impliedly displaces the common-law remedy to the extent that the former is available, but argues that where the statutory remedy is unavailable by reason of the statute of limitations applicable thereto, that the common-law remedy should then be applied. He argues that because the defendant did not discover the facts here relied upon until too late to present them in support of his motion for new trial, the statutory remedy should be deemed 'unavailable,' and the common-law remedy should therefore be resorted to. He cites no authority which supports this conclusion and we are convinced that it is not sound." The court then points out that the fact that a defendant, through his own mistake,

pleads guilty to a crime of which he is innocent, does not entitle him to a writ of *coram nobis*, saying 9 Cal.App. at page 255, 49 P.2d at page 617: "We fail to see how the position of defendant in this proceeding is any different from that of a person who pleads guilty to a crime believing in fact that he was guilty of the same at the time of his plea, when, as a matter of law, the facts could not establish his guilt. In the latter situation a defendant would have the undoubted right to make a motion to change his plea. (Citations.) If, however, the defendant omits to do so, and the time has expired for the exercise of any of the statutory remedies after judgment, which might be invoked to cure the situation, and the judgment becomes final, there would be no further legal recourse by any form of judicial review. The same, we believe, is true in this case."

It must be borne in mind when considering the fact that appellant has pleaded guilty to a crime of which apparently he is not guilty that it is not a situation in which a completely innocent person has inadvertently subjected himself to a jail sentence. Appellant intended to plead guilty to a felony and take his chances on the sentence which would follow. He merely pleaded guilty to a different crime (although not different as to penalty) than the one which he wanted to admit he committed.

#### Bar To Subsequent Proceeding.

[7] Appellant contends that his conviction could not be a bar to a subsequent prosecution on the original charge or of petty theft by trick and device for uttering and passing the instrument set forth in the complaint. It is unnecessary for us to determine that question at this time. If, and only if, an attempt is made to so prosecute him would that question become material.

The order is affirmed.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.

97 Cal.App.2d 850

**HAFLIGER v. COUNTY OF SACRAMENTO et al.****Civ. 7645.**District Court of Appeal, Third District,  
California.

June 1, 1950.

Joseph Haflinger brought action against the County of Sacramento, and James R. Garlick and others, individually, and as Supervisors of the County of Sacramento, to recover unpaid salary balances. The Superior Court, Sacramento County, Lowell L. Sparks, J., sustained defendants' special demurrer based on the statute of limitations as to the amounts alleged to have accrued as unpaid salary more than three years before the action was instituted and denied defendants' general demurrer, and after plaintiff's case was presented granted defendants' motion for a nonsuit. From the judgment which followed, plaintiff appealed. The District Court of Appeal, Adams, P. J., held that plaintiff's failure to file written claims for the amounts alleged to be due him with the Board of Supervisors foreclosed his right to sue for any wages claimed.

Affirmed.

**1. Counties ⇨3**

Although constitution provides that county charter supersedes general laws, provisions of general law control as to matters on which charter is silent. Const. art. 11, § 7½.

**2. Counties ⇨75(3)**

In action by employee against county to recover unpaid salary, where county charter contained no provision applicable to filing of claims, provisions of general laws relative to filing of claims was applicable. Const. art. 11, § 7½; Pol.Code, §§ 4075-4078.

**3. Counties ⇨75(3)**

In action by employee against county for unpaid salary, where plaintiff failed to file written claims for amounts alleged to be due him with Board of Supervisors, he foreclosed his right to sue for any wages claimed. Const. art. 11, § 7½; Political Code, §§ 4075-4078.

Busick &amp; Busick, Sacramento, for appellant.

J. Francis O'Shea, D. A., Wm. A. Green, Asst. D. A., John B. Heinrich, Dep., all of Sacramento, for respondents.

ADAMS, Presiding Justice.

On April 6, 1946, appellant Haflinger filed a complaint against the county of Sacramento and the members of its board of supervisors to recover salary balances which he claimed had been unpaid between July 1, 1936 and November 1, 1945. Said complaint was thereafter amended to allege that he had been employed by the county as a sheet metal worker five days each week, and as engineer at the county jail on Saturdays and Sundays, and that the salary paid him was below the prevailing wage rate paid for such services by private employers, in violation of section 63 of the county charter which provided that the board of supervisors should, by ordinance, provide for the payment of not less than the prevailing or general current rate of compensation or wages paid by private employers in the county of Sacramento for similar quality or quantity of service.

Plaintiff claimed a balance of \$37.50 due from July 1, 1936 to and including June 30, 1937 for his services as a sheet metal worker, \$63.37 due for the next following fiscal year, \$94.08 due for the next fiscal year, \$185.25 each for the next two fiscal years, \$297.00 for the next fiscal year thereafter, and \$396.75 and \$114.75, respectively, for the next two fiscal years, up to June 30, 1944. In addition, he alleged that for his services as engineer at the jail he had balances due him for each fiscal year between July 1, 1936 and June 30, 1945, and from July 1, 1945 to October 31, 1945.

He also alleged that he had theretofore made demand upon the board of supervisors that by ordinance they provide for the payment to him of not less than the prevailing wages paid by private employers in the county of Sacramento for sheet metal work, but said board had not so provided, and would not so provide unless compelled to do so by writ of mandate or other appropriate



writ. He prayed judgment for \$6,897.91, with interest, and that the court issue a writ of mandate requiring the board to provide by ordinance for payment to him of not less than the prevailing wage, said ordinance to be made retroactive to cover the period of his employment as alleged.

Defendants, by demurrer, set up the failure of the amended complaint to state a cause of action. They also set up sections 338(1) and 339 of the Code of Civil Procedure and sections 4075-4078 of the Political Code as barring the action.

As to the amounts alleged to have accrued between July 1, 1936 and June 30, 1941, the court sustained the demurrer as beyond the one year limitation imposed by section 4075 of the Political Code, and as to all other claims beyond the three year limitation imposed by section 338(1) of the Code of Civil Procedure. The general demurrer was overruled, the special demurrer being sustained only as to the items more than three years old.

At the trial, after plaintiff's case was presented a motion for a nonsuit filed by defendants was granted. From the judgment which followed, this appeal was taken. Appellant filed an opening brief only, and the cause was submitted without argument.

We note, first, that it is not alleged by plaintiff nor was there proof offered that plaintiff ever filed with the board of supervisors any written claim or claims for the amounts alleged to be due him. He admitted he did not. He contends that the provisions of the Political Code, sections 4075-4078, are not applicable because Art. XI, sec. 7½, of the Constitution provides that a county charter supersedes the general laws and that the adoption of the charter of Sacramento County ruled out the requirements of section 4075 of the Political Code, which section provided:

*"Presentation of claims: \* \* \* All claims against any county or against any public officer in his official capacity payable out of any public fund under the control of the board of supervisors, whether such claim be founded upon contract, express or implied, or upon any act or omission of the county or any officer or employee*

*thereof, \* \* \* shall be presented to the board of supervisors as herein provided before any suit may be brought on any such claim, and no suit shall be brought on any such claim until said claim has been presented as herein provided and rejected in whole or in part. In presenting any claim not founded upon contract full details as to the nature of the claim, the time and place when and where it arose, the public property and public officers or employees alleged to be at fault, the nature, extent and amount of the injury or damage claimed, and all other details necessary to a full consideration of the merit and legality of such claim shall be stated in writing signed by the claimant or someone authorized by him, and in all other respects such claims shall be presented and acted upon in the same manner as claims founded upon contracts."* (Italics added.)

[1,2] While Article XI, section 7½, of the Constitution, generally speaking, does provide that a county charter supersedes general laws, it reads: "Whenever any county has framed and adopted a charter, and the same shall have been approved by the Legislature, as herein provided, the general laws adopted by the Legislature in pursuance of Sections 4 and 5 of this article, shall, as to such county, be superseded by said charter as to matters for which, under this section it is competent to make provision in such charter, *and for which provision is made therein*, except as herein otherwise expressly provided." (Italics added.)

Appellant has not pointed out any provisions of the charter of the county of Sacramento applicable to the filing of claims, or which can be said to supersede the provisions of section 4075 of the Political Code, and we find none.

In *Jones v. De Shields*, 187 Cal. 331, 336, 202 P. 137, 140, cited and followed in *Nicholl v. City and County of San Francisco*, 201 Cal. 470, 474, 257 P. 501, it is said: "Section 7½ of article XI of the Constitution provides: That a charter upon its ratification by the Legislature 'shall become the charter of such county and shall become the organic law thereof relative to the matters

therein provided, \* \* \* and shall supersede all laws inconsistent with such charter *relative to the matters provided in such charter,*' and that 'whenever any county has framed and adopted a charter, \* \* \* the general laws \* \* \* shall, as to such county, be superseded by said charter as to such matters for which, under this section it is competent to make provision in such charter, *and for which provision is made therein,* except as herein otherwise expressly provided.' (Italics ours.) These provisions contemplate that there may be a case where a charter will fail to provide for matters which it properly should cover, and the intention is clear that in such a situation the general law, which in such a case has not been superseded by the charter, shall govern. See *Cline v. Lewis*, 175 Cal. [315], 316, 165 P. 915." And it was held that sections 4266 and 4024 of the Political Code were applicable to the facts of the case, the charter being silent on the subject. In *Cline v. Lewis*, there cited, it was held that there being no provision in the charter of the county of Los Angeles determining the time when ordinances should take effect, or as to the subjects of initiative and referendum, such matters, under the constitutional provision were controlled by the Political Code.

A similar holding was had in *Thompson v. County of Los Angeles*, 140 Cal.App. 73, 75, 35 P.2d 185, that the county charter containing no provision for the filing of claims before suit, for injuries sustained by reason of the defective or dangerous condition of a highway, the general law applied, the court saying, 140 Cal.App. at page 75, 35 P.2d at page 186: "The provisions of the general law control as to matters on which the charter is silent (*Deupree v. Payne*, 197 Cal. 529, 241 P. 869; *Cline v. Lewis*, 175 Cal. 315, 165 P. 915), and this act must be construed and applied in connection with sections 4075 to 4078, inclusive, of the Political Code, which deal with the subject of claims against a county." In *Deupree v. Payne*, above cited, it was held that as the charter of the county of Los Angeles was silent as to the powers of the board of supervisors in the matter of the passage and adoption of emergency ordinances the coun-

ty was governed in that respect by general law. Also see *Veterans' Welfare Board v. City of Oakland*, 74 Cal.App.2d 818, 827, 169 P.2d 1000.

In other cases, without mention of the absence of charter provisions, the general law has been followed, thus inferentially applying the rule of the foregoing case. See *Rhoda v. County of Alameda*, 134 Cal.App. 726, 734, 26 P.2d 691, holding that failure to file a claim under Political Code section 4075 was fatal to the action, and *Artukovich v. Astendorf*, 21 Cal.2d 329, 131 P.2d 831 applying section 4075 in an action against the county of Los Angeles, both counties previously having adopted charters.

[3] From the record it is apparent that the trial court relied upon the general law as applicable, and that appellant neither pleaded nor proved that he had filed any claim with the county. Section 4075 required the filing by plaintiff of a claim before this suit was begun; and by his failure to do so he foreclosed his right to sue for any wages claimed. The judgment of nonsuit was therefore proper.

Regarding the prayer of plaintiff's complaint, that, by writ of mandate, the board of supervisors be ordered to provide by ordinance for the payment to plaintiff of not less than the prevailing or general current rate of compensation paid by private employers in Sacramento County to sheet metal workers for services similar to those performed by plaintiff, and that such ordinance be made retroactive to cover the period of plaintiff's employment as alleged, the record shows that the board had, before this action was filed, fixed the minimum wage at \$13 per day, the amount plaintiff claimed was the prevailing wage scale at that time, and evidence to that effect was adduced by him. While that ordinance was not made retroactive, even if it would have been valid to do so, which we need not decide, it could avail plaintiff nothing since he filed no claim with the board of supervisors. The writ was properly denied.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

97 Cal.App.2d 841

**HAUN v. DE VAURS et ux.****RAHILLY et al. v. DE VAURS et ux.**

Civ. 7763, 7764.

Sac. 6966, 6967.

District Court of Appeal, Third District,  
California.

May 31, 1950.

Action by Eleanor E. Haun and by Mamie Rahilly and another against Leslie DeVours and another, to restrain defendants from diverting water from a channel alleged to be a natural water course, wherein defendants filed a cross-complaint. The Superior Court of Merced County, R. R. Sischo, J., rendered judgments for plaintiffs, and defendants appealed. The District Court of Appeal, Adams, P. J., held that channel was a natural water course and evidence was insufficient to establish defendants' claim that they had acquired a prescriptive right to use the water in the channel.

Judgments affirmed.

**1. Waters and water courses** ⇨38, 151

Where slough was originally a branch of a creek and flow from creek was later cut off but slough still had well defined channel and distinct banks and water produced by rainfall on adjoining lands flowed into slough and slough also carried foreign water abandoned by irrigation district, the cutting off of the waters from creek did not destroy the character of the channel as a "natural channel" or "water course", hence foreign waters abandoned by irrigation district were subject to appropriation under statute. Water Code, §§ 1200, 1201.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Natural Channel" and "Natural Water Course".

**2. Waters and water courses** ⇨151

Appropriative rights of lower owners to foreign waters, drained from irrigation district lands and carried by slough would not be infringed by agreement entered into between upper owners and district, whereby district disposed of surplus water to

upper owners prior to its abandonment. Water Code, §§ 1200, 1201.

**3. Waters and water courses** ⇨151

Appropriative rights of lower owners to foreign waters drained from irrigation district lands and carried by slough were subject to contingency that supply of such abandoned water might be intermittent or entirely terminated, at will of district. Water Code, §§ 1200, 1201.

**4. Waters and water courses** ⇨152(8)

In action by lower owners against upper owners to restrain upper owners from diverting water from a slough, evidence was insufficient to establish upper owners' claim that they had acquired a prescriptive right to such waters by reason of adverse use for more than five years prior to issuance of permits. Water Code, §§ 1200, 1201.

**5. Waters and water courses** ⇨152(11)

In action to restrain defendants from diverting water from channel, judgments for plaintiffs declaring merely that plaintiffs had prior and paramount right over defendants to appropriable water flowing in the channel to the extent set forth in their permits were not defective as being too broad in that they gave plaintiffs the right to appropriate specific amount of water but did not limit right to water that irrigation district should abandon where there was some water in the channel that did not come from district's spillway. Water Code, §§ 1200, 1201.

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Stephen P. Galvin and Stephen P. Galvin, Jr., Merced, for appellants.

Samuel K. Brantley, Jr., Merced, C. Ray Robinson, Merced, for respondents.

ADAMS, Presiding Justice.

Plaintiff Eleanor E. Haun, and plaintiffs Mamie F. Rahilly and Michael Rahilly, Jr., brought these two actions to restrain defendants Leslie DeVours and Margaret Patricia DeVours from diverting water from Middle Slough, which slough was alleged to be a natural watercourse,



its waters first flowing through the property of defendants and thence through that of plaintiffs below. Plaintiffs were appropriators of specified amounts of the water of the stream as foreign waters, that is, waters that had been abandoned by the Modesto Irrigation District and permitted to flow down Middle Slough. Defendants denied such rights in plaintiffs, contending that the slough is not a natural watercourse the waters of which are subject to appropriation, that they were not "foreign" waters, and that defendants had acquired a prescriptive right to such waters.

The trial court found that the slough is a natural watercourse, that its waters are mainly foreign waters, that they were subject to appropriation, and that defendants had not acquired a prescriptive right to same. Judgment was entered for plaintiffs adjudging that, as between the parties, plaintiffs had a prior and paramount right to the use of the water in the slough to the extent of their appropriations, and enjoining defendants from diverting water to which plaintiffs were entitled.

Defendants have appealed, and here contend, first, that Middle Slough is not a natural watercourse, but an artificial one, and that only waters flowing in a natural watercourse are subject to appropriation. They concede that whether a slough is or is not a natural channel is a question of fact, but urge that in this case the evidence is uncontradicted, wherefore a question of law is presented which should have been resolved in their favor.

[1] The evidence shows that Middle Slough was originally a branch of Mariposa Creek from which it received a portion of the flow of that stream. Long prior to the beginning of these actions the upper portion of the slough was filled in by the landowners whose lands it traversed, and flow from Mariposa Creek was cut off. There is evidence, however, that where the slough crosses the lands of the parties to this action it has a well defined channel and distinct banks of such depth and declivity that vehicles cannot be driven across it at most points. Into this channel flows water produced by rainfall on adjoining

lands. It also carries waters drained from the Merced Irrigation District lands above defendants' lands.

The cutting off of the waters of Mariposa Creek from the channel of the slough did not destroy the character of the channel as a natural channel or watercourse, *Cederburg v. Dutra*, 3 Cal.App. 572, 575, 86 P. 838; *Smith v. City of Los Angeles*, 66 Cal.App.2d 562, 578-579, 153 P.2d 69; and, under section 1201 of the Water Code, "All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code."

Appellants urge that regardless of section 1201 the waters in the slough are foreign waters, and, as such, are not appropriable; that they are not surface waters, within the meaning of section 1200 of the Water Code, because "surface water" as there used means water from rains, snows or springs which flow on the surface of the earth. Section 1200 reads: "Whenever the terms stream, lake or other body of water, or water occurs in relation to applications to appropriate water or permits or licenses issued pursuant to such applications, such term refers only to surface water, and to subterranean streams flowing through known and definite channels."

We conclude that such language includes the foreign waters flowing in the slough from the Merced Irrigation District lands. In *Bloss v. Rahilly*, 16 Cal.2d 70, 74, 104 P.2d 1049, 1051, in which case one of the present plaintiffs was a party defendant, our Supreme Court upheld the rights of an appropriator to similar foreign water, saying that it is "settled in this jurisdiction that so-called foreign waters are subject to appropriation." It quoted from *Crane v. Stevinson*, 5 Cal.2d 387, 394, 54 P.2d 1100, as follows: "\* \* \* 'In view of the later definition of state policy in rela-

tion to the conservation and use of water, as expressed in the Water Commission Act, and in the recent constitutional amendment (article 14, § 3) on that subject, there should remain no present doubt that so-called foreign waters are now subject to appropriation under the laws of this state. The fact that, where such waters have been brought into a stream as the result of abandonment by another appropriator, there is no way to compel him to continue such abandonment, necessarily affects the value of the subsequent appropriation right, but does not affect the existence of the right, subject to the limitation caused by the nature of the water supply in question.” And in that case plaintiff Bloss’ rights as an appropriator were quieted as against defendants.

[2,3] It appears from the record that on March 30, 1948, appellants and the district entered into a contract whereby the district sold to them the right to use any surplus water which the district might, during the irrigation season of that year, spill into the Fessler drain which connects with the slough above the lands of the parties to this action. This contract had terminated before the trial herein. The district did not obligate itself to furnish any specific quantity of water to defendants and scrupulously avoided any promise that there would be any such surplus water available. This agreement did not in any degree affect the appropriative rights of respondents, for those rights were always subject to the right of the district to sell and otherwise dispose of its surplus water before it should have abandoned the same; but the district might abandon its surplus water as it spilled into the slough and if and when it did so the same would, as between the parties hereto, come under the appropriative rights of respondents; or the district might, before such abandonment, make lawful disposition of the same. The appropriative rights of respondents are not infringed by such acts of the district for such rights were at all times subject to the contingency that the supply of water available for the lower appropriator might be intermittent and might be even terminated entirely at the will of the district. Stevens

v. Oakdale Irr. Dist., 13 Cal.2d 343, 348, 90 P.2d 58.

[4] Appellants next contend that they have prior and paramount rights over the appropriative rights of the respondents by reason of adverse use of the water in the slough for more than five years prior to the issuance of the permits. The trial court found against this contention and this holding must be sustained, since the evidence falls far short of proving prescriptive rights.

[5] Finally, it is contended by appellants that the judgments rendered are too broad in that they give the respondents a right to appropriate a specific amount of water but do not limit that right to the water that the district shall abandon. This contention likewise is unsound. To begin with, the respondents are simply declared by the judgments to have prior and paramount right over appellants to appropriable water flowing in the channel of Middle Slough to the extent set forth in their permits. It was not necessary to place any other limit upon respondents’ rights. Whatever the source of the water flowing in the slough, and the evidence discloses that there is some water that does not come from the district’s spillway, it does not come within respondents’ permits unless the same is appropriable. If it is, then the judgments simply declare that as between respondents and appellants the former have the prior and paramount right thereto within the permit limits. Throughout the judgments the trial court appears to have carefully so limited its decrees. Thus, after declaring the rights of respondents, the judgments declare that as to any of the injunctive restraints placed upon the defendants they are only intended to protect the respondents as to the amount of water to which they have been adjudged to be entitled; and the restraints embodied are expressly limited to the diverting or taking of water to which the respondents are entitled. Within these limits only are the appellants restrained.

The judgments are affirmed.

SPARKS, Justice pro tem., and PEEK, J., concur.

97 Cal.App.2d 855

**SCHOUTENS et al. v. SUPERIOR COURT  
IN AND FOR LOS ANGELES****COUNTY et al.****Civ. 17741.**District Court of Appeal, Second District,  
Division 1, California.

June 2, 1950.

Edward Schoutens and another petitioned for a writ of prohibition to restrain the Superior Court of Los Angeles County, and William B. McKesson, J., from directing the release of an attachment. The District Court of Appeal, Doran, J., overruled the respondents' demurrer and held that since petitioners' appeal was made in good faith, and a Sunday and an election day intervened between service of the notice of order discharging attachment and the petitioners' perfection of an appeal from such order seven days later, and that considering the policy of the law favoring the hearing of appeals on their merits, the attachment should be continued in force pending disposition of the appeal.

Writ of prohibition granted.

**1. Appeal and error ⇐2**

Where there is any ambiguity in statute pertaining to right of appeal, that construction should be adopted that protects right of appeal, since policy of law favors hearing of appeals on their merits.

**2. Appeal and error ⇐446**

Where appeal from order discharging attachment was not perfected until seven days after service of notice by mail, but record disclosed that appeal was in good faith as evidenced by posting of appeal bond before required, and Sunday and election day intervened, attachment should be continued in force pending disposition of appeal. Code Civ.Proc. §§ 12a, 946, 1013.

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Franklin W. Peck, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, Douglas De Coster, Deputy County Counsel, and Warren E. Libby, all of Los Angeles, for respondents.

Warren E. Libby, Los Angeles, for Harvey L. Cole, Real Party in Interest.

DORAN, Justice.

The petition for a writ of prohibition alleges that on June 6, 1949, the petitioners, husband and wife, commenced an action in Superior Court against one Harvey L. Cole, seeking to recover \$9,995.00 and interest, for money had and received. Incidental thereto, petitioners caused a writ of attachment to be issued which was thereafter levied upon certain real property, and all debts due and owing to defendant from the California Bank, 1600 North Vine St., Los Angeles, California. To the foregoing petition respondents filed a general demurrer and answer.

On September 20, 1949 Harvey L. Cole served upon petitioners notice of a motion to discharge the attachment on the ground that the writ was improperly and irregularly issued, which motion was granted with a stay of execution until October 25, 1949. A "Notice of order discharging attachment" was received by petitioners by mail on November 3, 1949. On November 2, 1949, petitioners filed with the County Clerk a surety bond of \$19,990.00, for the purpose of staying execution on said order discharging the attachment, pending appeal from such order. And on November 9, 1949 petitioners filed a notice of appeal; a notice to prepare a transcript on appeal was filed on November 15, 1949, and the transcript was filed in the District Court of Appeal on March 16, 1950. Such appeal is now pending and undetermined. On November 10, 1949, Cole made a demand on the Sheriff to release the attachment on the ground that the appeal had not been perfected within the required time, which demand was refused.

The petition further alleges that on December 30, 1949, Harvey L. Cole filed a petition for writ of mandate to compel release of the attachment, which petition was "denied without prejudice to application to Superior Court". Thereafter, on February 14, 1950 Cole served on petitioners an "order to show cause in re release of attached property", to which counter



affidavits were filed. On March 6, 1950, after argument, the Superior Court Judge Wm. B. McKesson granted the order, stay of execution thereon being extended until March 28, 1950. The order was granted on the ground that petitioners had failed to perfect the appeal within the prescribed time. By the present proceedings for writ of prohibition, petitioners seek to prevent the release of said attachment.

Determination of the present proceeding is dependent upon the question whether petitioner's appeal from the order discharging the attachment was perfected within the required period. If it was sufficiently perfected, then the lien of the attachment remained intact pending the appeal and any interference therewith, judicial or otherwise, should be prohibited. In this connection it will be remembered that on November 2, 1949, and before filing the notice of appeal, petitioners had filed with the County Clerk, a surety bond of twice the amount of the claim involved, as required by the statute, which amply secured the respondents.

Section 946 of the Code of Civil Procedure, here invoked by the respondents, provides that "An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant \* \* \* and unless, *within five days after written notice of the entry of the order appealed from such appeal be perfected.*" (Italics added.)

In respondents' Memorandum of Points and Authorities in support of a demurrer to the petition for prohibition, it is argued that under any one of three theories, the appeal was not perfected within the required five-day period, and that such situation is shown upon the face of the petition for prohibition. It is first submitted that the order discharging the attachment was signed and filed October 28, 1949; that petitioners had waived notice of entry of said order and that since petitioners notice of appeal was not filed until November 9, 1949, a "full eleven days elapsed prior to the perfection of any appeal". Respondents' second theory is that written notice of the order discharging attachment was served by mail on petitioners on November

1, 1949; that from such date to November 9, 1949, the date of perfecting the appeal, "a full seven days elapsed". A third theory is that from the date petitioners received actual notice by mail of said order, November 2, 1949, to November 9, 1949, "a full six days elapsed prior to the perfecting of any appeal".

The petitioners maintain that the appeal was taken in due time. It is contended that since the notice of entry of the order dissolving attachment was mailed by respondents on November 1, 1949, "The last day fell on Sunday, November 6, 1949. This gave them an additional day to and including November 7, 1949" under the provision of Section 12a of the Code of Civil Procedure. Petitioners then call attention to Section 1013 in reference to service of notices by mail, which provides that "if, within a given number of days after such service (by mail), a right may be exercised, or an act [may] be done by the adverse party, the time within which such right may be exercised or act be done, *is extended one day \* \* \**" (petitioners' italics); that therefore the time for appeal was extended to and including Tuesday, November 8, 1949, which latter date was an election day and therefore a holiday, which then gave petitioners yet another day, namely, Wednesday, November 9, 1949, which was the day on which the notice of appeal was filed.

[1] The case of Labarthe v. McRae, 35 Cal.App.2d 734, 737, 97 P.2d 251, 254, is cited by petitioners, which states: "if there is any ambiguity in a statute pertaining to the right of appeal, that construction should be adopted that protects the right of appeal. The policy of the law favors the hearing of appeals on their merits". On this same point is mentioned Manning v. Gavin, 14 Cal.2d 44, 92 P.2d 795, 796, and other cases, indicating that "in cases of doubt the court ought to resolve the doubt in favor of the application, so that the full merits of the litigation might be presented".

[2] The policy of liberality as set forth in the cases cited, should be applied in the instant controversy. The record discloses

no reason to believe the appeal was not in good faith. Indeed, petitioners' first act after the order had been issued, even before filing notice of appeal, was to post an adequate bond for the protection of respondents' rights, as required by statute. In view of this bond, the liberal policy above referred to, the intervention of a Sunday and an election day, and the general circumstances of the case, it would seem that only an undue refinement of logic and a disregard of the spirit of the law should prevent petitioner from pursuing the appeal and thus securing a proper hearing on the merits of the case. This being so the attachment should be continued in force pending the appeal.

The demurrer is overruled. Let the writ of prohibition issue as prayed.

WHITE, P. J., and DRAPEAU, J., concur.



98 Cal.App.2d 99

**STOUT v. UNION PAC. R. CO.**

Civ. 17533.

District Court of Appeal, Second District,  
Division 2, California.

June 13, 1950.

Clyde J. Stout sued the Union Pacific Railroad Company under the Federal Employers' Liability Act for personal injuries sustained while working as a brakeman in defendant's yards. From a judgment of the Superior Court of Los Angeles County, William S. Baird, J., on a jury's verdict for defendant, plaintiff appealed. The District Court of Appeal, Wilson, J., held that the evidence was sufficient to sustain the verdict and judgment.

Judgment affirmed.

#### I. Master and servant ⇨265(9)

In action against railroad company under Federal Employers' Liability Act for injuries to brakeman as alleged result of un-

usual exertion in attempting to turn a defective hand brake wheel on one of a cut of freight cars, burden was on plaintiff to prove that he was injured, that defendant was negligent in providing unsafe appliances, and that such negligence was proximate cause of injuries. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

#### 2. Appeal and error ⇨989

When appellant contends that judgment on jury's verdict is unsupported by evidence, reviewing court's power is limited to determination of question whether there is any substantial evidence supporting judgment.

#### 3. Appeal and error ⇨930(1)

On appeal from judgment on jury's verdict, all conflicts in evidence must be resolved in prevailing party's favor.

#### 4. Master and servant ⇨278(6)

In action against railroad company under Federal Employers' Liability Act for injuries to brakeman's back as alleged result of unusual exertion in attempting to turn defective hand brake wheel for purpose of stopping a cut of freight cars on which he was riding in defendant's yards, evidence was sufficient to sustain jury's verdict for plaintiff and judgment thereon. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

#### 5. Damages ⇨208(2)

Medical testimony was sufficient to take to jury question whether loss of cartilage pad between two lumbar vertebrae of railroad brakeman's spine was due to degenerative change because of wear and tear of activity in normal living and work, rather than unusual force claimed to have been exerted by him in attempting to turn defective hand brake wheel for purpose of stopping a cut of freight cars on which he was riding at time of alleged spinal injury, for which he sued railroad company. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

#### 6. Appeal and error ⇨1058(2)

In action for injuries to railroad brakeman as alleged result of unusual exertion in attempting to turn hand brake wheel for

purpose of stopping a cut of freight cars, exclusion of railroad conductor's expert testimony as to operation of brakes of type involved was not error, in view of witness' testimony, admitted without objection or motion to strike, as to facts sought to be elicited by questions to which defendant railroad company's objections were sustained.

#### 7. Trial 296(7)

An instruction that defendant's failure to produce witnesses must not be taken by jury as indicating that defendant had no defense or conceded to plaintiff on any issues presented was not erroneous as invading jury's province by denying them right to draw inferences from defendant's failure to produce witnesses, in view of further instruction that defendant might rely for defense entirely on evidence produced by plaintiff.

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Hilderbrand, Bills & McLeod, D. W. Brobst, Oakland, for appellant.

E. E. Bennett, Edward C. Renwick, Malcolm Davis, W. J. Schall, all of Los Angeles, for respondent.

WILSON, Justice.

Plaintiff, a brakeman employed by defendant in its yards at The Dalles, Oregon, brought this action for personal injuries pursuant to the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. The action was tried by a jury which rendered a verdict in favor of defendant. Plaintiff has appealed from the judgment entered on the verdict.

[1-4] The principal question raised on the appeal is whether the evidence is sufficient to sustain the verdict. No citation of authorities is necessary on these propositions: (1) The burden is on plaintiff to prove that he was injured, that defendant was negligent in providing an unsafe appliance and that such negligence was the proximate cause of plaintiff's injury; (2) when it is contended that the judgment is unsupported by the evidence the power of a reviewing court is limited to a determination whether there is any substantial evi-

dence, contradicted or uncontradicted, that will support the judgment; (3) all conflicts in the evidence must be resolved in favor of the prevailing party. A review of the evidence in the instant action demonstrates that it is sufficient to sustain the verdict and the judgment entered thereon.

At the time of the accident plaintiff was engaged as a brakeman in riding on one of a cut of five freight cars for the purpose of controlling their speed and stopping them by means of operating a hand brake on one of the cars. Plaintiff contends the hand brake was defective and inefficient and when plaintiff operated it in the usual manner it failed to slow the movement of the cars and that by reason of his exertion of unusual force in attempting to turn the brake wheel he injured his back, for which he seeks to recover.

The five freight cars had been cut loose from a train and were rolling free onto a siding which had a slight grade in the direction in which the cars were rolling; plaintiff had been instructed to set the brakes and stop the cars when they had rolled clear of the switch; he boarded a box car on which there was installed an Ajax brake of a newer and presumably more efficient type than the brakes on the other cars; the wheel that operated the brakes was located at the end of the car and was about two feet in diameter, set parallel with the end of the car; plaintiff stood on a small platform facing the wheel; in order to tighten the brake it was necessary to turn the wheel clockwise; usually the brake can be set with one hand. Plaintiff took hold of a grab iron with his left hand and wound the brake wheel with his right; the cars did not stop and he then used both hands, pulling with all his strength, at which time he testified his back was injured. He stated the cars kept on rolling and he stepped off.

Although the cars were rolling on a slight down grade they stopped within two car lengths after plaintiff alighted. No other member of the crew went near the cars and they did not hit anything which would have served to bring them to a stop. The five box cars weighed about 200 tons unladen and all were loaded. No explana-



tion has been offered for the stopping of the cars and the inference arises that when the brake wheel stopped spinning it tightened the brakes sufficiently to cause them to hold the cut of cars.

Plaintiff testified that there was nothing broken about the brakes as far as he could ascertain; that the "wheel went around all right" when he used one hand; that the only thing that caused him to think the brake was defective was that "it worked a little harder" than he had experienced with other Ajax brakes. Plaintiff never reported to any one that the brake was defective.

[5] Plaintiff called a medical expert who testified on direct examination that the X-ray picture of plaintiff's spine showed that the third and fourth lumbar segments had a thin space between them with large bony spurs sticking out, which demonstrates the loss of the cartilage pad between the lumbar vertebrae "with degenerative change that is long standing and has been severe enough to produce this spur formation or calcification in the ligaments." He testified that by "degenerative change" he meant "a wear out change"; that the cartilage pad that acts as a cushion and gives mobility to the segments of the back may become worn out or may be damaged by some specific injury, and as a result the cartilage is partially absorbed and becomes partially replaced with scar tissue, the result of the whole process being a thinning of the disc and the marginal spur growth. The degenerative change, said the witness, that was taking place in plaintiff's back at the time he was injured is due occasionally in some people to specific injuries that have a history but most often it occurs from wear and tear of activity in normal living and work; that it would take two or three years and probably longer to produce the kind of change shown in plaintiff's X-ray.

From the medical testimony the jury had a right to infer that the condition of plaintiff's spine was not due to the unusual force plaintiff claims to have exerted on the brake wheel but was due to the degenerative change described by his medical expert, and from the other evidence the jury might have

determined that the brake was not defective.

[6] Plaintiff assigns error in the rulings of the court sustaining defendant's objections to questions propounded to a railroad conductor who had been employed by defendant for 36 years, was familiar with the operation of Ajax brakes and also familiar with the tracks in the railroad yards at The Dalles. Referring to the operation of Ajax brakes, these questions were propounded to the witness:

(1) "Q. What if it is necessary to use two hands? What would you state as far as the condition of the brake is concerned?"

(2) "Would it be operating efficiently and would it be giving the result it is supposed to give if you were required to use two hands?"

(3) "Mr. Mosier, as far as you yourself are concerned, in all the thirty-six years of your experience—and you have been operating those brakes ever since they came out, the new Ajax brakes—as far as you are concerned, what does it indicate to you when you are required to use two hands to stop a cut of cars? Now, that is just as to you."

To each of these questions defendant objected and the objection was sustained. The court suggested, "If you will get him to describe the operation and tell what he bases his answer and conclusion on, it might be different." It is obvious that the questions were not in proper form to bring out the expert testimony which plaintiff was endeavoring to adduce. The court's suggestion was not adopted. However, the following questions were asked and answers given without objection on the part of defendant:

"Q. Assuming, Mr. Mosier, a cut of cars moving into Track No. 3, five of them in number that are loads, one of the cars being equipped with an Ajax brake, and they are let loose in on that track, and the speed has been estimated all the way from one to five miles an hour, would you please state, Mr. Mosier, how much physical effort was required to bring that cut of cars to a stop until such time as it could be again picked

up by the engine and put back on the train from which it was taken. A. Well, an Ajax brake, properly adjusted, should stop those cars on the track. It wouldn't stop them quickly, but it would stop them.

"Q. With how much physical effort? A. Not more than you would exert with one hand."

The witness was further asked: "Mr Mosier, as far as you are concerned, if you have to use two hands to slow up the movement of a cut of cars of that description, would you state what that would indicate as far as the condition of the Ajax brake is concerned?" Defendant's objection was overruled and the witness answered: "It possibly wouldn't be in proper adjustment." The court remarked, "That is a conclusion, as to proper adjustment. It doesn't mean anything."

No motion to strike the answer was made and it therefore stands as evidence in the case. We find no error in the rulings of the court upon the omission or rejection of evidence.

[7] Plaintiff contends that the court erred in instructing the jury as follows: "The fact that the defendant has not produced a witness or witnesses in this case is not to be taken by you as an indication that the defendant has no defense to this action or that it concedes to the plaintiff on any of the issues presented to you." Plaintiff argues that the instruction invaded the province of the jury denying them the right to draw inferences from the failure of defendant to produce any witnesses. The above quotation, however, is only a part of an entire instruction. Following the language above quoted the instruction reads: "The defendant may, if it desires, rely entirely for its defense upon the evidence produced by the plaintiff. You are to consider the evidence as a whole and if you find in the testimony of the plaintiff or of the witnesses produced by him, evidence favorable to the defendant you shall consider it as such and you may not reject it solely because it originated in the plaintiff's case." The instruction did not intimate to the jurors that they could not draw inferences from the failure of defendant to

produce witnesses. They were expressly told that the defendant might, if it desired, rely entirely upon the evidence produced by plaintiff, and that is just what defendant did.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



97 Cal.App.2d 913

**KERRIN v. KERRIN.**

Civ. 7758.

District Court of Appeal  
Third District, California.

June 9, 1950.

Barbara A. Kerrin brought action against Cyril N. Kerrin to recover the difference between payments provided for in divorce decree ratifying and affirming a property settlement agreement wherein defendant agreed to pay \$150 a month for support of plaintiff and a minor son of the parties, and monthly allotment of \$67 a month for support of the plaintiff and the son during the period of defendant's service in the United States Navy. The Superior Court of Nevada County, James Snell, J., rendered a judgment for the defendant, and the plaintiff appealed. The District Court of Appeal, Peek, J., held that plaintiff was not precluded from recovering either by the Soldiers' and Sailors' Civil Relief Act or by the Servicemen's Dependents Allowance Act.

Reversed and cause remanded with instructions to enter judgment for plaintiff.

#### **1. Army and navy ☞34, 50**

The purpose of the Soldiers' and Sailors' Civil Relief Act was not to provide for the discharge of civil liabilities of servicemen but to the contrary was merely to suspend enforcement of civil liabilities, in certain cases, of persons in the military service in order to enable them to devote their entire energy to defense needs of the nation, and there is nothing to the con-

trary in the Servicemen's Dependents Allowance Act. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1 et seq., 100, 50 U.S.C.A., Appendix, §§ 501 et seq., 510; Servicemen's Dependents Allowance Act of 1942, 56 Stat. 381, 37 U.S.C.A. §§ 201-221.

## 2. Army and navy 34, 50

Where husband procured a divorce decree ratifying and affirming property settlement agreement whereby husband agreed to pay \$150 a month for support of wife and a minor son of the parties, and thereafter the divorced husband was inducted into the United States Navy, and during the period of his service in the Navy, the divorced wife was allotted the sum of \$67 a month for support of herself and son, divorced wife was not precluded from recovering from divorced husband the difference between the payments provided for in the agreement and the allotments either by Soldiers' and Sailors' Civil Relief Act or by the Servicemen's Dependents Allowance Act. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1 et seq., 100, 50 U.S.C.A., Appendix §§ 501 et seq., 510; Servicemen's Dependents Allowance Act of 1942, 56 Stat. 381, 37 U.S.C.A. §§ 201-221.

W. P. Dwyer, Jr., Sacramento, for appellant.

W. E. Wright, Nevada City, for respondent.

PEEK, Justice.

This is an appeal from a judgment denying recovery to the plaintiff wife of payments alleged to be due her from the defendant husband under the terms of a property settlement agreement.

From the findings of fact adopted by the trial court it appears that on January 7, 1945, the parties entered into a property settlement agreement wherein defendant husband agreed to pay \$150 per month for the support of plaintiff and a minor son of the parties; that on March 6, 1945, defendant secured a decree of divorce in the state of Nevada, which decree ratified and affirmed the agreement; that on May 21, 1945, defendant was inducted into the

United States Navy where he remained on active duty until December 21, 1945, when he was honorably discharged; that during the period of defendant's service in the United States Navy the plaintiff was allotted the sum of \$67 per month for support of herself and the minor child of the parties; that the defendant has fully performed the terms of the property settlement agreement except the payment to plaintiff of \$581, which sum represents the difference between the payments provided for in the agreement and the monthly allotments received by the plaintiff during the period of defendant's active service in the United States Navy.

Lastly the court found that by reason of the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, 50 U.S.C.A. Appendix, § 501 et seq., the terms and conditions of said agreement in so far as they concerned the payment of said sum of \$581, were suspended, and that defendant was "forever released and relieved of the payment" thereof. The judgment was entered accordingly and this appeal followed.

The sole question raised by appellant, which is not contested by respondent, who has failed to file a brief, is whether the Soldiers' and Sailors' Civil Relief Act, Title 50 U.S.C.A. Appendix, § 510 et seq., operated to relieve defendant during his service in the United States Navy of his obligation under said agreement as ratified by the Nevada court.

[1] The purpose of said act was not to provide for the discharge of civil liabilities of servicemen but to the contrary, as stated therein, was merely "to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions." 50 U.S.C.A. Appendix, § 510; See *Stevens v. Stevens*, 88 Cal.App.2d 654, 199 P.2d 314. We find nothing to the contrary in the Servicemen's Dependents Allowance Act of 1942, 56 Stat. 381, Title 37 U.S.C.A. §§ 201-221; See



Keen v. Goodwin, 28 Wash.2d 332, 182 P.2d 697.

[2] It necessarily follows that since neither of said acts can be construed as relieving defendant from the obligations incurred by reason of the property settlement agreement and the subsequent order of the Nevada court, the judgment of the trial court by which defendant was "forever released and relieved of the payment of said sum of \$581.00", cannot be sustained.

The judgment is reversed and the cause is remanded with instructions to the trial court to enter judgment in favor of plaintiff in the sum of \$581.

ADAMS, P. J., and VAN DYKE, J., concur.



97 Cal.App.2d 848

Ex parte BROWN.

Cr. 4480.

District Court of Appeal, Second District.  
Division 1, California.

June 1, 1950.

Proceeding in the matter of the application of Jack A. Brown for writ of habeas corpus to secure release of petitioner from imprisonment in the county jail upon a commitment of the Superior Court of Los Angeles County. The District Court of Appeal, White, P. J., held that Superior Court's order finding petitioner guilty of contempt of court for failure to pay one-half of the referee's fee in action in which petitioner was defendant as directed by court was in excess of court's jurisdiction, where fee was fixed in amount in excess of that provided by statute without the parties agreeing thereto in writing.

Writ granted and petitioner discharged from custody.

Reference ⇐76(4, 5)

An order directing defendant to pay one-half of referee's fee, fixed in an amount

of \$2,041.19, which exceeded statutory \$5 per day without the parties agreeing thereto in writing, was in excess of court's jurisdiction and defendant could not be held in contempt for disobeying it. Code Civ.Proc. §§ 639, subd. 2, 1023, 1219.

Harry W. Elliott, Los Angeles, Rodd Kelsey, Beverly Hills, for petitioner.

William E. Simpson, District Attorney, Jere J. Sullivan, Deputy District Attorney, Ralph F. Bagley, Deputy District Attorney, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an application for habeas corpus from a commitment of Jack A. Brown (hereinafter referred to as petitioner) on a judgment finding him guilty of contempt of court and sentencing him to be confined in the county jail of Los Angeles County "under the provisions of section 1219 of the Code of Civil Procedure" until such time as he should pay one-half of the sum of \$2,041.19 for services rendered by a referee appointed in an action wherein petitioner was a defendant.

The record reflects that in the aforesaid action the court rendered an "interlocutory judgment and order of reference" pursuant to which Ralph E. Sperry, "a public accountant in the County of Los Angeles, be, and he is hereby appointed referee to take and state an account to enable this court to render final judgment in the correct amounts." At a subsequent hearing upon the report submitted by the referee, the court fixed the latter's fees at \$2,041.19, "and each side is ordered to pay one-half of this fee." Petitioner, having failed to comply with said order, was adjudged in contempt of court and committed to the county jail as aforesaid.

On the hearing before us the petitioner urges that the order of commitment was in excess of the jurisdiction of the court, in that neither in the affidavit upon which the order of contempt was based nor in the entire proceedings, including the commitment, does it appear that he agreed, in writing, upon any other rate of compensation

for such referee other than that provided for in section 1023 of the Code of Civil Procedure, to-wit, five dollars for every day spent in the business of the reference.

An examination of the record in this case indicates that the court, pursuant to the provisions of subdivision 2 of section 639 of the Code of Civil Procedure, directed a reference, because the taking of an account was necessary for the information of the court before judgment or for carrying a judgment or order into effect. However, section 1023 of the Code of Civil Procedure provides that the fees of referees are five dollars for every day spent in the business of the reference, unless the parties agree in writing upon any other rate of compensation. It is manifest, therefore, that when the court in the foregoing proceeding allowed a rate of compensation on the basis of fifty dollars per day without any agreement in writing to which petitioner herein was a party, such order was in excess of the court's jurisdiction.

For the foregoing reasons, it follows that the writ should be granted and the petitioner discharged from custody. It is so ordered.

DORAN and DRAPEAU, JJ., concur.



97 Cal.App.2d 888

In re POWERS' ESTATE.

McMAHON v. McCULLOCH et al.  
Civ. 14252.

District Court of Appeal, First District,  
Division 1, California.  
June 7, 1950.

Alexander McCulloch, as executor of the will of Josephine Frances Powers, deceased, filed a petition for settlement of his final account and distribution of the estate. Joseph Whalen McMahon filed a motion for allowance of costs and counsel fees incurred in contesting the will after probate thereof.

Cal.Rep. 217-218 P.2d—57

From an order of the Superior Court in and for the City and County of San Francisco, T. I. Fitzpatrick, J., denying the motion, and a decree of such court settling the account and distributing the estate, movant appealed. The District Court of Appeal, Peters, P. J., held that the Superior Court had no power to award appellant counsel fees or trial or appellate costs.

Order and decree affirmed.

#### 1. Wills ⚡404, 410

The probate code provision that either superior court or appellate court may order payment of costs by any party to probate proceedings or out of assets of testator's estate does not authorize allowance of trial and appellate costs or counsel fees to one contesting will after probate thereof, whether successfully or not. Probate Code, § 1232.

#### 2. Wills ⚡405

Costs of trial of will contest after probate, which is not revoked, must be paid by contestant and cannot be charged against testator's estate. Probate Code, §§ 383, 1232.

#### 3. Wills ⚡404

The probate court has no power to award costs on appeal from judgment for will proponent notwithstanding jury's verdict for contestant after probate of will, but can only decide who shall be liable for such costs, even where appellate court's opinion is silent as to costs, and only appellate court has power to award appeal costs to either successful or unsuccessful contestant. Probate Code, § 1232; Rules on Appeal, rules 26(a, b).

#### 4. Judgment ⚡749

Where appellate court refused to grant appellant costs on appeal from judgment for will proponent notwithstanding jury's verdict for contestant after probate, despite appellant's continued and persistent request for such costs at every stage of proceedings, matter was res judicata. Probate Code, § 1232; Rules on Appeal, rules 26(a, b).

Robert E. Hatch, San Francisco, for appellant.

Tobin & Tobin, Charles R. Collins, Frank J. Fontes, San Francisco, for respondents.

PETERS, Presiding Justice.

Josephine Powers died testate on July 20, 1943, leaving her entire estate to persons other than blood relatives and to various charities. The will was admitted to probate and letters testamentary were issued to Alexander McCulloch. Appellant, who is a second cousin of decedent, and who claims to be her closest surviving blood relative, filed a contest on the ground that the testatrix was of unsound mind when the will was executed. At the first trial the jury found in favor of contestant, but a new trial was granted. On the second trial the jury again found in favor of the contestant, but the trial court granted a judgment to the proponent notwithstanding the verdict. This was affirmed on appeal, *In re Estate of Powers*, 81 Cal.App.2d 480, 184 P.2d 319, and a petition for hearing denied by the Supreme Court on November 6, 1947, two justices dissenting. 81 Cal.App.2d at page 486 184 P.2d at page 323. The remittitur, which issued on November 12, 1947, awards costs on appeal to the prevailing party. No motion to recall, change or correct the remittitur has ever been filed. On the same day the remittitur issued, McCulloch filed his petition for settlement of the final account and for distribution. In this petition there appears no mention of any costs to be paid to appellant, the losing contestant. On November 22, 1948, the appellant, purporting to act under section 1232 of the Probate Code, filed a notice of motion for allowance of costs and counsel fees. The attached exhibit discloses that for expenses and trial and appellate costs appellant's counsel had advanced and expended \$1,702.21. A counsel fee of \$5,000 was requested. After a hearing, the motion was denied. The court thereupon entered its decree settling the account and distributing the estate. Appellant has appealed from the order denying his motion and from the last-mentioned decree of the probate court.

[1] The appellant contends that under section 1232 of the Probate Code the probate court may allow, even to an unsuccessful contestant, costs and counsel fees, and

that, if the contestant acted in good faith, the court must make such allowances, and its failure to do so is an abuse of discretion, as a matter of law. There is no such rule of law.

Section 1232 of the Probate Code, which is based on former section 1720 of the Code of Civil Procedure, reads as follows: "Costs. When not otherwise prescribed by this code or by rules adopted by the Judicial Council, either the superior court or the court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require."

If trial and appellate costs in a contest after probate, which this proceeding was, could be allowed by the trial court under this section, and they cannot, it is perfectly clear that the power thus conferred would not include the power to allow counsel fees even to a successful contestant or proponent. While there is some dicta in *Henry v. Superior Court*, 93 Cal. 569, 29 P. 230, to the effect that counsel fees may be included within the meaning of the term "costs" as used in old section 1720, 93 Cal. at page 571, 29 P. at page 231, that dicta was expressly overruled in *Re Estate of Olmstead*, 120 Cal. 447, 454, 52 P. 804, where it was unequivocally held that the court had no power to award counsel fees under the section in question. This rule has been consistently followed. *In re Estate of Arnold*, 121 Cal. App. 247, 248, 8 P.2d 897; *In re Estate of Feldman*, 78 Cal.App.2d 778, 795, 178 P.2d 498; *In re Estate of Schwartz*, 87 Cal.App. 2d 569, 574, 197 P.2d 223. If the probate court has no power to award counsel fees from the estate to an executor who successfully resists a contest, it is too clear to require further comment that a losing contestant cannot be awarded such fees from the estate. *In re Estate of Walden*, 174 Cal. 776, 777, 164 P. 639.

[2] This leaves open the questions as to whether, under section 1232, the probate court could, and if it could whether it should, have awarded trial and appeal costs to appellant. It will be noted that section 1232 provides that the power conferred by the section exists only when the matter of



costs is "not otherwise prescribed by this code." So far as trial costs are concerned, section 383 of the Probate Code provides: "If the probate is not revoked, the costs of trial must be paid by the contestant. If the probate is revoked, the costs must be paid by the party who resisted the revocation or out of the property of the decedent, as the court directs." The instant proceeding involved a contest after probate. The will was admitted to probate on August 11, 1943. The contest was not filed until January 20, 1944. Therefore, as far as trial costs are concerned, they "must be paid by the contestant," and cannot be charged against the estate.

[3] So far as the appellate costs are concerned, section 1232 provides: "When not otherwise prescribed \* \* \* by rules adopted by the Judicial Council" the probate court has power to allow costs. Prior to the adoption of the Rules on Appeal in 1943, it was the law that if the appellate court, in probate cases, made no reference to costs on appeal in its opinion, the sole power to allow such costs then passed to the probate court under section 1232 of the Probate Code. In *re Estate of Johnson*, 200 Cal. 307, 252 P. 1052; In *re Estate of Erickson*, 4 Cal.App.2d 602, 41 P.2d 939; In *re Estate of Wallace*, 12 Cal.2d 476, 86 P.2d 95; In *re Estate of Schaetzel*, 44 Cal.App.2d 320, 112 P.2d 324.

In 1943, the new Rules on Appeal were adopted. Rules 26(a) and 26(b) were adopted for the express purpose of overruling the rule announced in the cases above cited. Rule 26(a) provides, in part: "In any case in which the interests of justice require it, the reviewing court may make any award or apportionment of costs which it deems proper. In probate cases, in the absence of an express direction for costs by the reviewing court, costs on appeal shall be awarded to the prevailing party, but the superior court shall decide against whom such award shall be made."

Rule 26(b) provides, in part, as follows: "In any case in which the reviewing court directs the manner in which costs shall be awarded or denied, the clerk shall enter on the record and insert in the remittitur a judgment in accordance with such direc-

tions. In the absence of such directions by the reviewing court the clerk shall enter on the record and insert in the remittitur a judgment for costs as follows: (1) In the case of a general and unqualified affirmance of the judgment, for the respondent;" etc.

The draftsman's notes to these rules states, in part: "Supersedes \* \* \* in part, Prob. C. 1232 \* \* \*. The provision on costs in probate appeals is an attempt to modify what seems to be an undesirable interpretation of Prob. C. 1232, namely, that the probate court has complete freedom in making the award. The new rule provides that the prevailing party normally *receives* costs, as in other cases, but that the probate court may determine whether the estate, the representative, or an heir or distributee should be *liable* therefor."

In discussing this rule in 17 So.Cal.L. Rev. 232, 257, B. E. Witkin, draftsman of the Rules, states:

"Formerly the rule was that in appeals in *probate* matters, costs were awarded by the superior court, and no reference thereto appeared in the remittitur. In other words, the prevailing party might not get costs, and even might have to pay costs. The rule was unsound in principle, and seems to have been based upon a misconception of the problem, which was not who was *entitled* to costs, but rather who should be *liable* therefor—the estate, the representative, or the distributee. Rule 26(a) now provides that in probate cases, in the absence of other direction by the reviewing court 'costs on appeal shall be awarded to the prevailing party, but the superior court shall decide against whom such award shall be made.'

"\* \* \* recent cases have indicated that the reviewing court has inherent power to award or deny costs in its discretion to accomplish the ends of justice. Rule 26(a) follows these controlling decisions, and states the unlimited discretion of the reviewing court to make any order on costs which it deems proper."

Thus, although the probate court formerly had power to award costs on appeal if

the appellate court opinion was silent, and could even award such costs to an unsuccessful contestant in a proper case, In re Estate of Bump, 152 Cal. 271, 92 P. 642; In re Estate of Jones, 166 Cal. 147, 135 P. 293, that is no longer the law. Under the present rules, the probate court, so far as appeal costs are concerned, and even where the appellate opinion is silent as to costs, only has the power to decide who shall be liable for costs, and has no power to award them. The appellate court is now the only court that has power to award appeal costs to either a successful or unsuccessful contestant. Once an appeal has been determined, and where, as here, the appellate court makes no specific mention of costs, the unsuccessful contestant and litigant is not entitled to costs, the probate court has no power to award them, and the litigant's sole remedy, if any, would be in the appellate court on a petition to recall the remittitur.

[4] There is another reason why the probate court properly denied appellant's motion for costs. In the appeal from the judgment notwithstanding the verdict, at every stage of the proceedings, appellant raised this identical issue of costs. In his opening brief he asked for costs and urged the point that if he acted in good faith he was entitled to costs as a matter of law. In two reply briefs the same argument is made. In the petition for rehearing the very first point urged was that the appellate court had overlooked appellant's claim to costs, and in the petition for hearing in the Supreme Court the same point was urged. These various arguments were answered by the respondent. Thus, appellant's claim for costs has been considered and passed upon on the prior appeal by the refusal of the appellate court, in its discretion, to grant appellant his costs despite his continued and persistent requests for such costs. The matter is *res judicata*, and cannot be considered in this proceeding, even if the probate court had power, which it has not, to award such costs. By failing to exercise its discretion, the appellate court has necessarily determined that appellant is not entitled to costs on

appeal. Appellant is barred by that determination from again raising the issue.

For these many reasons, the probate court had no power to award counsel fees, or trial or appellate costs to appellant. This being so, it properly denied the motion.

The order and the decree appealed from are affirmed.

BRAY, J., and SCHOTTKY, Justice pro tem., concur.



**BOWDEN v. BANK OF AMERICA NAT.  
TRUST & SAVINGS ASS'N.**  
Civ. 17483.

District Court of Appeal, Second District,  
Division 2, California.  
May 25, 1950.

Rehearing Denied June 12, 1950.

Hearing Granted July 20, 1950.\*

Leslie S. Bowden, as trustee for the estate of Dunlap Trucking Company, bankrupt, brought action against Bank of America National Trust & Savings Association, a national banking association, alleging conversion. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., gave judgment for the plaintiff, and the defendant appealed. The District Court of Appeal, Moore, P. J., held that the consolidated chattel mortgage given to the defendant by the bankrupt was void by reason of the defendant's failure to deposit it as required by the Motor Vehicle Code, and that the individual chattel mortgages and conditional sales contracts were extinguished by the defendant's participation in the preparation of the consolidated mortgage which contained provisions inconsistent with subsistence of the original liens.

Affirmed.

**1. Chattel mortgages — 31**

Where creditor held legal title to motor vehicles as assignee of three conditional

\* Subsequent opinion 224 P.2d 713.

sales contracts and as assignee of certificates of ownership on remaining vehicles, such creditor could not become mortgagee of same vehicles.

## 2. Chattel mortgages ⇨136

Sales ⇨477(3)

Where creditor participated in preparation of consolidated chattel mortgage in which mortgagor warranted his sole ownership of motor vehicles and absence of any liens thereon, knowing that legal title to such vehicles was already in said creditor as assignee of conditional sales contracts and individual chattel mortgages, all of creditor's rights under sales contracts and original mortgages were lost, although the consolidated mortgage was void because not timely recorded. Vehicle Code, § 195.

## 3. Bankruptcy ⇨184(2½)

Where debtor was adjudged bankrupt and creditor held chattel mortgage for 109 days after its execution before depositing mortgage with motor vehicle department, such mortgage was a nullity under federal law. Vehicle Code, § 195; Bankr. Act, § 70, sub. a(5), 11 U.S.C.A. § 110, sub. a(5).

## 4. Bankruptcy ⇨143(1)

Under federal law, trustee in bankruptcy gets title to all property which prior to petition bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him.

## 5. Chattel mortgages ⇨1

Chattel mortgage is creature of statute, and rights asserted under it can be preserved only by strict compliance with and diligent observance of statute. Civ. Code, § 2957.

## 6. Chattel mortgages ⇨192

General chattel mortgage recording statute, providing that chattel mortgage is void "unless recorded," and Vehicle Code, providing that no chattel mortgage on any vehicle is valid as against creditors "until deposited," have same meaning, to wit, that mortgage is void unless recorded with reasonable promptness. Civ. Code, § 2957; Vehicle Code, § 195.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Unless Recorded" and "Until Deposited".

## 7. Liens ⇨1

State policy is hostile to any form of secret lien.

## 8. Bankruptcy ⇨184(2½), 185

Chattel mortgages ⇨192

Under state laws, belated recordation of chattel mortgage is valid notice to subsequent creditors, but no advantage could be had on that account by creditor of bankrupt in action by bankruptcy trustee to recover property taken from bankrupt where recordation of mortgage was unreasonably delayed and new debts incurred, and recovery was not limited to claims of bankrupt's creditors arising within period between issuance and recordation of mortgage. Civ. Code, § 2957; Vehicle Code, § 195.

## 9. Appeal and error ⇨1008(1)

Trial court's finding of value in conversion action would not be disturbed in absence of clear showing that finding was arbitrary.

## 10. Appeal and error ⇨931(1)

On appeal it must be presumed that court believed testimony that supported the findings.

## 11. Appeal and error ⇨219(2)

Opportunity afforded under statute to propose amendments to and criticisms of proposed findings imposes upon losing party duty of presenting such matters to trial judge while latter still has jurisdiction of case, and if no objection is made right to object must be deemed to have been waived. Code Civ.Proc. § 634.

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Hugo A. Steinmeyer and Robert H. Fabian, Los Angeles, for appellant. Samuel B. Stewart, Jr., San Francisco, Freston & Files, Ralph E. Lewis, Los Angeles, of counsel.

Craig, Weller & Laugharn, Los Angeles, for respondent, by Thomas S. Tobin, Los Angeles.



MOORE, Presiding Justice.

Appeal from a judgment for the value of certain movables found to have been wrongfully taken by defendant from the bankrupt and converted to its own use.

The Dunlap Trucking Company, a corporation, herein referred to as Dunlap or the bankrupt, acquired many motor trucks, trailers and other automotive equipment. The transactions involved in this controversy were purchases made on the time payment plan. In three instances Dunlap bought on conditional sales contracts payable in monthly installments; in seven, it financed the purchases by loans from appellant to which it made installment notes and chattel mortgages. The three conditional sales agreements were dated July 10, August 20 and September 5, 1946. Each was duly assigned to appellant. Five of the mortgages involved were taken prior to March 18, 1946, when the advances aggregated \$48,000. The remaining mortgages were dated May 14, 1946, and February 1, 1947, and were recorded respectively on July 8, 1946, and February 4, 1947. The latter two were to secure the sum of \$5,200—making appellant's total outlay the sum of \$53,496. An installment note evidenced the amount of the debt secured by each mortgage and the amount of each monthly payment. They aggregated \$2,470 per month.

The total of such indebtedness having been on March 28, 1947, reduced to \$38,-

064, it was by Dunlap consolidated in one note payable in semi-monthly installments of \$793. A chattel mortgage on the entire lot of vehicles mentioned in the instruments above described was by Dunlap executed as security for the payment of such note. One hundred nine days later, July 15, 1947, the consolidated mortgage was deposited (sometimes referred to herein as "recorded") in the office of the State Motor Vehicle Department pursuant to section 195, Motor Vehicle Code.<sup>1</sup> Between the dates of its execution and recordation, Dunlap became indebted to a number of creditors for small sums aggregating not to exceed \$2600.

On September 3, 1947, Dunlap having defaulted on the monthly payments due on the consolidated note, appellant took possession of the vehicles described in its mortgages and conditional sales contracts. Eight days later Dunlap filed its voluntary petition in bankruptcy and was adjudged a bankrupt. On September 29, 1947, plaintiff was named as its trustee.

This action was filed by respondent alleging conversion in that the consolidated mortgage was invalid by reason of the excessive interval between its execution and recordation. He pleaded that the assets of the bankrupt were grossly insufficient to pay its liabilities in full; that as to those who became creditors of the bankrupt during the 109-day period it was absolutely null and void as security. Upon a general denial and

1. "No chattel mortgage on any vehicle registered hereunder irrespective of whether such registration was effected prior or subsequent to the execution of such mortgage, is valid as against creditors or subsequent purchasers or encumbrancers until the mortgagee or his successor or assignee has deposited with the department, at its office in Sacramento, a copy of said mortgage with an attached certificate of a notary public stating that the same is a true and correct copy of the original, accompanied by a properly endorsed certificate of ownership to the vehicle described in said mortgage if said vehicle is then registered hereunder, or if said vehicle is not so registered, by an application in usual form for an original registration, together with an application for registration as legal owner, and upon payment of the fees as provided in this code."

Section 196, Vehicle Code. "When the chattel mortgagee, his successor or assignee, has deposited with the department a copy of the chattel mortgage as provided in section 195 hereof, such deposit constitutes constructive notice of said mortgage and its contents to creditors and subsequent purchasers and encumbrancers but such mortgaged vehicle shall be subject to a lien as provided in Division VIII hereof."

Section 197, Motor Vehicle Code. "Upon the deposit of any such chattel mortgage and application for registration and upon the payment of the fees as provided in this code, the department shall register the mortgage, his successor or assignee as legal owner in the manner provided for the registration of motor vehicles under the provisions of this act."

on allegations of (1) ownership under earlier mortgages and conditional sales contracts and (2) acceptance of the consolidated mortgage as a renewal or extension of all the indebtedness of Dunlap, following a trial the court found that the bank held title to three vehicles under conditional sales contracts; three others under a mortgage dated February 1, 1947; the balance of the vehicles under six separate mortgages executed and recorded in 1946. Also, the court found that the consolidated mortgage was delivered to appellant for the purpose of superseding the prior chattel mortgages and contracts held by the bank by consolidating the existing indebtedness into one debt, payable in consolidated, semi-monthly installments; at that time appellant held legal title to all the vehicles and was the registered owner, holding the pink slips as security for the balance of the purchase prices under the conditional sales contracts and the notes and mortgages; the consolidated mortgage was not recorded until July 15, 1947; during the interval of 109 days Dunlap became indebted to divers small creditors who continued so at the date of its being adjudged a bankrupt; the consolidated mortgage constituted a secret lien and was a void security as against creditors; appellant took possession purportedly under the consolidated mortgage on September 3, 1947, and by its seizure and attempt to foreclose the mortgage converted all the vehicles included in the instrument. Upon such findings the court concluded that (1) under section 70, sub. a(5) of the National Bankruptcy Act, 11 U.S.C.A. § 110, sub. a, (5), respondent was vested with all rights of the bankrupt and of its creditors to the chattels described in the consolidated mortgage; (2) appellant was an unsecured creditor insofar as the rights of creditors existing between the date of the execution of the mortgage and its deposit with the Department of Motor Vehicles whose claims were filed and allowed in bankruptcy proceeding; (3) the chattel mortgage under which the property was seized did not constitute valid security as against them and respondent; (4) the sale of the chattels constituted a conversion of same for which respondent is entitled to judgment without prejudice to

appellant's right to establish its claim as unsecured. Judgment for \$40,000 was thereupon awarded.

Appellant contends that the judgment should be reversed upon four grounds: (1) it held at all times a valid, continuing lien for the entire indebtedness under the original mortgages and conditional sales contracts, even though it be conceded that the consolidated mortgage was invalid as to the small claims; (2) in fact, the consolidated mortgage was valid and was immune to attack by respondent under a rational interpretation of section 195 of the Motor Vehicle Code; (3) assuming that the original mortgages had been discharged and the consolidated mortgage was subject to successful attack, still the amount of recovery such under conditions should be restricted to the damage measured by the amount of the claims of the small creditors assumed to be entitled to attack the consolidated mortgage; (4) there is no evidence of damage in the sum of \$40,000.

#### Consolidated Mortgage a Nullity

[1-3] Having been withheld from record for over three and a half months after its execution, the consolidated mortgage was void. During that period new creditors of Dunlap came upon the scene. Not only was it tardily recorded but when it reached the records it was found to contain the following: "The mortgagor does hereby warrant that he is the sole owner of all the within mentioned personal property and that there are no liens or encumbrances or adverse claims of any kind whatever thereon or on any part thereof." Furthermore, that mortgage was prepared by appellant upon its own blank form. It knew that in accepting a chattel mortgage upon the vehicles it was ignoring the fact that at that time it had ownership of three vehicles as vendor under the three conditional sales contracts and the remainder as assignee of the certificates of ownership (pink slips). Therefore it could not become a mortgagee of the vehicles. *Alexander v. Walling*, 105 Cal.App. 525, 534, 288 P. 138; *Standard Auto Sales Company v. Lehman*, 43 Cal. App. 763, 776, 186 P. 178. But notwithstanding the consolidated mortgage was in-



valid as evidence of a lien, it was so utterly inconsistent with the subsistence of the original liens and reservations of title as to evidence the mutual intention of the parties to vest Dunlap with ownership free of encumbrances except the lien in favor of the bank created by the consolidated mortgage. However, by virtue of its neglect promptly to deposit the new instrument as required by section 195, *supra*, it faced the bankruptcy court without security for its loans. By its own participation in the preparation of the consolidated mortgage all its rights under the sales contracts and the seven original chattel mortgages were extinguished. Also, by reason of its failure promptly to deposit it as provided by section 195 it became a nullity as to creditors, purchasers or encumbrancers. *Moore v. Bay*, 284 U.S. 4, 52 S.Ct. 3, 76 L.Ed. 133, 134, 76 A.L.R. 1198. Consequently, it had no standing against the attack of the trustee.

[4] Appellant contends that the consolidated mortgage if invalid could extend no further than to protect the few creditors who extended credit during the 109-day period. Such is not the law with relation to the rights of a creditor holding a chattel mortgage belatedly recorded where the debtor is adjudged a bankrupt. When he has failed to record his mortgage with reasonable promptness, it is rendered invalid. In 1928 the federal Supreme Court held that the delay of 19 days to record a chattel mortgage rendered it a nullity and that what thus is recovered for the benefit of the estate is to be distributed in dividends of an equal per centum on all allowed unsecured claims. "The trustee in bankruptcy gets the title to all property \* \* \* which prior to the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him." *Moore v. Bay*, *supra*. The *Moore-Bay* decision is established law in matters affecting bankruptcy. It is the subject of favorable comment in a note found in 76 A.L.R. page 1200.

[5] Appellant contends that the original mortgages still subsist, that they meet all requirements of the law with respect to the formalities and the recordation and since

there was not a specific finding that the parties agreed to a cancellation or satisfaction thereof the creditors were unharmed and the seizure and sale were lawful. Since the court found that the consolidated mortgage superseded the original mortgages, the question of release of those mortgages is definitely settled. The fact that it was of record and therefore served as notice to any new creditors of Dunlap does not avail appellant. It was a nullity as to all creditors and appellant's good faith could not give it life. If by its acceptance of the consolidated mortgage the bank erased the original mortgages and if the new instrument became a nullity before it was recorded no amount of good faith on the part of appellant will serve to re-establish the old mortgages or to vitalize the new. *Noyes v. Bank of Italy*, 206 Cal. 266, 272, 274 P. 68. The chattel mortgage is a creature of statute and rights asserted under it can be preserved only by a strict compliance with and a diligent observance of code provisions relative thereto. *Kahriman v. Jones*, 203 Cal. 254, 255, 256, 263 P. 537.

[6,7] Appellant argues that while section 2957 of the Civil Code provides that a chattel mortgage is void *unless* the mortgage is recorded, yet section 195 of the Vehicle Code has distinctly different language in that it provides that "no chattel mortgage on any vehicle \* \* \* is valid as against creditors \* \* \* until the mortgagee \* \* \* has deposited with the department \* \* \* a copy of said mortgage \* \* \* accompanied by a properly endorsed certificate of ownership to the vehicle described." By reason of the difference in verbiage of the statutes appellant asserts that the legislative intent was to treat a mortgage on a motor vehicle as being valid from the time it is deposited and not as a nullity where the mortgagee neglects promptly to deposit it with the Department, citing *In re Wiegand*, D.C., 27 F.Supp. 725. But the Circuit Court of Appeals concluded that the different words used in the two statutes have the same meaning, to wit, that the mortgage is void unless recorded with reasonable promptness. *Bank of America v. Sampsell*, 9 Cir., 114 F. 2d 211; *Budget Plan Finance, Inc., v. England*, 9 Cir., 170 F.2d 59; *Moore v. Bay*, *su-*



pra. The decision in the Sampsell case merits approval as the precedent to be followed inasmuch as it not only follows *Moore v. Bay*, but is in harmony with the state policy which is hostile to any form of secret lien.

[8-10] Appellant contends that the court erred in finding respondent's damage to be \$40,000. It insists that recovery should have been limited to the sum of \$2600. It relies upon section 3336 of the Civil Code which makes the measure of damage in a conversion action the value of the property converted or an amount sufficient to indemnify the injured party to the extent of his loss. Appellant argues that respondent stands in the shoes of the complaining creditors and can recover no more than their losses. There are two answers to such contention.

(1) The failure of appellant promptly to record the consolidated mortgage made it a nullity under the federal law. *Moore v. Bay*, supra; 76 A.L.R. note on page 1200. Because, forsooth, under the laws of this state a belated recordation of a chattel mortgage is a valid notice to subsequent creditors no advantage can on that account be gained by a creditor of a bankrupt in an action by the latter's trustee to recover property taken from the bankrupt where the recordation of the mortgage was unreasonably delayed and new debts were incurred. If under the doctrine of *Moore v. Bay* appellant's mortgage was a nullity as to all creditors, the trustee was entitled to all the bankrupts' property, leaving the way open to all creditors to share in the assets of the estate according to their established claims. Therefore, the total value of the converted property was recoverable by the trustee.<sup>2</sup>

(2) As to the property's value in the sum of \$40,000, the court derived its finding from conflicting evidence. The president of Dunlap testified that the value of the vehicles was in excess of \$50,000. One witness ap-

praised them at \$29,000. The fact that the witness *Glove* testified to a large reduction in the market value of the vehicles between June and October, 1947, did not compel the trial court to adopt the appraisal of any particular witness. The value of \$40,000 was evidently derived from a consideration of the several appraisals and the depreciation as proved. The finding of value will not be disturbed in the absence of a clear showing that it was arbitrary and on review it will be supported by the proof favorable to the judgment. *Wood v. Samaritan Institution*, 26 Cal.2d 847, 849, 161 P.2d 556; *Morrison v. Willhoit*, 62 Cal.App.2d 830, 836, 145 P.2d 707. On appeal it must be presumed that the court believed the testimony that supports the finding. *Taber v. Beske*, 182 Cal. 214, 217, 187 P. 746.

[11] Appellant's complaint of a lack of findings with respect to material issues comes with poor grace. After proposed findings had been filed, appellant presented counter findings. At a conference of court and counsel the findings and amendments proposed by appellant were adopted. No objection was made by appellant to any finding finally made. The opportunity afforded, section 634, Code Civ.Proc., to propose amendments to and criticisms of proposed findings imposes upon the losing party the duty of presenting such matters to the trial judge while the latter still has jurisdiction of the case and if no objection is made the right to object must be deemed to have been waived. *La Vigne v. La Vigne*, 96 Cal.App. 2d 531, 216 P.2d 75; *Del Ruth v. Del Ruth*, 75 Cal.App.2d 638, 644, 171 P.2d 34.

Judgment affirmed.

WILSON, J., concurs.

McCOMB, J., deeming himself disqualified, takes no part in this decision.

2. While under federal law failure promptly to record a chattel mortgage renders it ineffective as to all creditors whose interest arose subsequent to its execution, yet under California law a belated

recordation of such a mortgage is notice to all who become creditors after the recordation. *Wolpert v. Gripton*, 213 Cal. 474, 481, 2 P.2d 767.

97 Cal.App.2d 859

In re GLASSGOLD'S ESTATE.

GLASSGOLD v. GLASSGOLD.

GLASSGOLD v. SUPERIOR COURT IN AND  
FOR CITY AND COUNTY OF SAN  
FRANCISCO et al.  
Civ. 14259, 14269.

District Court of Appeal. First District,  
Division 1, California.

June 5, 1950.

Rose Glassgold filed a motion to vacate final decree of distribution entered in the estate of David Glassgold, also known as D. Glassgold, deceased. The Superior Court of the State of California in and for the City and County of San Francisco, T. I. Fitzpatrick, J., denied the motion to vacate, and Rose appealed and instituted a certiorari proceeding, in name of her guardian who was appointed after the appeal from order of denial, against the Superior Court of the State of California, in and for the City and County of San Francisco, Morris Glassgold, etc., to have the order of denial annulled. The District Court of Appeal, Peters, P. J., held that evidence justified finding that Rose was guilty of laches in moving to vacate final order of distribution so as to preclude relief by certiorari, and that final order was not appealable.

Appeal and proceeding in certiorari dismissed.

#### 1. Executors and administrators §314(12)

An order of probate court denying motion to vacate final decree of distribution made in estate of a decedent, made under statute authorizing relief from judgment taken by mistake, inadvertence, surprise, or excusable neglect, was not appealable. Code Civ.Proc. § 473; Probate Code, § 1240.

#### 2. Certiorari §41

Where certiorari is not sought until expiration of time to appeal from court order, and delay is unexplained, the expiration of such time may be sufficient to bar relief by certiorari on ground of laches.

#### 3. Certiorari §4, 28(1)

The writ of certiorari is available in California only where inferior tribunal

exceeds jurisdiction, there is no right of appeal, and there is no other speedy and adequate remedy. Code Civ.Proc. § 1068.

#### 4. Certiorari §28(2)

Any error of probate court in its determination refusing to vacate final decree of distribution in estate of a decedent could not be reviewed on certiorari since court had jurisdiction. Code Civ.Proc. § 1068.

#### 5. Executors and administrators §314(12)

In support of order of probate court denying motion to vacate final decree of distribution in estate of a decedent, District Court of Appeal would conclusively presume that probate court resolved all conflicts against person seeking to have decree vacated.

#### 6. Executors and administrators §315(4)

Evidence justified finding that person who claimed to be widow of a decedent was guilty of laches in moving to vacate final order of distribution in estate of decedent, made under statute authorizing relief from a judgment entered through mistake, inadvertence, surprise, or excusable neglect, and person claiming to be widow of decedent was therefore precluded from having order of denial annulled in certiorari proceedings. Code Civ.Proc. § 473.

#### 7. Certiorari §68

What is a reasonable time within which person alleging erroneous judgment was entered through mistake, inadvertence, surprise, or excusable neglect, may move for relief, is for trial court. Code Civ. Proc. § 473.

#### 8. Executors and administrators §315(4)

One who claims to be entitled to succeed to a portion of estate of decedent cannot sit back after she has knowledge of death, allow estate to be probated, allow a decree of distribution, allow time to appeal to elapse, and then, just under six months period, claim relief under statute authorizing relief from erroneous judgment entered through mistake, inadvertence, surprise, or excusable neglect, and successfully urge that she is entitled to such relief as a matter of law. Code Civ. Proc. § 473.

**9. Judgment ☞363**

The motion for relief under statute authorizing relief from erroneous judgment entered through mistake, inadvertence, surprise, or excusable neglect, is addressed to sound discretion of trial court. Code Civ.Proc. § 473.

**10. Appeal and error ☞982(1)**

Discretion of trial court exercised on motion for relief under statute authorizing relief from erroneous judgment entered through mistake, inadvertence, surprise or excusable neglect, cannot be interfered with where action of trial court is supported by record. Code Civ.Proc. § 473.

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Robert E. Hatch, Stimmel & Stimmel, Lelia R. Leep, all of San Francisco, attorneys for petitioner and appellant.

Philip S. Ehrlich, Albert A. Axelrod, R. J. Hecht, all of San Francisco, attorneys for respondents.

**PETERS, Presiding Justice.**

These two proceedings have been consolidated for purposes of appeal. 1 Civ. 14,259 is an appeal from an order of the Probate Court denying a motion made under section 473 of the Code of Civil Procedure to vacate the final decree of distribution in the estate of David Glassgold, while 1 Civ. 14,269 is an attempt to have the order of denial annulled by means of *certiorari*.

Morris Glassgold is the brother of David Glassgold, deceased. In 1924, David married Rose. In 1930, Rose secured an interlocutory decree of divorce. Both parties were represented by counsel. The final decree was not entered during David's lifetime, but after David's death in 1947, and after the final decree of distribution had been entered in March of 1948, Morris had a judge of the Superior Court of San Francisco enter a final decree *nunc pro tunc* as of many years prior to the death of David. Another judge of the same court subsequently, on the motion of Rose, set aside the *nunc pro tunc* order previously entered. Thus, during the times here

relevant, no final decree of divorce has been entered.

David died on August 9, 1947, in San Francisco. Morris petitioned for letters of administration on August 13, 1947, averring that David died intestate, that he was the sole heir of David, and that he was entitled to the entire estate. The name of Rose was not mentioned in the petition. Notice of the time and place for hearing was given in the manner required by law. Morris was appointed administrator on August 28, 1947. Notice to creditors was published as required by law, and all other statutory notices given. Morris filed his final account and petition for final distribution on February 28, 1948. The final decree of distribution awarding him the entire estate as sole heir at law was filed on March 17, 1948. Admittedly, Rose was not given actual notice of any of these proceedings.

On September 8, 1948, just under the six-month period prescribed by section 473 of the Code of Civil Procedure, Rose filed a notice of motion to vacate the final decree, from which no appeal had been taken and which was then final. She averred that she was the surviving spouse of David, and, as such, entitled to all the community property, and to one-half of the separate property. The motion charged that the final decree of distribution had been made as a result of "mistake, surprise, inadvertence and/or excusable neglect"; that Morris misrepresented himself as David's sole heir when he knew or should have known that Rose was alive and David's wife at the time of his death. Her affidavit filed in support of the notice of motion averred that she was the widow of David; that she was living in San Francisco at the time of David's death; that her name and address were listed in the telephone directory; that Morris knew she was alive at the time of David's death, and knew that she was then the wife of David; that she received no notice of the probate proceedings until more than sixty days after March 17, 1948, and therefore had no opportunity to act until after the time for appeal from the decree of final distribution



had expired; that immediately upon learning of the final decree she employed counsel.

Morris filed a lengthy counter-affidavit. So far as pertinent here, he denied that the marriage had not been dissolved, and averred that no appeal had been taken from the interlocutory decree of divorce; that at no time after the interlocutory was granted did the parties cohabit, and they were never reconciled. He admitted that at the time of David's death he knew Rose was alive, but averred that he believed a final decree of divorce had been entered; that David, before his death, labored under the same belief; that he did not know that no such decree had been entered until after the decree of final distribution had been entered. On information and belief he averred that on the date of David's death Rose was informed of it by the hospital. He also averred that notices of the funeral services appeared in the San Francisco newspapers; that at no time during probate did Rose make any claim; that Rose knew of the pendency of those proceedings long before September 7, 1948. He denied that Rose did not receive official notice of the proceedings.

Rose filed a second affidavit in which she averred that since 1936 she has been confined, by reason of a heart condition, either in hospitals or in her home except for occasional visits to her doctor; that on August 7, 1947, she returned to her home from the hospital where she had been confined because of a stroke, and was confined to her bed at home for an indefinite time; that at 3 a. m. of a certain morning shortly after she returned home from the hospital she received a telephone call telling her that something had happened to David; that she told the caller that she was ill and helpless and referred him to Morris; that the telephone call caused a relapse and she was advised by her physicians that any further excitement might be fatal; that she is not familiar with probate proceedings and had always been told that David had no money; that she was surprised to learn that he had an estate; and that she knew nothing of the

probate proceeding until after distribution had been granted.

Some oral testimony was also taken on the hearing of the motion to vacate. Morris testified that he knew Rose and David had been married, but believed that they were divorced; that when David died he knew that Rose was alive and in San Francisco, but did not know her address or that she had been in the hospital, or anything about her health and condition; that when he first consulted his attorney about petitioning for letters of administration his attorney asked about relatives of the deceased, and that he told the attorney that David had been married but that he had been divorced many years before; that his brother had told him that he had a final decree of divorce; that he made no investigation of the finality of the divorce because he believed that it was final. The attorney for Morris testified that Morris may have told him about David's wife and the divorce, but stated that he had no definite recollection; that his normal office practice was to ask that question, and he imagined that it had been asked and answered as testified to by Morris. He also testified that he may have told an attorney for Rose, after the entry of the decree of distribution, that he had never before heard that David had been married. This attorney for Rose testified that such a conversation had occurred.

On this showing the motion to vacate was denied. Rose thereupon appealed from the order of denial (1 Civ. 14,259). Thereafter, Rose was declared incompetent, and her son appointed guardian of her person and estate. The *certiorari* proceeding (1 Civ. 14,269) was instituted in the guardian's name.

[1] It is clear that the appeal must be dismissed. In probate matters an appeal does not lie from the denial of a motion to vacate made under section 473 of the Code of Civil Procedure. "Section 1240 of the Probate Code specifies the orders and judgments in probate from which an appeal will lie, and an order denying relief under section 473 of the Code of Civil Procedure is not one of the orders so specified. \* \* \* this court has on numerous

occasions held that no appeal will lie from an order in probate denying relief under section 473 of the Code of Civil Procedure." Estate of O'Dea, 15 Cal.2d 637, 638, 639, 104 P.2d 368, 369. See, also, Estate of Brady, 32 Cal.2d 478, 479, 196 P.2d 881; Estate of Herrington, 79 Cal. App.2d 389, 390, 179 P.2d 650; Estate of Ryker, 92 Cal.App.2d 162, 206 P.2d 406; Estate of Hart, 92 Cal.App.2d 691, 208 P.2d 59. Thus, the order appealed from is nonappealable, and the purported appeal must be dismissed.

[2] It is also our opinion that review by *certiorari* should be denied. In the first place, there is a question of whether the petition for *certiorari* was filed too late. The time to appeal from the denial of the motion to vacate expired April 8, 1949. The appeal was filed on April 2, 1949. The petition for *certiorari* was not filed until July 26, 1949. While there is no statutory time within which a petition for such a writ must be filed, the remedy may be barred by laches. Where there is an unexplained delay in seeking the writ, the courts have considered the time in which to appeal as being a reasonable time, and, in the absence of an explanation, the expiration of such time may be sufficient to bar relief. Bryant v. Superior Court, 16 Cal.App.2d 556, 561, 61 P.2d 483. Rose and her counsel should have known that an appeal would not lie from the denial of a motion to vacate in probate matters. The O'Dea case had been decided in 1940, and clearly established the law. There seems to be no reasonable explanation as to why the petition for *certiorari* was so long delayed. This alone might well be held to bar relief by means of *certiorari*.

[3] But there are other reasons why *certiorari* is not here available. Section 1068 of the Code of Civil Procedure provides that the writ may issue where an inferior court has exceeded its jurisdiction "and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy." The proper rule that has been frequently quoted was stated as follows in the leading case of Redlands High School Dist. v. Superior Court, 20 Cal.2d 348, 350, 125 P.2d 490, 491: "The writ of

*certiorari* is available in this state only if the following conditions are present: (1) An excess of jurisdiction on the part of an inferior tribunal; (2) no right of appeal; and (3) no other plain, speedy and adequate remedy."

[4-7] Tested by these standards, the action of the trial court in refusing to vacate the final decree of distribution cannot be annulled. Certainly, the trial court had jurisdiction of the controversy. The court having jurisdiction, even if it was in error in its determination, such error cannot be reviewed on *certiorari*. Spanach v. Superior Court, 4 Cal.2d 447, 450, 50 P.2d 444; Estate of Kay, 30 Cal.2d 215, 226, 181 P.2d 1. Moreover, the trial court had power on the motion to vacate to pass on all controverted questions of fact. In support of its order of denial it must be conclusively presumed that the trial court resolved all conflicts against Rose, and therefore impliedly found that Rose knew of the death of David on the date of such death, but did nothing to protect her rights until the motion to vacate was filed some thirteen months later. There is evidence to support such an implied finding. According to Rose's own affidavit, one reason she was not diligent in protecting her rights was that she erroneously believed that David had no property, although she had averred in her divorce complaint that the business David was then operating, and which he was still operating at the time of his death, was worth a substantial sum of money. Section 473 of the Code of Civil Procedure does not automatically require the vacation of every erroneous judgment. It is only when the erroneous judgment has been entered through "mistake, inadvertence, surprise, or excusable neglect" of the party that relief may be granted. The question now is not whether the trial court could have set aside the final decree of distribution, but whether, as a matter of law, it was compelled to do so. If there is any evidence to support the implied finding of the trial court that the decree of distribution was not entered as the result of mistake, inadvertence or excusable neglect, as those terms are used in section 473, this court has no power to in-



terfere. While Rose averred that she was ill and confined to her home during the thirteen-month period, she also averred that she visited her doctor during this period, and could, obviously, likewise have visited a lawyer. The trial court was not bound to conclude that she could not, had she been diligent, secured legal advice. To be entitled to relief under section 473, the person seeking relief must make the motion "within a reasonable time, in no case exceeding six months." The six-month period is the maximum, but the mere fact that the motion has been made within that period does not automatically entitle the movant to relief. Such party must also show that the motion was made within a "reasonable time," which is simply another way of stating that the movant cannot secure relief by *certiorari* if he has been guilty of laches. The trial court was justified in finding that Rose was guilty of laches. That alone is sufficient to justify a denial of the requested relief. (See cases collected 14 Cal.Jur. p. 1062, § 109.) It is for the trial court to say what is a reasonable time. See cases collected 14 Cal.Jur. p. 1065, § 110.)

[8-10] It must be remembered that the decree of distribution became final sixty days after it was entered. One who claims to be entitled to succeed to a portion of the estate of a decedent cannot sit back after she has knowledge of the death, allow the estate to be probated, allow a decree of distribution to be entered, allow the time to appeal to elapse, and then, just under the six-month period, claim relief under section 473 and successfully urge that she is entitled to such relief as a matter of law. The relief permitted by section 473 is an extraordinary and conditional remedy, allowed to those who, through no fault of their own, have been deprived of their day in court. Where, as here, the trial court impliedly found that Rose knew of the death but simply slept on her rights in the mistaken belief that David had no estate,

a belief not engendered by Morris or David, the action of the trial court in denying relief cannot be upset. The motion for relief under section 473 is addressed to the sound discretion of the trial court. Estate of Ryker, 95 Cal.App.2d 507, 213 P.2d 420, and particularly opinion on denial of petition for rehearing found in the minutes of the court for February 9, 1950. Where, as here, the record supports the action of the trial court, that discretion cannot be interfered with.

The theory of Rose seems to be that she was prevented from learning of the pendency of the probate by the deliberate acts of Morris, who, it is charged, concealed from her the fact that the proceedings were pending. If such fraud appeared, Rose might well be entitled to the requested relief. But here there was positive evidence that Morris had acted in utmost good faith. He testified that he had been told by David that the divorce was final, and honestly believed that this was so. There is no evidence to the contrary. Even if there were, this conflict has also been resolved against Rose by the trial court.

Under such circumstances, the action of the trial court in refusing to vacate the final decree of distribution cannot be disturbed on *certiorari*. If Rose has any remedy it is by an independent action in equity against Morris to impress a trust upon the distributed property. Hewett v. Linstead, 49 Cal.App.2d 607, 122 P.2d 352; Larabee v. Tracy, 21 Cal.2d 645, 134 P.2d 265. Such an action is in fact pending. We express no opinion at all on the question as to whether any of the determinations made in this proceeding are or are not *res judicata* in the equity case. That problem is not now before us.

The appeal in 1 Civ. 14,259 and the proceeding in *certiorari* numbered 1 Civ. 14,269 are dismissed.

BRAY, J., and SCHOTTKY, Justice pro tem., concur.



**SEXTON v. SIMONDET et ux.**

Civ. 7757.

District Court of Appeal, Third District,  
California.

June 7, 1950.

Rehearing Denied July 7, 1950.

Hearing Denied Aug. 3, 1950.

Action by Coen V. Sexton against C. A. Simondet and May Simondet, his wife, to recover realty commission which defendant allegedly agreed to pay plaintiff for finding a purchaser for certain realty. The action was begun in Sacramento County, and the defendants, residents of Calaveras, moved for a change of place of trial to that county. The Superior Court, Sacramento County, Peter J. Shields, J., denied the motion for a change of place of trial, and defendants appealed. The District Court of Appeal, Van Dyke, J., held that since of the two agreements executed only the second, which did not contain a stipulation for performance in county of plaintiff's residence, contained provisions matching the contracts or obligations pleaded and allegations as to parties, cause was triable on proper demand only in county of defendants' residence, and since plaintiff elected to join second count of complaint with one so triable both would be required to be moved.

Judgment reversed.

Venue ⇐ 16½, 21

Where realty agent in county of his residence commenced action based on alleged agreement by vendors to pay specific commissions for obtaining a purchaser for certain realty, which alleged agreement, by express stipulation, was to be performed in county of agent's residence, but only in second agreement attached to vendors' motion for change of venue to county of their residence did provisions exist which matched pleaded contractual obligations and allegations as to parties, and such agreement did not contain stipulations depended on to hold venue in county of agent's residence, cause was triable on proper demand only in county or vendors' residence, and when agent elected to join a second count with cause so triable both would be moved. Code Civ.Proc. § 395(1).

Huberty &amp; Huberty, San Andreas, for appellants.

Mull &amp; Pierce, Sacramento, Mazzera, Snyder &amp; DeMartini, Stockton, for respondent.

VAN DYKE, Justice.

This is an appeal from an order of the trial court denying a motion for a change of place of trial. The action was begun in Sacramento County; the defendants, residents of Calaveras, moved for a change of place of trial to that county.

The complaint contains two counts. The first thereof contains allegations that may be summarized as follows: Plaintiff is a licensed real estate and business opportunity broker. On October 10, 1947, defendants, who are husband and wife, entered into a written contract with plaintiff whereby they employed him, as their agent, to find a purchaser for real and personal property in Calaveras County for a price of \$50,000, payable on terms. By the agreement defendants agreed to pay plaintiff a commission of \$5000. The contract was made in Sacramento County and, by express provision, was to be performed there. Plaintiff fully performed by finding a purchaser, one Gebhardt, ready, able and willing to buy upon the contract terms. Gebhardt entered into a written agreement of purchase and sale with defendants. Defendants breached their contract with plaintiff in that they refused to pay the stipulated commission. The pleader does not make the written instrument a part of his pleading. He alleges what he claims to be the substance thereof.

Looking at this count, and confining our observation now to the face of the pleading as summarized, without reference to the actual written contract, which we will discuss later, we find this count to be a statement of a cause of action arising upon contract; that the contract was entered into and, by express stipulation, was to be performed in Sacramento County; that Sacramento County, therefore, is a proper place for the trial. Code Civ.Proc. sec. 395, subd. 1; *Armstrong v. Smith*, 49 Cal.App.2d 528, 122 P.2d 115.

But appellants make the following contentions: They say but one written contract, dated October 10, 1947, was entered into, that plaintiff has not truly stated its substance, and has not in fact sued upon it. A copy of the instrument itself is annexed to the affidavit. We shall refer to this, for convenience, as the brokerage contract. They say a second document, copy of which is likewise annexed as an exhibit, was executed. This document is dated November 5, 1947, and we shall call it, for convenience, the second document. They say this second document is an independent contract, separate from the brokerage contract, and is the contract which plaintiff sues upon. And they conclude that since this second document was signed by defendants in Calaveras County, the county of their residence, and neither therein nor at all have defendants specially contracted that their obligations thereunder were to be performed in any other county, Calaveras County is the only proper county for the trial of the issues actually tendered by the first count of plaintiff's complaint. Code Civ.Proc. sec. 395, subd. 1; *Armstrong v. Smith*, supra. This legal conclusion is correct if the above stated premises upon which it is grounded have been established. The real issue then is, what contract is the first count based on? A detailed statement as to the contents of the documents involved is necessary.

The brokerage contract, dated October 10, 1947, is entitled "Uniform Authorization to Sell." C. A. Simondet signed it; his wife, the other party defendant, did not. He is designated the "seller" and plaintiff the "agent". The seller employed the agent to sell, and empowered him to bind the seller to convey, the described property. (The complaint describes the same property except that one item ["Accounts receivable (approx. 6500.00)"] listed in the brokerage contract is omitted from the complaint.) The seller fixed the price at \$60,000 net to the seller. The terms were: minimum cash down, \$40,000; balance, note and deed of trust. Possession was to be delivered one day after passing of deed and bill of sale. The contract then provided as follows: "Seller agrees that should a sale or exchange of said property be made

upon said terms, or any terms satisfactory to 'Seller' or otherwise during the term of this contract, by either party to this agreement, or by any other party, or after the termination of this agreement, if sold to a party to whose attention said property was brought by or through 'Agent' said 'Agent' shall receive out of the first payment on said property a commission of Netlisting per cent of the price for which said property was sold. 'Seller' and 'Agent' mutually agree that this authorization to sell is Exclusive, and in the event the property described herein or any part thereof, be traded, exchanged, leased, or sold to anyone during the life of this agreement, whether by a party of this agreement or not, the 'Agent' herein shall be entitled to the commission herein specified for any trade, exchange, lease or sale. Said commission shall be paid at the office of 'Agent' in the City of Sacramento, the place where this contract is to be performed."

The following observations are pertinent here, as will be seen: Had the contract ended with the provisions thereof ahead of the language quoted above, it would plainly have been a so-called "net listing" contract or "broker's net contract," one whereby the seller does not agree to pay the agent any commission at all in a proper sense, but compels him to sell the property at a price in advance of the net price, or to get his compensation from the buyer. Under such a contract the agent could never successfully sue the seller for compensation. *Ford v. Brown*, 120 Cal. 551, 552, 52 P. 817, 818, where the Supreme Court, referring to a net price contract, said that under such a contract the "brokers were employed \* \* \* to sell land at any price so they gave her \$14,800 net. She did not agree to pay them anything for their services. On the contrary, the brokers were, in effect, told that she would not pay them, but they must get their pay from the purchaser." To the same effect see, also, *Haigler v. Donnelly*, 18 Cal.2d 674, 678, 117 P.2d 331, and *Palm-tag v. Danielson*, 30 Cal.2d 517, 183 P.2d 265.

But the contract did contain the quoted provision and thereby the exact nature of the contract became uncertain. It is con-



tended by respondent, plaintiff below, that these provisions show the contract to have been of the special type above discussed, but a general brokerage contract which mentioned a price merely as an asking price, and, as the court said in *Palm-tag v. Danielson*, supra, simply for the guidance of the broker in his negotiations with prospective purchasers.

Without further discussion of the brokerage contract at this time, we will turn to the second document. It is entitled "Deposit Receipt". It is signed by plaintiff through his salesman Wheeler, and acknowledges receipt from Gebhardt of a check for \$4000 on account of the purchase price of described property. This description coincides exactly with that used in the complaint. It expressly excludes accounts receivable. The purchase price named is \$50,000, not \$60,000. Twenty-one thousand dollars is payable as further deposit "as soon as this offer is accepted." Balance at start of escrow. The title is not to pass before January 2d following. The seller is to aid in running the business for one month thereafter, without charge. The document states: "This is an offer," and that its terms are subject to the seller's approval. At this point the agent signed, and just below Gebhardt agreed, over his signature, to buy on the terms expressed. Following that, defendants both signed, declaring themselves bound to sell, and expressly agreed to pay plaintiff, as commission, the sum of \$5,000, the exact sum for which plaintiff sues. Nowhere is the brokerage contract referred to, and the document expresses a complete offer to buy, acceptance thereof, and hence a contract complete within its own terms, with an express agreement to pay the plaintiff's commission.

For the purpose of the motion the trial court had to look to the complaint, the affidavit in support of the motion, and the counter-affidavit of the salesman Wheeler. It stands undisputed that but one contract was executed on October 10, 1947—that set forth in *haec verba* in the movant's affidavit. Comparing that document with the first count, which purports to plead its substance, we find the following: It is al-

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leged that plaintiff and defendants entered into a written contract on October 10, 1947. True, except that one defendant was not a party to it. It is alleged that certain property was the subject of this contract. True, but the actual contract included in the property to be sold the very substantial item of accounts receivable. For a price, says the pleader, of \$50,000. Untrue, since the real contract fixed a price \$10,000 higher. Under the contract terms, says the pleader, the defendants agreed to pay \$5,000 commission. Not at all. The true contract fixed no amount of commission, and only one defendant was a party signatory thereto. Plaintiff performed, says the pleader, in this: that on November 5, 1947 (the date of the second document), and while the brokerage contract was in force, Gebhardt was obtained as a purchaser "upon the terms and conditions aforesaid." True, as those terms were pleaded, untrue if we consider the terms of the real contract. Gebhardt, says the pleader, on that date entered into a written agreement of purchase and sale. True, but that agreement was indisputably the second document, wherein alone do we find both defendants bound to pay plaintiff the exact commission for which he sues.

Considering now the second document, and comparing its contents with the pleading, we find that its provisions alone exactly match the pleading of the contractual obligations, and the allegations as to parties. Thus it was the only document signed by both defendants, the only one the property description in which matches the pleading; the only one which matches the pleaded price; the only one which does contain the undertaking pleaded to pay the commission sued for. But it significantly does not contain the stipulations depended on to hold the venue in Sacramento County.

Respondent contends the two instruments must be construed together, that the second document was merely evidence of a step taken in performance of the first. He points particularly to the portions of the brokerage contract quoted above and says in effect these provisions take the contract out of the net listing class and make it



a general contract of brokerage. But a consideration of these provisions develops the error in this contention. They do declare, and in language generally applicable to general brokerage contracts, that if a sale is made on any terms satisfactory to the seller the agent shall receive a commission of "Netlisting" per cent of the price. But the very insertion of the term net listing in the blank left to state the rate of commission makes it obvious the parties were studiously staying within the undertaking declared in the first part of the instrument and that they inserted the word "netlisting" to harmonize therewith. Otherwise the sentence means little. There is no such thing as a netlisting per cent. Clearly the plain antecedent provisions of the contract must control.

We are not forgetting that the affidavit of the salesman Wheeler contains an attempt to explain this sentence. He avers that during the talk in plaintiff's place of business leading up to the signing of the brokerage contract, he told defendant C. A. Simondet that the commission for selling a business was ten per cent of the price; that for said defendant to get \$60,000 the property must be sold for enough more to pay the commission; that if a reasonable offer were received he would not refuse it, but would report it to determine if it was acceptable to Simondet. That said defendant agreed to all of this and then, says the affiant, the brokerage contract was prepared, read by Simondet and signed by him.

Obviously, under such circumstances, these oral matters became no part of the written contract. They are contradictory therewith. They were omitted from the written instrument. The only function of such evidence of antecedent oral negotiations was to explain, if it would explain, the doubtful sentence now being considered. But it does not explain. It certainly does not explain why the term "netlisting" was inserted. That term was completely inconsistent with the alleged oral understanding. Affiant Wheeler does go on to say that on November 5th Gerhardt "made an offer to purchase the said business at

and for the sum of Fifty Thousand Dollars (\$50,000.00) and the said defendant accepted said offer and renewed his promise to pay a commission to plaintiff, all as set forth in the deposit receipt. \* \* \*" It must be held there had been no such promise which could be "renewed," and that the deposit receipt embodied that promise for the first time. For the purposes of this motion we hold the first count in the complaint to be based upon the deposit receipt, wherein only is there found an agreement to pay the sum for which respondent sues, and therefore that appellants were entitled to have that cause tried in the county of their residence.

Turning now to the second count, the parties advance various contentions as to the nature thereof. But if we are right in what we have heretofore said, then it becomes unnecessary to go further, because whether that count sounds in tort, as contended by appellants, or in contract, as contended by respondent, it is joined with a cause triable, on proper demand, only in the county of appellants' residence. Hence, when respondent elected to join this count with one so triable, both must be moved. As authority for this statement we quote the following from *Goossen v. Clifton*, 75 Cal. App.2d 44, 49, 170 P.2d 104, 108: "The rule is fundamental. The important right to protect is that of the defendant to have the cause tried in the county of his residence. For the plaintiff to be entitled to the exceptional right of having the cause tried in some other county, he must clearly bring himself within a statutory exception. If, by joining several causes of action, the defendant could be deprived of his right, the right would be lost in many cases. It is for that reason that the courts hold that the test is whether on any one of the causes of action the defendant is entitled to a change to the county of his residence. If there is one such cause, then defendant is entitled to the change no matter how many other causes may be set forth in which he is not entitled to the change. That is the situation here presented."

As said in *Armstrong v. Smith*, *supra*, "Sight must not be lost of the fact that on

this appeal we are dealing solely with a question of venue. The enforceability of the contract is not in question, nor are any of the issues tendered by the complaint." [49 Cal.App.2d 528, 122 P.2d 119.]

The judgment is reversed.

ADAMS, P. J., and PEEK, J., concur.



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PEOPLE v. MANGIAGLI.

C. A. 2571.

Appellate Department, Superior Court,  
Los Angeles County, California.

May 16, 1950.

As Amended on Denial of Rehearing

June 5, 1950.

S. J. Mangiagli was convicted in the Municipal Court of the City of Los Angeles, Lewis Drucker, J., for practicing medicine without a valid unrevoked license and defendant appealed. The Appellate Department of the Superior Court, County of Los Angeles, Shaw, P. J., held that evidence that defendant administered blood plasma to a patient and gave hypodermic injection for purpose of replacing a loss of blood due to an internal hemorrhage of patient was sufficient to support conviction, even though defendant held a valid chiropractic license.

Affirmed.

**1. Physicians and surgeons** ⚡6(9)

A complaint in two courts, charging the practice of medicine without an unrevoked certificate, upon the same person but on different days, which was in the words of the statute describing the offense, was sufficient. Business and Professions Code, §§ 2000 et seq., 2141; Pen.Code, § 1426.

**2. Physicians and surgeons** ⚡6(8)

The statute authorizing the licensing of chiropractors is in the nature of an exception to the statute providing that the prac-

tice of medicine without a certificate is a misdemeanor, and is a complete defense to statute if defendant has not exceeded the authority of his chiropractic license. Gen. Laws, Act 4811, § 7; Business and Professions Code, §§ 2141, 2426.

**3. Physicians and surgeons** ⚡6(8)

Under statute authorizing a licensed chiropractor to practice chiropractic as taught in chiropractic schools or colleges, the permissible practice by holder of license does not extend beyond scope of chiropractic as that term was understood and defined in 1922, and therefore in a prosecution for practice of medicine without a certificate, evidence of what is now taught in chiropractic schools and colleges is not a defense. Gen. Laws, Act 4811, § 7; Business and Professions Code, §§ 2141, 2426.

**4. Physicians and surgeons** ⚡6(1)

The administration of blood plasma and the use of a hypodermic injection for purpose of treating a patient are not such mechanical, hygienic or sanitary measures incident to care of the body as may be used by chiropractic licensees. Gen. Laws, Act 4811, § 7.

**5. Physicians and surgeons** ⚡6(10)

In prosecution for practicing medicine without a certificate, evidence that defendant, a licensed chiropractor, administered blood plasma and used a hypodermic injection for purpose of replacing a loss of blood due to an internal hemorrhage of patient, was sufficient to support conviction. Business and Professions Code, §§ 2141, 2426.

**6. Physicians and surgeons** ⚡6(1)

The statute declaring that chiropractic licensees shall not engage in certain practices, is negative and not positive, and therefore does not imply that licensee may engage in every sort of practice not listed as forbidden. Gen. Laws, Act 4811, § 7.

**7. Physicians and surgeons** ⚡6(8)

In prosecution of a licensed chiropractor for practice of medicine without a certificate, where defendant had been called a day before he came, and immediately knew patient's ailment when he saw her,

and during time he waited for blood plasma to administer to patient he had opportunity to call in a qualified physician, no emergency existed so as to be a defense to prosecution. Business and Professions Code, §§ 2141, 2426.

**8. Criminal law** Ⓒ1169(9)

In prosecution of a licensed chiropractor for practice of medicine without a certificate, permitting a witness to testify in response to hypothetical question, which did not assume that injection was made for purpose of treating patient, that the injection of some substance by a hypodermic needle into the body tissue of another constitutes the practice of medicine or surgery, was not prejudicial error. Business and Professions Code, § 2000 et seq.

**9. Criminal law** Ⓒ1169(3)

**Physicians and surgeons** Ⓒ6(10)

In prosecution of a licensed chiropractor for practice of medicine without a certificate, where defendant admitted that he gave a hypodermic injection to husband of patient mentioned in complaint, and fact of husband's injection was not alleged in complaint, admission of evidence that defendant gave husband a hypodermic injection was not prejudicial error. Business and Professions Code, § 2000 et seq.

On Denial of Rehearing.

**10. Administrative law and procedure** Ⓒ390

**Physicians and surgeons** Ⓒ1

Since the statute defining chiropractic was plain and unambiguous, an administrative regulation defining chiropractic, which was in conflict therewith, was void. Admin.Code, Tit. 16, subc. 4, art. 1, § 302 (a); Gen.Laws, Act 4811, § 7.

**11. Administrative law and procedure** Ⓒ387, 390

An administrative officer may not make a rule or regulation that alters or enlarges terms of a legislative enactment, and if meaning of statute is not doubtful and regulations are in conflict with meaning, regulations are simply void.

Ray L. Chesebro, City Attorney, Donald M. Redwine, Assistant City Attorney, Los Angeles, and Leland C. Nielsen, Deputy City Attorney, for respondent.

SHAW, Presiding Judge.

This is another case like *People v. Fowler*, 1938, 32 Cal.App.2d Supp. 737, 84 P.2d 326, where a licensed chiropractor prosecuted for violation of the provisions of the Business and Professions Code regarding medical practice, Div. 2, Chap. 5, § 2000 et seq., presents his chiropractic license as a sufficient authority for what he has done and a defense to the prosecution. We conclude that the defense is not sufficient here.

[1] The complaint herein contains two counts, charging, in the words of section 2141, Business and Professions Code, hereinafter quoted, violations of that section on the same patient, but on different days. Objection is made to this complaint on the ground that it is too vague and uncertain. It is in the words of the statute describing the offense, and must therefore be regarded as sufficient. Sec. 1426, Penal Code; *People v. Saffell*, 1946, 74 Cal.App.2d Supp. 967, 973-977, 168 P.2d 497.

The evidence shows that on the day charged in the first count defendant came to see the patient, a woman, after having been called the day before, and found her in a serious condition of uterine hemorrhage, following a menstrual period. This hemorrhage had begun the day before and was quite severe. When he came she "felt very, very weak," she said. After examining the patient and taking her pulse and blood pressure, defendant concluded that she was in a condition almost of shock and that the lost blood must be replaced immediately. He packed her uterus with gauze to stop the hemorrhage, an operation which took twenty minutes, and then ordered blood plasma by telephone from a laboratory. The laboratory brought the plasma and necessary equipment, and defendant himself made the transfusion, which was done by inserting a needle into a vein of her arm and connecting it with the bottle of plasma. Later on the same day he also injected into her flesh with a hypodermic needle some fluid, the nature



of which the patient and her husband did not know, but which defendant testified was liver extract. He also gave her some white pills which defendant testified were probably parathyroid tablets. The second count relates to the next day. On this occasion he gave her another injection with a hypodermic needle of something which appears to have been liver extract.

Section 2426 of the Business and Professions Code makes violation of any of the provisions of Chapter 5 of Division 2 a misdemeanor, and section 2141, also a part of that chapter, provides: "Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this State, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, is guilty of a misdemeanor." By other provisions of this chapter the certificate here referred to may be issued either by the Board of Medical Examiners or the Board of Osteopathic Examiners.

[2] A separate and independent enactment, known as the Chiropractic Act, adopted in 1922 as an initiative measure, Stats.1923, p. lxxxviii, Deering's Gen.Laws, Act 4811, authorizes the issuance of licenses to practice "chiropractic." Defendant had such a license at the time of the acts complained of. The legal problems presented here are substantially identical with those considered in *People v. Fowler*, supra, 1938, 32 Cal.App.2d Supp. 737, 84 P.2d 326. This court discussed there at some length the construction of the several statutes above mentioned and their effect on each other, and without repeating all that was there said we approve of and adhere to it. As we said there, the Chiropractic Act is in the nature of an exception to the Business and Professions Code provisions cited, and is a complete defense here if the defendant has not exceeded the authority of his chiropractic license, 32

Cal.App.2d Supp. 742, 84 P.2d 326. That authority is fixed by section 7 of the Chiropractic Act, which provides that licenses issued under it "shall authorize the holder thereof [1] to practice chiropractic in the state of California as taught in chiropractic schools or colleges; and, also, [2] to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, but [3] shall not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry, nor the use of any drug or medicine now or hereafter included in materia medica." (Numbers inserted by us.)

Considerable time was consumed at the trial by the introduction of evidence by defendant to show that what he did is now taught in chiropractic schools and colleges. This matter was discussed in the *Fowler* case, supra, where we held that section 7 authorized, by the provision, numbered as [1] above, nothing that was not chiropractic, as that term was understood in 1922, when the act was passed, and that the term was then defined as "A system of [or] the practice of adjusting the joints, especially of the spine, by hand for the curing of disease." 32 Cal.App.2d Supp. 745-746, 84 P.2d 331. We further said, regarding chiropractic schools: "The effect of the words 'as taught in chiropractic schools or colleges' is not to set at large the signification of 'chiropractic,' leaving the schools and colleges to fix upon it any meaning they choose. Were the word 'chiropractic' of unknown, ambiguous or doubtful meaning, this clause, 'as taught' etc., might serve to provide a means of defining or fixing its signification, but there is here no such lack of clarity. The scope of chiropractic being well known, the schools and colleges, so far as the authorization of the chiropractor's license is concerned, must stay within its boundaries; they cannot exceed or enlarge them. The matter left to them is merely the ascertainment and selection of such among the possible modes of doing what is comprehended within that term as may seem to them best and most desirable, and so the fixing of the standards of action in that respect to be followed by chiropractic licensees."

[3] In other words, the limits of permissible practice by the holder of a chiropractic license, as fixed by section 7 of the statute, do not extend, under the provision we have numbered [1], beyond the scope of chiropractic as that term was understood and defined in 1922, and the ambitious attempts of chiropractic schools or colleges to extend them by teaching other subjects under the guise of chiropractic must fail, so long as the statute remains as it is now. The statute has been amended by a proposal made by the legislature in 1947, Stats. 1947, pp. 676-680, and approved by popular vote; but the amendments so made have not changed section 7 of the act, and we find nothing in the changes of other sections which affects or alters the meaning of section 7.

[4,5] None of the acts of defendant above described come within the scope of chiropractic, as limited above and in the Fowler case, and hence they are not within the first authorization, as we have above numbered the two authorizing clauses of section 7. As we held in the Fowler case, at 32 Cal.App.2d Supp. 750, 84 P.2d 326, the limiting clause of section 7, numbered above as [3], prevents a chiropractic licensee from using drugs or medical preparations or severing or penetrating the tissues of human beings. Perhaps the packing of the uterus might be classed as one of the described measures incident to the care of the body listed in the second authorization. Of this we have some doubt, in view of the purpose for which it was done, which hardly suggests that it was "incident to the care of the body." But however that may be, it is clear that the other acts done, the administration of blood plasma and the hypodermic injection, when done for the treatment of ailment, disease, or other physical condition, are not such mechanical, hygienic or sanitary measures incident to the care of the body, as may be used by chiropractic licensees. At least one of them was done on the occasion charged in each count, and the evidence in this respect is sufficient to support the conviction on each.

In this connection, defendant cites and relies upon *King v. Board of Medical Examiners*, 1944, 65 Cal.App.2d 644, 151 P.2d

282. That was a case where the Board had revoked the license of a drugless practitioner for unprofessional conduct. His license to act in that capacity did not authorize "in any manner severing or penetrating any of the tissues of human beings except the severing of the umbilical cord." Business and Professions Code, sec. 2138, and the doing of such acts in the treatment of disease and other specified conditions was made unprofessional conduct, Business and Professions Code, sec. 2394. It appeared that petitioner, whose license had been revoked for unprofessional conduct, had taken a drop of blood from a person's ear for the purpose of making a test of that persons' blood in connection with a lecture petitioner was giving, and it was held that since this was not done for treatment, it did not amount to unprofessional conduct. Assuming that a chiropractor might claim a like exemption from the prohibitions thrown around him, it is not applicable here, for the defendant's acts were all done for purposes of treatment. The Supreme Court has just distinguished the *King* decision on this ground in the case of a licensed drugless practitioner who had performed a blood transfusion, holding that since he did this for the purpose of treating a patient he was guilty of unprofessional conduct, under the Business and Professions Code section 2394, above cited. *Cooper v. Board of Medical Examiners*, 1950, 35 Cal.2d 242, 217 P.2d 630.

[6] Defendant contends that what he did is not the practice of medicine or surgery, and seems to assume that if it is not, he may engage in it under his chiropractic license. Even if this premise were conceded, the conclusion would not necessarily follow. The reference in the part of section 7 of the Chiropractic Act numbered above as [3] to medicine, surgery, and the other matters listed with them, is not positive but negative. It declares that chiropractic licensees shall *not* engage in certain practices, but does not imply, and section 7 does not provide, that such licensees may engage in every sort of practice not listed as forbidden. Compare the reasoning in *In re Rust*, 1919, 181 Cal. 73, 79, 183 P. 548. As we held in *People v. Fow-*



1er, supra, 32 Cal.App.2d Supp. 750, 84 P.2d 326, this provision is merely a limitation upon the two authorizing clauses [1] and [2].

Defendant complains of the giving and refusal of several instructions, but the instructions given conform to our views on the law as above stated and those refused do not, so we deem it unnecessary to copy them here. We find no error in these matters.

Section 2144 of the Business and Professions Code provide that "Nothing in this chapter prohibits service in case of emergency, \* \* \*" and defendant contends that this was a case of emergency and he is therefore exempt from prosecution for his actions above narrated. The code contains no definition of an "emergency," but its meaning as used in the like provision of predecessors of the present statute, has received judicial scrutiny. In *People v. Lee Wah*, 1886, 71 Cal. 80, 82, 11 P. 851, a prosecution for violation of the medical practice act of 1876, the court approved an instruction which told the jury that an emergency "means a case in which the ordinary medical practitioners of the schools provided for by the statute, who are provided with the proper diplomas, and have submitted themselves to the proper examination, are not readily obtainable. This is an emergency as where the exigency is of so pressing a character that some kind of action must be taken before such parties can be found or procured." In *People v. Vermillion*, 1916, 30 Cal.App. 417, 418, 158 P. 504, another case where a defendant charged with treating the sick without a proper certificate claimed an emergency as a defense, the court said: "There was no evidence tending to show that the services were of an emergency character; that is, services rendered by way of affording temporary relief until the services of a regular practitioner could be procured." In *People v. Cosper*, 1926, 76 Cal.App. 597, 600, 245 P. 466, 468, a similar prosecution, where the defendant cared for a childbirth, his services having been arranged for several days in advance and his actual attendance covering a period of twenty hours before the birth, the court

disposed of the question of emergency by saying: "During that time ample opportunity was afforded to secure a regularly licensed physician."

[7] Under these interpretations and the facts of the present case the jury could not well do otherwise than find that there was no emergency. The defendant had been called the day before he came, and while it does not appear that he was then told the nature of the patient's ailment, he learned it, according to his testimony, as soon as he saw her. He consumed twenty minutes in packing her with gauze, and some time elapsed thereafter before he did anything else, for not till after that was done did he telephone for the blood plasma and he then had to await its arrival. During the same time he could have telephoned to and summoned a properly qualified physician, some of whom he knew, but he did not do so. That he was not proceeding on the emergency theory is apparent from this testimony given by him on cross-examination: "Q. At no time did you call a doctor, that is, a medical doctor? A. No, I felt I was capable enough to take care of her."

[8] A witness called by the prosecution was permitted to testify, over objection, and in response to hypothetical questions, that the injection of some substance by a hypodermic needle into the body tissue of another constitutes the practice of medicine or surgery. This may have been error, for the question did not assume that the injection was made for the diagnosis, or treatment of disease or other condition mentioned in section 2141, Business and Professions Code, and hence did not include all the elements necessary to a proper answer. But we do not regard the error, if any, as prejudicial, considering the view we take and have already stated of the law and its application to the facts here.

[9] Testimony was also permitted, over defendant's objection, that defendant had given hypodermic injections to the husband of the patient above mentioned. This was not charged in the complaint, and we see no sufficient reason for admitting the evidence. The case does not appear to be one



of those where plan or design is material to the inquiry, nor can we see how the evidence was relevant to the question whether there was an emergency in the case of the patient herself. But we cannot see that the defendant could have been prejudiced by the error. The defendant admitted that he made such injections, and was plainly insisting, throughout the trial, that his chiropractic license gave him the right to make them. Though he was wrong in so insisting, the presence in the record of irrelevant instances could surely not harm him.

The judgment is affirmed.

BISHOP and STEPHENS, JJ., concurs.

#### Order Denying Rehearing.

#### PER CURIAM.

The petition of defendant for a rehearing after judgment of this court on appeal, in the above entitled case, having been filed, and having been duly considered,

Said petition is hereby denied.

[10,11] In his petition for rehearing defendant asserts that our decision cannot stand because it is in conflict with a regulation of the Board of Chiropractic Examiners adopted October 22, 1949, defining chiropractic thus: "The basic principle of chiropractic is the maintenance of the structural and functional integrity of the nervous system. The practice of chiropractic consists of all necessary means to carry out these principles." (Calif.Admin. Code, Title 16, subchap. 4, art. I, sec. 302 (a).) The conflict between this regulation and the meaning of "chiropractic" as defined in our opinion herein, and in *People v. Fowler*, 1938, 32 Cal.App.2d Supp. 737,

84 P.2d 326, is fairly obvious. Under this regulation a licensed chiropractor might very well engage in a great variety of medical and surgical practice; indeed, it would be difficult to discover any sort of treatment of the sick or afflicted that could not, by a little ingenuity, be brought within it. But this does not cause us to doubt the correctness of our decision; it leads us, rather, to the conclusion that the regulation is void. The Chiropractic Act is not at all doubtful or ambiguous, as clearly appears from the authorities cited in the *Fowler* case, at 32 Cal.App.2d Supp. 745-747, 84 P.2d 326. There is, therefore, no room for administrative construction to affect or alter its meaning. *Hodge v. McCall*, 1921, 185 Cal. 330, 334, 197 P. 86; *Cullinan v. McColgan*, 1947, 80 Cal.App.2d 976, 979, 183 P.2d 115. "An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment." *Whitcomb Hotel, Inc. v. California Employment Comm.*, 1944, 24 Cal.2d 753, 757, 151 P.2d 233, 236, 155 A.L.R. 405; approved in *First Industrial Loan Co. v. Daugherty*, 1945, 26 Cal.2d 545, 550, 150 P.2d 921; to same effect, *California Employment Comm. v. Kovacevich*, 1946, 27 Cal.2d 546, 553, 165 P.2d 917; *California Drive In Restaurant Ass'n v. Clark*, 1943, 22 Cal.2d 287, 294, 140 P.2d 657, 147 A.L.R. 1028; *Cullinan v. McColgan*, supra, 1947, 80 Cal.App.2d 976, 980, 183 P.2d 115, see, also *Boone v. Kingsbury*, 1928, 206 Cal. 148, 161-163, 273 P. 797; *Bodinson Mfg. Co. v. California Employment Comm.*, 1941, 17 Cal.2d 321, 326, 109 P.2d 935. "But if its meaning (that of a statute) be not doubtful, and the regulations are in conflict with that meaning, they are simply void." *Hodge v. McCall*, supra, 185 Cal. 334, 197 P. 86, 88.













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